



parties subsequently agreed to postpone the hearing to the 19<sup>th</sup> March, 2010.

3.2 Notwithstanding that the parties could not complete CMAC Form 21, the Case Management Administrator sought a new date from the arbitrator whilst the parties were at CMAC offices and the 19<sup>th</sup> March 2010 was confirmed via telephone by both Mr. Basil Tfwala and Mr. Maxwell Nkambule, who was representing the Respondent that day. An entry that the arbitration was rescheduled for the 19<sup>th</sup> March 2010, was made on the file.

3.3 Rule 9 (3) stipulates that ' the Commission or a Commissioner may accept proof of service in a manner other than prescribed in the rules, as sufficient if in the opinion of the Commission or Commissioner it meets the requirement of proof of service.'

3.4 I find that, on the 1<sup>st</sup> March 2010 the parties were aware that this matter was postponed and rescheduled to be heard on the 19<sup>th</sup> March 2010. Consequently when Mr. Basil Tfwala applied for the matter to be heard *ex parte*, because the other party failed to give a reasonable explanation

-4-

for its non-attendance, I allowed the application and the matter did proceed unopposed. See Rule 27 (1) (b) of the CMAC Rules; *Wilton v Gatony and Another* 1994 (4) SA 160(W)

#### **4. SUMMARY OF EVIDENCE**

4.1 Under oath the Applicant stated that she was employed by the Respondent on the 27<sup>th</sup> January 2009 as a Shop Assistant and her wages per month, at the time of dismissal was E700.00.

4.2 Nanile Dlamini's evidence was that on the 30<sup>th</sup> August 2009, whilst on duty, the Respondent's director assaulted her on her back by the neck with an open hand. The smack was so hard she felt intense pain.

4.3 According to the Applicant, the director's reason for slapping her was that she had applied Vaseline on her dry lips whilst on the till register.

4.4 The Applicant's testimony was that following the assault, she stood up and cried and left the shop for her quarters and upon advice from her sister, she reported the incident to the Royal Swaziland

-5-

Police (RSP) Simunye and the company (RSSC) security personnel.

4.5 Dlamini's evidence was that in the presence of the RSP and RSSC security, Mr. Fias, the director apologized and said he assaulted her by mistake.

4.6 The Applicant testified that even though it was the first time the director had laid a hand on her, on previous occasions he had threatened her with assault.

4.7 It was the Applicant's evidence that the following day, on the 31<sup>st</sup> August 2009; she took a decision to resign from employment because of the assault and verbally communicated her decision to Mr.Fias who wanted her to write a letter.

4.8 Nanile Dlamini's testimony was that by assaulting her, the Respondent constructively dismissed her and based on the rate of pay stipulated by the Regulation of Wages (Retail, Hairdressers, Wholesale and Distributive Trades Industry) Order, 2009, she was claiming Notice pay and twelve months compensation for unfair dismissal.

4.9 The second witness for the Applicant who testified under oath was Zwelithini Dlamini.

4.10 Zwelithini Dlamini's evidence corroborates that of the Applicant and he asserted that a male adult of

Indian descent assaulted the Applicant with an open hand and following the slap, he locked the till. He saw the Applicant leave the shop. 4.11 It was Zwelithini Dlamini's evidence that he knew by sight both the Applicant and the Indian gentleman, because he had purchased items on numerous occasions from the shop.

## **5. ANALYSIS OF EVIDENCE AND LAW**

5.1 Where an employee complains that the conduct of an employer towards her was such that, she could no longer be reasonably expected to continue in her employment and she consequently leaves her employment and invokes Section 37 of the Employment Act 1980, and therefore alleges constructive dismissal, the onus to prove that she was so dismissed rests with that employee.

See Timothy Mfanimpela Vilakazi v Anti-Corruption Commission and Others (IC Case no. 232/02); Simon Nhlabatsi v V.I.P. Protection Services (IC Case no.84/02).

5.2 It was held in the Simon Nhlabatsi case(supra) that, whether an employee in the circumstances of, the case has proved that she was constructively dismissed, is a question of fact to be determined by a judge.

5.3 The Applicant's evidence which was corroborated by one witness, remains unchallenged due to the Respondent's failure to attend the arbitration. It is my finding that the Applicant was assaulted by Mr. Fias who used his open hand and that there was no lawful excuse for assaulting the Applicant.

5.4 One of the primary duties of an employer towards his employee is to provide her with reasonably ; safe and healthy working conditions.

**See John Grogan, Workplace Law (8<sup>th</sup> Ed).**

5.5 The Employment Act 1980 views assault seriously, such that it is fair to terminate the services of an employee who assaults his employer or a co-worker.

**See Section 36 (b) of the Act**

5.6 Since an employer by law is obliged to protect and keep an employee safe and healthy whilst in his employment, when that same employer assaults and threatens the employee, there is no reasonable ground for expecting the employee to feel safe and protected in that undertaking.

5.7 It is my finding that in the circumstances the employment relationship became intolerable when Mr. Fias physically attacked the Applicant, thus he constructively dismissed her.

5.8 It would be absurd to demand of the Applicant to exhaust internal remedies before resigning, when she has to lodge a grievance with the same individual who assaulted her.

## **6. CONCLUSION**

6.1 I have found that in the circumstances of the case the Respondent did constructively dismiss the Applicant by its conduct.

6.2 In arriving at a fair and equitable remedy, I consider that the Respondent has broken the trust that the Applicant had in it. The Respondent was charged with protecting the Applicant and not violate her dignity.

6.3 Further, I have taken into account that the assault occurred in full view of customers of the shop.

6.4 The Applicant had worked for the Respondent for only seven months before the incident, before her subsequent resignation.

6.5 Although the Applicant had worked for a relatively short time, this arbitrator, in awarding compensation should discourage employers who have little or no regard for employees. This is not the slave age where people were not protected by legal framework against bodily invasion.

**-9-**

6.6 I hold that an award of twelve months wages as compensation for constructive dismissal is fair in the circumstances of the case. Such wages to be those provided by the Regulation of Wages (Retail, Hairdressing, Wholesale and Distributive Trade Industry) Order, 2009.

6.7 The following order is therefore made;

## **7. AWARD**

7.1 The Respondent is ordered to pay the Applicant the following:

(a) Notice pay	= E1 136.32
(b) 12 months wages as Compensation	= E13 635.84
TOTAL	=E14 772.16

7.2 The Respondent is directed to pay the sum of E14 772.16 at CMAC offices Government offices, Siteki by the 30<sup>th</sup> June, 2010.

7.3 There is no order for costs.

DATED AT SIMUNYE THIS..... DAY OF MAY, 2010.

**-10-**

VELAPHI DLAMINI CMAC ARBITRATOR

**-11-**