

IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

Held in Manzini CASE NO: SWMZ 128/08

In the matter between;

STEVEN GININDZA Applicant

AND

EDWARD DLAMINI T/A Respondent

THULA 'UKHALELANI TRANSPORT

CORAM;

**ARBITRATOR : THULANI DLAMINI
FOR APPLICANT : G. FAKUDZE
FOR RESPONDENT : M. MDLULI**

ARBITRATION AWARD

1. Parties and Hearing

The Applicant in this matter is Steven Ginindza an adult Swazi male and former employee of the Respondent. The Respondent on the other hand is Edward Dlamini t/a Thula 'Ukhalelani Transport, an adult Swazi male businessman operating a transport business and based within the Manzini Region. The arbitration hearing proceeded at different dates between the October, 2008 and May 2009 when it was finally completed.

2. BACKGROUND OF DISPUTE AND ISSUES TO BE DECIDED

The dispute before the Commission relates to the alleged constructive dismissal of the Applicant by the Respondent in September, 2007. It (dispute) was reported to the commission in terms of section 76 of the Industrial Relations Act, 2000 (as Amended) and was referred to conciliation, where, however, the parties failed to reach an amicable settlement of same. As a result of this, a certificate of unresolved dispute was issued and the parties decided to refer the matter to arbitration, hence my appointment to arbitrate herein. I am required to decide whether the Applicant was indeed constructively dismissed or not by the Respondent.

3. SUMMARY OF EVIDENCE APPLICANT'S CASE

3.1 TESTIMONY OF STEVEN GININDZA (Applicant)

The Applicant stated under oath that he was employed by the Respondent as a bus driver in February 2004 and that the bus he was

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employed to drive was servicing the Manzini/Lobamba route. His monthly salary was E 800.00. He went on to state that he was no longer working for the Respondent and the reason he advanced was that: he was not earning enough money and he used to ask the Respondent to review his salary to no avail. This apparently went on until when the Respondent stopped paying him his monthly salaries at all, he then decided to resign in terms of section 37 of the Employment Act 1980.

The Applicant stated further that the Respondent always paid his salaries very late, sometimes even two weeks after month end and that this used to greatly inconvenience him. It was the Applicant's further testimony that in one instance he was not paid for three consecutive months, i.e. May, June and July 2007. As a result of the non-payment of his salaries he and his family endured a lot of hardships, one of which was the expulsion of his children from school for non-payment of school fees.

When he engaged the Respondent about his salaries he (Respondent) allegedly refused to entertain him telling him to concentrate on his work. Then on the 12th July 2007 he telephoned the Respondent and even went to see him in his office and he still refused to pay him and even threatened to shoot him. He then decided to resign from his employment citing constructive dismissal. He now claims against the Respondent, the following;

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| a) Notice Pay. | E1,420.00 |
| b) Additional notice pay. | E 436.96 |
| c) Severance pay. | E1,092.40 |
| d) Salary for April. | E1,420.00 |
| e) Salary for May. | E1,420.00 |

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| f) Salary for June. | E1,420.00 |
| g) 12 days worked in July. | E 655.44 |
| h) Off days (18 months at 4 days per month). | E7,865.80 |
| i) Underpayments (18 months). | E11,164.32 |
| j) Public holidays (18 months). | E2,184.80 |
| k) Leave pay (18 months). | E1,966.32 |
| l) 12 months compensation for unfair dismissal. | E17,042.88 |

Total claimed E48,089.88

Under cross examination the following statements were put to the Applicant by Mr. Mdluli on behalf of the Respondent;

- i) That he was not employed by the Respondent personally but by his manager Nathi Mamba.
- ii) That he only worked for 8 months,
- iii) That he earned E1,200.00 per month,
- iv) That the bus he used to drive only operated between Monday and Friday and not on weekends, public and school holidays since it was used mostly to transport students.
- v) That he never spoke to the Respondent on 12 July 2007 as he alleged in chief.
- vi) That he deserted his work since he had found alternative employment.

To all these statements put to the Applicant he still maintained his evidence in chief. When questioned as to the exact date of his resignation, since in his report of dispute form he stated same to be 05 September 2007, he maintained that the correct date is 12 July 2007.

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That was the Applicant's case.

RESPONDENT'S CASE

3.1 TESTIMONY OF EDWARD HLUPHEKILE DLAMINI

The Respondent stated under oath that he knew the Applicant as his former driver for the Manzini/Lobamba route and that he was introduced to him by his nephew/manager Nathi Mamba. Relating how the Applicant came to drive his bus he mentioned that one of his buses did not have a driver and since Mamba knew the Applicant he was offered the position whilst means were made to get a permanent one. He went to testify that the Applicant was paid a monthly salary of E1,200.00 and that he (Respondent) would give the Applicant's monthly salaries to Mamba to pass on to the Applicant, which he believes he always did. He denied that he used to pay the Applicant's monthly salaries way after month end. He also maintained that the bus only worked during the week and not on weekends, public and school holidays since, according to him, there were few customers on these mentioned dates. Another reason advanced for the bus not servicing its route on weekends and holidays was that a majority of its passengers were school going children.

The Respondent further maintained that the Applicant worked for only eight months and that during this period his salary was always paid in full regardless of the fact that he did not work on weekends and on public and school holidays. He denied that he ever threatened to shoot the Applicant. According to him, he harbours no ill-feelings against the Applicant even though he abandoned his bus on the side of a main

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road; and without giving him notice of his resignation and he attributes this to the fact that he had a good relationship with him. He further stated that according to him the main reason the Applicant left was because he had found a permanent job as a driver in another bus.

Under cross examination this witness maintained that he did not personally employ the Applicant but that he was introduced to him by his manager Nathi. He maintained as well that the Applicant only worked for eight months and that he was earning E1,200.00 per month. He also denied having threatened the Applicant in any way.

3.2 TESTIMONY OF NATHI MAMBA

This witness testified under oath that he was approached by the Applicant seeking employment as a bus driver. Since there was a bus which had no driver he engaged the Applicant to replace the driver who had left. He later introduced the Applicant to the Respondent to drive the bus servicing the Manzini/Lobamba route. He went to state that the Applicant was paid E1,200.00 per month and that the mode of payment was cash. He would receive the Applicant's pay from the Respondent and he would hand it over to him at the end of each month. It was Mamba's further testimony that the bus worked only during weekdays and that on weekends, public and school holidays it would not service its route because there were few passengers on these days. Explaining the manner in which the Applicant left his employment this witness stated that he (Applicant) drove the bus from Lobamba to Manzini and parked it next to Tracar and there after stated that he was leaving. The very next day he saw him driving another bus trading under the style name 'Lekelela'.

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Under cross questioning by Fakudze on behalf of the Applicant this witness maintained that the Applicant approached him for work and since there was a bus without a driver he took him and later introduced him to the Respondent as somebody to 'assist' as the Lobamba/Manzini route had no driver. He also maintained that his salary was E1,200.00 per month. He denied that when the Applicant resigned he had not been paid for three months.

4. ANALYSIS OF EVIDENCE AND ARGUMENTS

In its closing submissions and arguments the Applicant's representative maintained that the Applicant was employed in February 2004 and was in continuous employment until 12 July 2007 when he resigned. He maintained as well that the Applicant was employed by the Respondent and not by Nathi Mamba as alleged. Fakudze, on behalf of the Applicant, further contended that the onus rests with the Respondent to prove that indeed the Applicant was paid E1,200.00 per month and not the E800.00 he says he was earning. And in this regard I was referred to section 22 (1) of the Employment 1980 (as amended) which requires the Respondent to provide written particulars of employment. And in the absence of such the written particulars of appointment, then the evidence of the Respondent's witnesses should be disregarded. A further submission by the Applicant's representative was to the effect that, in terms of section 61 the Respondent was obliged to issue details of wages payments. And since in casu there is a dispute in relation to the Applicant's salary, then in terms of the section referred to the Respondent bears the onus of proving that indeed he was paid E1,200.00.

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It was further argued by Fakudze that the Respondent failed to establish a fixed date of payment of the Applicant's salaries as required by section 47 (11) (a) of the Employment Act. This is relation to the Applicant's evidence that he was getting his salaries late.

Fakudze further submitted that the Respondent's case was riddled with too many contradictions. In

this regard reference was made to the evidence of the Respondent and his witness in relation to the number of trips the bus made and as to whether it was scheduled or non-scheduled.

Another submission on behalf of the Applicant was to the effect that in the circumstances prevailing, the Applicant could no longer be reasonably expected to continue working for the Respondent hence his resignation. These were outlined as working without pay for 3 months and being threatened with a fire arm. The resignation of the Applicant was in terms of section 37 of the Employment Act, so the argument continued. The submission by the Applicant's representative was to the effect that the Respondent's conduct was such that he could no longer be expected to work for the Respondent. Section 37 of the Employment Act provides as follows;

"When the conduct of an employer towards an employee is proved by that employee to have been such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves his employment whether with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by his employer"

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The argument by the Applicant's representative was now that his work conditions were such that he had no other option but to resign. He could no longer provide for his family because he was no longer getting paid. His children were expelled from school.

Fakudze further argued that the Applicant did not intend to end the employment relationship but rather was forced by the circumstances prevailing. It is said that objectively speaking, the Applicant could no longer be reasonably expected to fulfill his obligation to work, and that such situation was intentionally created by the Respondent so that the Applicant resigned.

In countering the Applicants arguments and submissions the Respondent's representative started off by stating that when the Applicant adduced evidence under oath and under cross examination he stated that he left the Respondent's employ on the 12th July 2007. This date however contradicts with another date stated by the Applicant as 04 September 2007. Mdluli, on behalf of the Respondent further argued that the Respondent gave evidence under oath to the effect that the Applicant was paid E1,200.00 per month as his salary. He concedes that this amount was E112.00 short of the gazetted amount. To that end, the submission was therefore that the Respondent was willing to reimburse the Applicant the shortfall for the period between April and July 2007 when he left his employment.

It was further reiterated that the bus the Applicant was engaged to drive was a bus mainly transporting school children along the Manzini-Lobamba corridor. So that the bus was only on the road between Monday and Friday when schools were open and would be parked on

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weekends, holidays and school holidays. This evidence came from both the Respondent and his witness.

Reference was made to the letter of resignation written by the Applicant dated 05 September 2007. Mdluli then asked why the Applicant would resign on 12 July, then wait for two months before writing his letter of resignation. The argument being advanced herein is that the inconsistency between the actual date of resignation shows that the Applicant is not being truthful. The real reason behind the Applicant's resignation is that the Applicant had secured alternative employment and not because of what he alleges to be intolerable working conditions, it was further argued. And in this regard I was referred to the evidence of Nathi Mamba who testified that he saw the Applicant driving another bus the very next day after his resignation.

The argument being advanced herein by the Respondent's representative is that in the case of the Applicant, he was never constructively dismissed but he resigned at his own behest, since he had secured another job with Lekelela bus. Therefore his case can not be said to be falling under section 37 of the Employment Act. Instead, so the argument continued, it was the Applicant who contravened the Employment Act by failing to notice his employer of his intention to resign. I was then referred to the evidence of the Respondent and Nathi Mamba in its totality in support of the above assertions.

The Respondent, through its representative then prayed that the case of the Applicant be dismissed save for the claim for underpayments.

Having heard the evidence, submissions and arguments of both parties to this dispute it now remains for me to decide whether the Applicant

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had made out a case for constructive dismissal to make an award in his favour.

The law of constructive dismissal is succinctly set out in the following judgement by the Labour Appeal Court in *Jooste v Transnet Ltd t/a SA Airways* (1995) 16 ILJ 629 (LAC);

"In considering what conduct on the part of the employer constitutes constructive dismissal, it needs to be emphasised that a 'constructive dismissal' is merely one form of dismissal. In a conventional dismissal, it is the employer who puts an end to the contract of employment by dismissing the employee. In a constructive dismissal it is the employee who terminates the employment relationship by resigning due to the employer. As Lord Denning said in *Woods v WM Car Services (Peterborough) Ltd* (1982) IRLR 413 (CA) at 415: The circumstances [of constructive dismissal] are so infinitely various that there can be, and is, no rule of law saying that circumstances justify and what do not. It is a question of fact for the tribunal of fact..."

Subject to the reservation that in our labour law it is not necessary to find an implied term of the kind required in English law, an approach that comments itself to me is that of the Employment Appeal Tribunal in *Woods v WM Car Services...*: [I]t is clearly established that there is implied in a contract of employment that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee:

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Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR

84. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effects, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it...the conduct of the parties has to be looked at as a whole and its cumulative impact assessed."

In *Pretoria Society for the Care of the Retarded v Loots* [1997] 6 BLLR 721 (LAC) the Labour Appeal Court went on to say the following (at 724 D-F), after quoting approvingly from *Jooste v Transnet supra*:

"When an employee resigns or terminates the contract as a result of constructive dismissal such an employee is in fact indicating that the situation has become so unbearable that the employee can not fulfil what is the employee's most important function, namely to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned. Where she proves the creation of an unbearable work environment she is entitled to say that by so

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doing the employer is repudiating the contract and she has a choice either to stand by the contract or accept the repudiation and the contract comes to an end..."

It can therefore be confirmed that in cases of constructive dismissal the inquiry is whether or not the employer conducted itself in a manner that destroyed the relationship between the parties. What is also required is some form of culpability on the part of the employer although it is not required that the

employer must necessarily have intended to get rid of the employee.

The cases mentioned above basically establish that the onus rests on the employee to prove that the resignation constituted a constructive dismissal: in other words the employee must prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship. Once this is established, the inquiry then becomes whether the employer (irrespective of any intention to repudiate the contract of employment) had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. Looking at the employer's conduct as a whole and in its cumulative impact, the courts have asked in such cases whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it. Still on that score one should emphasise that the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes conditions intolerable. More indeed: the employer must be culpably responsible in some way for the

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intolerable conditions: the conduct must (in the formulation the courts have adopted) have lacked 'reasonable and proper cause'. Culpability does not mean that the employer must have wanted or intended to get rid of the employee, though in many instances of constructive dismissal that is the case.

Coming to the present case, the contention of the Applicant is that the intolerable conditions that made his resign were: a) not being paid his salaries for three consecutive months and b) being threatened with a fire-arm on the 12th July 2007 when he was at the Respondents offices. And the evidence before me is that he wrote his letter of resignation on 05 September 2007. In the resignation letter he does not make any mention of the date 12 July 2007, so that according to the letter the resignation date is the 05th September 2007. Further to that, it is accepted that being threatened with a fire-arm is a serious criminal offence, and there is no evidence before me that the Applicant reported such occurrence with the Police, let alone have the Respondent charged. The law of evidence is that a trier of fact should in general not be too ready to rely on the evidence of a single witness, unless such evidence meets the stringent test of being clear and satisfactory in every material respect. The evidence of the Applicant before me fails this test and I accordingly reject it. This is more so because the Applicant did not impress me as a credible witness. He failed to explain how it was that he was to resign on the one day and on the very next one be on another bus as a driver. I accordingly find that the Respondent can not be said to be culpably responsible for the resignation of the Applicant. His resignation can not therefore be said to be in terms of section 37 of the Employment Act, but rather was to take up new employment with the new employer. The evidence of the

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Applicant, as opposed to that of the Respondents, is riddled with so many contradictions that it would be safe not to rely on it.

4. AWARD

I accordingly dismiss the case of the Applicant in its entirety save for the following claims which I am of the view he is legally entitled to payment of:

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| i) | 12 days worked in July 2007 | E 655.44 |
| ii) | Underpayments for four months | E 448.00 |
| | Total | E1,103.44 |

Payment hereof should be made forthwith.

DATED AT MANZINI ON THIS 16th DAY OF OCTOBER, 2009.

THULANI DLAMINI

CMAC COMMISSIONER