

In the Conciliation, Mediation and Arbitration Commission

Held at Manzini SWMZ 290/08

Faith Kunene APPLICANT

AND

Swaziland Property Market Respondent

CORAM:

Arbitrator : Robert S. Mhlanga
For Applicant : Mr G. Fakudze
For Respondent : Mr M. Masina

ARBITRATION AWARD

VENUE : CMAC OFFICES, ENGULENI BUILDING, GROUND FLOOR

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1. DETAILS OF HEARING AND REPRESENTATION

1.1 The Applicant is Faith Kunene an adult Swazi female who was duly represented herein by Mr Gcina Fakudze.

1.2 The Respondent is Swaziland Property Market (SPM), a company duly registered in terms of the company laws of Swaziland and it was represented herein by its manager, Mr Masina (Alias Khombelwako).

2. BACKGROUND OF THE DISPUTE

2.1 The Applicant alleges that she is employed by the Respondent (Swaziland Property Market) as a commercial cleaner.

2.2 The Applicant claims that the Respondent is underpaying her in that she is earning a salary of E300-00 per month, whereas she is supposed to get E973-00 per month.

2.3 Subsequently, the Applicant reported a dispute of underpayments to CMAC. The Applicant alleges that the Respondent is owing her E12,114-00 (Twelve Thousand one hundred and fourteen Emalangenis), being in respect of the accumulated underpayments over the period of eighteen (18 months) (dating from the time of her employment to date of report of dispute herein).

2.4 The dispute was conciliated upon, but unfortunately it was not resolved since the Respondent denies that it is liable to pay the Applicant the said sum of E12,114-00, because the Applicant is allegedly not employed by it.

2.5 Consequently, a Certificate of Unresolved Dispute was issued by the Commission. The parties by consent

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referred the matter to Arbitration for the determination of the dispute herein.

2.6 A Pre-Arbitration conference was held on the 5th December, 2008. The purpose of the pre-arbitration meeting was inter alia, to explain the rights of the parties in these proceedings, like for instance, the right to legal representation; the right to call witnesses (if any); the right to cross-examine each party's witness and most importantly to determine the issues to be decided by the arbitrator (narrowing down of the issues) and to find out if there were any documents to be used by each party during the hearing, and if so, to exchange same prior to the date of the hearing.

2.7 Subsequently, the case was by agreement postponed to the 22nd January, 2009 for arbitration hearing. On this date the matter could not proceed due to the fact that the Respondent failed to attend, and consequently it was rescheduled for hearing on the 5th February, 2009.

2.8 On the 5th February, 2009, both parties attended the arbitration hearing. Before the commencement of the hearing, Mr Masina introduced one Daisy Thwala from Chisthi Investments (Pty) Ltd. Mr Masina submitted that Mr Mansoor, the Managing Director of Chisthi Investments (Pty) Ltd had sent Ms Daisy Thwala to represent him in this case (to be the witness on behalf of the Respondent). Mr Masina informed the arbitrator that Daisy Thwala would testify that Chisthi Investments (Pty) Ltd is the Applicant's substantive employer, not Swaziland Property Market (Respondent).

2.9 Ms Thwala confirmed that she was from Chisthi Investments (Pty) Ltd. She further confirmed that the Applicant is employed by Chisthi Investments (Pty) Ltd as a cleaner. Therefore, I suggested to the parties that a Conciliation during Arbitration in terms of the CMAC Rules

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should be conducted in an attempt to resolve the dispute (following the fact that Chisthi Investments (Pty) Ltd admits that the Applicant is its employee, yet this company did not partake in the initial conciliation process).

2.10 The 'Conciliation within Arbitration' was attempted, but it was later abandoned due to the fact that the Applicant through her representative insisted that the arbitration hearing should proceed. The Applicant's representative submitted that the conciliation was a waste of time because Chisthi Investments (Pty) Ltd was not the Applicant's employer. The Applicant maintained that Swaziland Property Market (SPM) is her substantive employer.

3. ISSUE TO BE DECIDED

3.1 In the present case the main issue and or question which I am called upon to decide is whether or not the Respondent (SPM) is owing the Applicant the accumulated underpayments amounting to E12, 114-00, as alleged by the Applicant herein.

3.2 Since the Respondent disputes the fact that the Applicant is being employed by it, therefore, it is necessary for me to determine first the question whether or not the Applicant is the Respondent's employee.

4. SUMMARY OF EVIDENCE 4.1 APPLICANT'S CASE

4.1.1 The Applicant, Faith Kunene gave her testimony under oath. The Applicant testified that she is employed by the Respondent (Swaziland Property Market) as a commercial cleaner. The Applicant

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stated that she was employed by the Respondent through Mr Masina, in or about 2005. She said that she was recruited by Mr Masina.

4.1.2 The Applicant testified that she is cleaning at the residential flats situated in Manzini city opposite Barnetts Building.

4.1.3 The Applicant further testified that her monthly wages are paid by Swaziland Property Market (Respondent).

4.1.4 The Applicant also testified that she reports to Mr Masina (SPM) whenever she needs something at her workstation. She said that Mr Masina provides her with the cleaning tools and or cleaning chemicals.

4.1.5 The Applicant stated that her working hours are to the effect that she starts work at 7:00am to

3:00pm.

4.1.6 It was also the Applicant's testimony that the Respondent is underpaying her in that she is being paid E300-00 per month, instead of the statutory prescribed minimum wage of E973-00.

4.1.7 In conclusion, the Applicant prays for an award to be granted in her favour, directing the Respondent to pay her the sum of E12, 114-00, being in respect of underpayments accrued over the period of 18 months.

CROSS EXAMINATION OF MS FAITH KUNENE

4.1.8 During cross examination, Ms Faith Kunene testified that her relative one Lucy Ndzinisa told her that Mr Masina from Swaziland Property

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Market (Respondent) was looking for a matured female to work as a cleaner. She said that Lucy Ndzinisa advised her to contact Mr Masina regarding this position of a cleaner. She said that she did that and consequently the Respondent employed her.

4.1.9 The Respondent's Representative put it to the Applicant that the Respondent never employed her and that she is not the Respondent's employee. In response to this question the Applicant maintained that the Respondent is her employer.

4.1.10 The Respondent's Representative further put it to the Applicant that her substantive employer is Chisthi Investments (Pty) Ltd, not Swaziland Property Market. The Applicant disagreed with this; she insisted that she was employed by the Respondent. She said that, Mr Masina upon her employment did not explain to her as to who is her employer.

4.1.11 Mr Masina on behalf of the Respondent further put it to the Applicant that the Respondent is an Estate Agent. He said that the Respondent was instructed by Mr Mansoor, the Managing Director of Chisthi Investments (Pty) Ltd, to deduct E300-00 from the monthly rental collected on behalf of his company and pay the said sum of money to the Applicant as her monthly salary. In response to that, the Applicant said that she could neither admit nor deny this allegation as she does not know anything about this arrangement between the two (Respondent and Mr Mansoor).

4.1.12 During cross examination the Respondent denied that it is liable to pay the Applicant the said sum of E12,114-00 or any sum of money whatsoever,

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because it never employed the Applicant. However, the Applicant maintained that the Respondent is liable to pay her the said money for underpayments.

MACHINEGUN MAZIYA'S EVIDENCE

4.1.13 The Applicant called Mr Machinegun Maziya to testify on her behalf in this case. I will refer to this witness as Mr Machinegun Maziya or AW2 as the case may be.

4.1.14 Mr Machinegun Maziya testified under oath that he was also employed by the Respondent (Swaziland Property Market).

4.1.15 AW2 said that he is employed as a commercial cleaner and that he earns a gross salary of E973-00 per month.

4.1.16 Mr Maziya further testified that he knows the Applicant and he said that the Applicant is his workmate or colleague. He stated that the Applicant's job is similar to his work, he said that they are doing the same job (cleaning).

4.1.17 AW2 further testified that his salary, as well as the Applicant's wages is paid by the Respondent

(SPM).

4.1.18 During cross examination, the Respondent through its representative put it to Mr Maziya (AW2) that he is not the Respondent's employee, but that he is employed by Cathedral Investments (Pty) Ltd. In response thereto, AW2 admitted that he is employed by Cathedral Investments (Pty) Ltd. However, AW2 stated that the reason he says he is employed by he Respondent (SPM) is because his salary is paid by

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the Respondent; and that it is also the Respondent which deducts from his salary the Swaziland National Provident Fund Contributions.

4.2 RESPONDENT'S CASE

4.2.1 The Respondent led the evidence of one witness namely; Daisy Thwala, to buttress its case. I will refer to this witness as RW1 or Ms Daisy Thwala as the case may be.

4.2.2 Ms Thwala duly sworn testified that she works for Chisthi Investments (Pty) Ltd as a secretary. She said that she is based at Luyengo (Macondza Store) and so is Mr Mansoor, the Managing Director of Chisthi Investments (Pty) Ltd.

4.2.3 RW 1 confirmed the fact that the Respondent, Swaziland Property Market is Chisthi Investments' Agent. She further testified that Chisthi Investments owns a number of properties in Manzini and Nhlanguano. She stated that Swaziland Property Market (SPM) was engaged by her aforesaid company to manage its properties and among other things, to collect rental on its behalf, and to pay all the debts or monthly expenses associated with the maintenance of such properties.

4.2.4 Ms Thwala stated that the Respondent (SPM) was mandated by Chisthi Investments to collect the rental; and to pay monthly expenses on behalf of the company, and then the Respondent sends its statement of account to the company. The balance of the money or rental collected is also remitted to Chisthi Investments (Pty) Ltd (after all the company debts have been settled or paid). Infact, Ms Thwala testified that she personally collects the

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cheque from Swaziland Property Market on a regular basis.

4.2.5 RW1 further stated that the Applicant, Faith Kunene is employed by Chisthi Investment (Pty) Ltd as a cleaner. She said that the Respondent was given a mandate by Chisthi Investments to pay the Applicant the sum of E300-00 per month as her wages. She said that this money is deducted from the company rental (which is collected by the Respondent on its behalf). Swaziland Property Market is said to be mandated to deduct the said E300-00 from the rental on a monthly basis and then pay same to the Applicant.

4.2.6 Ms Thwala further testified that Swaziland Property Market (Respondent) cannot increase the Applicant's monthly wages from E300-00, without the permission or approval of Chisthi Investments.

4.2.7 RW1 also stated that the previous employee namely, Minah Mkhonta was also paid E300-00 per month.

CROSS EXAMINATION OF DAISY THWALA

4.2.8 During cross examination RW1 further confirmed that the Applicant is under the employ of Chisthi Investments (Pty) Ltd.

4.2.9 This witness (RW1) also testified during cross examination that Swaziland Property Market (Respondent) was instructed by Chisthi Investments to look for someone to replace Minah, hence the employment of Faith Kunene (Applicant) as a cleaner.

4.2.10 RW1 was asked as to why the Applicant is being paid by Swaziland Property Market, if indeed she (Applicant) is employed by Chisthi investments. In response the witness (RW1) said that, the Applicant is actually paid by Chisthi Investments, because Swaziland Property Market is mandated by Chisthi Investments to pay the Applicant the sum of E300-00 per month (E300-00 is deducted from the rental).

4.2.11 It was further put to RW1 that he Applicant is not the employee of her company (Chisthi Investments), but that the Applicant is employed by Swaziland Property Market. However, RW1 maintained that the Applicant is an employee of Chisthi Investments (Pty) Ltd.

4.2.12 1 was further asked as to on what basis the company (Chisthi Investments) is paying the Applicant the salary of E300-00 per month. RW1 responded that the sum of E300-00 per month is justified in that the Applicant is not doing hard work; her job could be done within one (1) hour to 2 hours per day. She said that the Applicant cannot be paid in accordance with the Retail, Hairdressing, Wholesale and Distributive Trades order of 2006, because she is not a commercial cleaner.

4.2.13 It was put to RW1 that the Applicant is not paid by Chisthi Investments. RW1 maintained that the Applicant is paid by Chisthi Investment through the Respondent.

4.2.14 It was further put to RW1 that the Applicant is being underpaid in that she is not paid the statutory prescribed minimum wage of E973-00 per month. RW1 did not respond to this allegation; she said that

it is the Managing Director of Chisthi Investments who can answer that question.

5. ANALYSIS OF EVIDENCE AND SUBMISSIONS

5.1 In the present case both parties filed their closing submissions in support of their respective cases.

5.2 Briefly, the Applicant's submissions are as follows;

5.2.1 With regard to the Applicant's employment, it is the Applicant's argument that she was employed by the Respondent (SPM) as a commercial cleaner. The Applicant submits that presently she is under the employ of Swaziland Property Market (Respondent).

5.2.2 The Applicant further submits that she was personally recruited by Mr Masina, who was acting on behalf of the Respondent. It is submitted by the Applicant that upon her employment, Mr Masina showed her where she would work (workstation), and Mr Masina further specified her working schedule. Furthermore, it is submitted that the Respondent provides her with the working tools and cleaning materials. Over and above that, the Respondent pays her monthly wages or salary. It is also submitted that the Applicant is under the supervision of the Respondent.

5.2.3 Therefore, it is the Applicant's argument that it is not true that the Applicant is employed by Chisthi Investments as alleged by the Respondent herein.

5.2.4 It is the Applicant's submission that for one to be regarded as an employer the following requirements must be satisfied namely;

- (a) He/She must be able to exercise direct supervision and control of the employee.
- (b) The employer must be able to give instructions to the employee.
- (c) The employer must remunerate the employee for services rendered.
- (d) The employer must provide tools to the employee.
- (e) There must be an employment agreement.

5.2.5 In light of the above mentioned requirements, it is submitted on behalf of the Applicant that Chisthi Investments (Pty) Ltd does not satisfy any of the said requirements, and therefore it is not the Applicant's employer (my emphasis added). It is not the Applicant's submission that Swaziland Property Market is the Applicant's employer because it meets all the aforesaid requirements.

5.2.6 Regarding the issue of underpayment (which is the main issue) which needs to be determined herein; it is the Applicant's submissions that she is being underpaid by the Respondent (SPM). The Applicant argues that she is supposed to get or earn E973-00 per month according to the Retail, Hairdressing, Wholesale and Distributive Trades order of 2006, not the salary of E300-00 per month she currently earns.

5.2.7 It is further submitted on behalf of the Applicant that she must be paid E973-00 per month, just like Machinegun Maziya (AW2), who is also employed by Respondent as a commercial cleaner, and he is doing the same job as the Applicant. It is submitted that the continuous underpayment of the Applicant

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is unlawful and that it is in contravention with the aforesaid Retail, Hairdressing, Wholesale and Distributive Trades Order of 2006 (my emphasis added).

5.2.8 In conclusion, it is submitted on the Applicant's behalf that the Respondent is indebted to the Applicant in the sum of E12, 114-00 being in respect of underpayments covering the period of 18 months.

5.3 On the other hand the Respondent's counterarguments are as follows;

5.3.1 It is the Respondent's submission that the Applicant, Ms Faith Kunene is not employed by it, but that she is employed by Chisthi Investments (Pty) Ltd. It is submitted that the said company (Chisthi Investments (Pty) Ltd) owns a block of flats situated at plot No:43 Krogh and Jorissen Streets; Manzini, where the Applicant is said to be working as a cleaner.

5.3.2 It is further submitted by the Respondent that the Applicant was recommended to Mr Mansoor (Chisthi Investments Managing Director) by her (Applicant) predecessor Minah Mkhonta as a suitable replacement for her (Minah Mkhonta) at the request of Minah's friend one, Lucy Ndzinisa. It is the Respondent's argument that Mr Mansoor instructed the Respondent (SPM) to meet the Applicant and then to show her the flats where she would work. It is said that Mr Masina met the Applicant and he showed her where she would work.

5.3.3 The Respondent argues that the Applicant was informed by Mr Masina that her employer was Chisthi Investments (Pty) Ltd.

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5.3.4 It is the Respondent's submission that the relationship between the Respondent (SPM) and Chisthi Investments (Pty) Ltd is that, the Respondent is an Estate Agent company with a power of Attorney to represent and or undertake the following activities on behalf of Chisthi Investments (Pty) Ltd (as a principal) namely:

- (a) To lease out flats situate on Lot No.43 on behalf of Chisthi Investments (Pty) Ltd.
- (b) To collect rentals on behalf of Chisthi Investments on monthly basis.
- (c) To account to Christhi Investments (Pty) Ltd on monthly basis for all monies collected by SPM.
- (d) To pay the cleaner (Applicant) the sum of E300-00 per month (by deducting this amount from the rental collected).

5.3.5 The Respondent further submits that the decision as to how much salary the Applicant should be paid does not rest with it, but solely with the Directors of Chisthi Investments (Pty) Ltd, who own the company.

5.3.6 With regard to AW2's evidence to the effect that he and Applicant are employed by the

Respondent (Swaziland Property Market), the Respondent denies this allegation. It is the Respondent's submission that this is not true. The Respondent argues that AW2, Machinegun Maziya is employed by Cathedral Investments (Pty) Ltd as a cleaner.

5.3.7 It is submitted by the Respondent that it also undertakes work for Cathedral Investments which is

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similar to that being done on behalf of Chisthi Investments (my emphasis added). It is said that Cathedral Investments authorized the Respondent to deduct from the rental a sum of E973-00 for AW2 and further deduct from this amount E48-65, being the employee's contributions to Swaziland Provident Fund.

5.3.8 In conclusion, the Respondent prays that the Applicant's claim be dismissed.

6. CONCLUSION

6.1 In the present case the main issue which needs to be decided is underpayment. However, there is another issue namely, whether or not the Respondent (Swaziland Property Market) is the Applicant's employer. As I stated above, this issue needs to be tackled first, before I move to the main issue herein.

6.2 The general principle that, 'the one who alleges must prove', is applicable in this case. The Applicant is the one who bears the onus to prove on a balance of probabilities that the Respondent is her employer. Furthermore, she needs to prove that the Respondent is underpaying her and that she is entitled to the sum of E12,114-00 being in respect of accumulated underpayments over the period of 18 months. On the other hand, the Respondent has a duty to rebut the Applicant's evidence or allegations.

6.3 With regard to the issue of whether or not the Respondent is the Applicant's employer, the Applicant testified that she is the Respondent's employee. She alleged that she was employed by the Respondent in or about 2005 as a commercial cleaner. The Applicant

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also called one, Machinegun Maziya (AW2) to testify in support of her case. The Applicant argues that she is a commercial cleaner and that she must be paid E973-00, being the statutory prescribed minimum wage of a commercial cleaner in terms of the Retail, Hairdressing, Wholesale and Distributive Trades order of 2006. AW2 testified that the Applicant is his workmate and that they are both employed by the Respondent and that they do the same job. AW2 testified that the Respondent pays him E973-00 per month before the deduction of the Swaziland National Provident Fund Contributions.

6.4 The Applicant's argument is that the Respondent (SPM) is her employer because it pays her salary; it supervises her; it provides her with tools and cleaning materials; and that she reports to the Respondent whenever she needs something at her workstation.

6.5 I do not agree with the Applicant's argument that Swaziland Property Market (Respondent) is her employer simply because the Respondent pays her salary, and that the Respondent provides her with tools and or cleaning materials. In short, the fact that the Respondent meets the aforementioned requirements of an employer does not mean that the Respondent is the Applicant's substantive employer.

6.6 The Applicant's testimony that she is employed by Swaziland Property Market (Respondent) is hereby rejected. The evidence of AW2, Machinegun Maziya regarding the issue of Applicant's employment, to the effect that the Applicant is the Respondent's employee is rejected. Under cross examination AW2, admitted that he was employed by Cathedral Investments (Pty) Ltd, not the Respondent. So AW2's evidence regarding this issue cannot be accepted as it is a fabrication.

6.7 I accept the Respondent's evidence that the Applicant is not its employee; but that the Applicant's substantive employer is Chisthi Investment (Pty) Ltd. RW1 testified that she works for Chisthi Investments (Pty) Ltd as a secretary. She (RW1) stated that the Applicant is an employee of Chisthi Investments (Pty) Ltd. She further testified that the Respondent was mandated or instructed by her company to act on its behalf with regard to the management and or maintenance of the property (flats) where the Applicant works as a cleaner. RW1 further testified that the Respondent (SPM) was also mandated by Chisthi Investments to pay (from the rental collected on its behalf) the Applicant her salary of E300-00 every month. RW1 also said that the Respondent can not increase the Applicant's wages from E300-00 without the consent or mandate of Chisthi Investments (Pty) Ltd.

6.8 In support of its case the Respondent has presented documentary evidence in the form of a letter from Chisthi Investments dated 23rd February, 2009, copies of statements of account from the Respondent to Chisthi Investments and a copy of a Title Deed (showing that plot No:43 where the block of flats are built belongs to Chisthi Investments (Pty) Ltd).

6.9 The letter from Chisthi Investments in part reads as follows; "I, Mohamed Mansoor in my capacity as the Director of Chisthi Investment (Pty) Ltd, hereby confirm that the company has delegated Messrs Daisy Thwala to represent it in the matter brought to CMAC by our cleaner at ERF 43 Manzini, Faith Kunene. Faith Kunene sweeps the courtyard and staircase leading to and from residential flats for 2 or 3 hours a day". In this letter Chisthi Investments (Pty) Ltd confirms that the Applicant is employed by it as a cleaner.

6.10 On the other hand the aforementioned statements of account confirms the fact that the Respondent acts on behalf of Chisthi Investments; it is collecting rental and paying off the company's monthly expenses and thereafter remit the balance to Chisthi Investments. In the aforesaid statements of account the Applicant's salary of E300-00 reflects under the monthly expenses of the company. It is also shown that the sum of E300-00 is deducted from the monthly rental collected on behalf of Chisthi Investments (Pty) Ltd.

6.11 From the Respondent's foregoing evidence and submissions, it is clear that the Respondent is not the Applicant's substantive employer. From the evidence adduced herein, I am convinced that Chisthi Investments (Pty) Ltd is the Applicant's substantive employer, not the Respondent.

6.12 In my view, Chisthi Investments (Pty) Ltd is the Applicant's substantive employer. Therefore, it is my finding that the Respondent is not liable to pay the Applicant the sum of E12, 114-00 or any sum of money whatsoever arising from the Applicant's employment because the Respondent is not the Applicant employer. However, the Applicant is entitled to claim the payment of the aforesaid sum of E12, 114-00 in respect of underpayments from Chisthi Investments (Pty) Ltd as her rightful employer.

7. AWARD

6.1 In light of my foregoing conclusion and findings, and having taken into account the circumstances of this case, I hereby make the following Award:

- (a) That the Applicant's claim against the Respondent (Swaziland Property Market) is dismissed.

- (b) It is hereby declared that Chisthi Investments (Pty) Ltd is the Applicant's substantive employer.

DATED AT MANZINI ON THIS 28th DAY OF MAY, 2009.

ROBERT S. MHLANGA

(CMAC ARBITRATOR)

