

IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

HELD AT MANZINI REFNO: SWMZ413/09

In the matter between:

BUHLE DLAMINI APPLICANT

AND

SHANDEZ INVESTMENTS RESPONDENT

CORAM

ARBITRATOR : VELAPHI DLAMINI
FOR APPLICANT : EPHRAIM DLAMINI
FOR RESPONDENT : DUMSANI NGCAMPHALALA

EX PARTE ARBITRATION AWARD

DATE OF HEARING : 10TH MARCH 2010

VENUE : 4TH FLOOR, SNAT COOPS BUILDING, MANZINI

1. DETAILS OF HEARING AND REPRESENTATION

1.1 This matter was heard on the 10th March 2010 at the Conciliation, Mediation and Arbitration Commission offices (CMAC or Commission) situated at 4th Floor, SNAT Coops building in Manzini.

1.2 The Applicant is Buhle Dlamini, an adult Swazi male of P.O.Box 4055 Manzini. He was represented by Mr. Ephraim Dlamini, a consultant.

1.3 The Respondent is Shandez Investments, a limited company of P.O.Box 1149 Manzini. The company was represented by Mr. Dumsani Ngcamphalala an attorney, during the pre-arbitration conference.

2. BACKGROUND FACTS

2.1 The Applicant reported a dispute for unfair dismissal at the Commissions offices at Enguleni building in Manzini on the 13th August, 2009.

2.2 Dlamini's statement was that his dismissal was both substantively and procedurally unfair.

2.3 The outcome that the Applicant requested from the Commission was as follows, reinstatement with arrear wages or alternatively, notice pay-E1 300.00, leave pay-E 1 107.60, May 2009 wages-E1 300.00, overtime(15 hours Per month)-E 12 460.00 and compensation for unfair dismissal-E 14 400.00.

2.4 The dispute was conciliated by the Commission, however it remained unresolved and a Certificate of Unresolved Dispute no: 605/09 was issued on the 9th September 2009. The parties requested for arbitration under the auspices of the Commission. I was appointed on the 17th November, 2009 to decide the dispute.

3. SHANDEZ'S NON-REPRESENTATION

3.1 At the pre-arbitration conference of this matter on the 23rd February, 2010, the parties by consent set the arbitration hearing for the 10th March, 2010 at 11:00 am. CMAC Form 21 was signed by both Mr. Ephraim Dlamini for the Applicant and Mr. Dumsani Ngcamphalala for the Respondent.

3.2 At 11:40 am on the 10th March, 2010, the matter was called, only the Applicant and his representative were present, however neither Mr Ngcamphalala nor his client attended the hearing.

3.3 Mr. Epharaim Dlamini applied that the case proceeds ex parte in view of the fact that the Respondent was aware that the matter would commence on the 10th March 2010 at 11:00 am.

3.4 Having considered CMAC Form 21, that is the agreement to postpone arbitration was proof that the other party was aware of the hearing, but the same failed to proffer any explanation for its non-attendance, I ordered the matter to proceed ex parte.

See Rule 27(1) (b) of the CMAC Rules; Wilton v Gatony and Another 1994 (4) SA 160 (W).

3.5 The default of representation by the other party however is not a leeway for the party who is present to be automatically awarded her claims. It is incumbent upon the arbitrator to still evaluate and examine the evidence presented by that party during the ex parte hearing, before deciding if a case has been made supporting those claims.

See Ex parte Bennett 1978(2) SA 300(W); Herbstein and Van Wissen, The Civil Practice of the Supreme Court of South Africa 4th ed.

4. SUMMARY OF EVIDENCE

4.1 On oath the Applicant testified that he was employed by the Respondent as an Assistant Driver in September, 2007 and his wages at the time of his dismissal was E1 300.00 per month.

4.2 Dlamini's evidence was that he was orally dismissed by the company on the 30th May, 2009 following suspicion that he was involved in a

conspiracy to commit fraud against the Respondent's client Matsapha Spar.

4.3 The events leading to the suspicion are that, on the 27th May, 2009 a certain Matsapha Spar Manager ordered sheets of glass from the company at a cost of E 7000.00, which was delivered by the Applicant and an invoice furnished to the Spar. In the afternoon of the same day the manager again called the Applicant to order more panes of glass, this time at a cost of E 4 000.00 and again he gave the manager an invoice for the latter order, which was also delivered by him at Matsapha Spar.

4.4 It latter transpired that the manager had committed fraud against his employer, which involved the purchase of the sheets of glass at Shandez Investments.

4.5 The Applicant's evidence was that his employer involved the Royal Swaziland Police, Esigodweni police station to investigate his role in the fraud, however the police cleared him of any wrong doing.

4.6 Whilst he was at Lavumisa, the company instructed him to report at Spar to testify at a disciplinary hearing of the Spar manager, however he could not make it because he was far. When he came to collect his wage at the end of May, 2009 he was informed that he would not be paid the wages and was further instructed to leave work.

4.7 The Applicant's testimony was that he was claiming overtime, because in some working days he would deliver glass at Nhlangano Build It, (Buhleni Buid It) and Siteki MW Glassworks. He would return to the office at 7:00 pm and 8:00pm respectively. In these places he made deliveries three times each in a month.

4.8 Dlamini's evidence was that since he was employed he was never allowed to go on leave.

4.9 The Applicant testified that he was not currently employed and although he was unmarried, he had a child who was dependant on him.

4.10 It was the Applicant's assertion that the termination at his services was not preceded by a disciplinary inquiry.

5. ANALYSIS OF EVIDENCE AND LAW

5.1 Now, in the absence of a justifiable reason and or explanation by the Respondent, the Applicant's uncontroverted version stands. He has proved that his services were protected by Section 35 of the Employment Act 1980 and that the company did not have a fair reason to dismiss him. Further the Respondent has not proved that in all the circumstances of the case, it was reasonable to dismiss the Applicant.

See Section 42 of the Employment Act 1980;

5.2 The dismissal was not preceded by a disciplinary hearing. No charges were laid against him. It was the Applicant's own assumption that the Respondent may have suspected him of conspiracy to commit fraud. The Respondent did not proffer that reason since she failed to appear at the arbitration. Without a proper explanation, failure by the Applicant to attend the disciplinary hearing at another distinct company (Spar) does not render him guilty of dishonesty.

See Themba Tsabedze v Tex-Ray Swaziland (Pty) Ltd (IC case no: 559/06); and Alpheus Thobela Dlamini v Dalcrue Agricultural Holdings (Pty) Ltd (IC case no: 123/05).

5.3 It is my finding further that, the Applicant is owed his arrear wages of May, 2009 and leave pay as claimed.

5.4 Regarding the overtime claimed by the Applicant, the Regulation of the Wage (Retail, Headressing, Wholesale and Distributive Trades) Order 2006, stipulates in Regulation 5 that, the hours of work for employees other than petrol pump attendant and a watchman, shall be forty-eight hours per week divided into eight and one half per day excluding a rest period of one hour on Monday to Friday inclusive.

5.5 According to the Regulation of Wages (Order 2006), the Applicant's daily shift should have been eight and one half hours. In his evidence the Applicant did not state when his normal shift started and end. Dlamini could only say he worked overtime nine days in a month wherein he returned to the shop at 7:00 pm and sometime 8:00 pm. The Applicant did not state at what time he had started his shift on those occasions. It is my finding that the Applicant has failed to prove his claim for overtime.

6. CONCLUSION

6.1 I have found that the Applicant's dismissal was substantively and procedurally unfair.

6.2 Further, I have found that Dlamini is entitled to be awarded his claim for arrear wages for May, 2009 and leave pay.

6.3 However further found that he ought to fail on his claim for overtime

6.4 Now, with respect to the compensation to be awarded to the Applicant, the following facts have been considered;

- (a) The Applicant had worked for the Respondent for one year and eight months before he was dismissed.
- (b) The Respondent terminated his services without notice or holding a disciplinary inquiry.
- (c) The Applicant has one dependant and at the time of the hearing he was not employed.

6.5 It is my holding that an award of 10 months wages as compensation is fair and equitable in the circumstances.

6.6 The following order is therefore made:

7. AWARD

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

- (a) Notice pay = E 1 300.00
- (b) Leave = E 1 107.00

however the police cleared him of any wrongdoing.

4.6 Whilst he was at Lavumisa, the company instructed him to report at Spar to testify at a disciplinary hearing of the Spar manager, however he could not make it because he was far. When he came to collect his wage at the end of May, 2009 he was informed that he would not be paid the wages and was further instructed to leave work.

4.7 The Applicant's testimony was that he was claiming overtime, because in some working days he would deliver glass at Nhlanguano Build It, Buhleni Buid It and Siteki MW Glassworks. He would return to the office at 7:00 pm and 8:00pm respectively. In these places he made deliveries three times each in a month.

4.8 Dlamini's evidence was that since he was employed he was never allowed to go on leave.

- c) Arrear wages (May 2009) = E 1 300.00
- d) 10 months wages as compensation E13 000.00
- TOTAL AWARD E 16 707.00

7.2 The Respondent is directed to pay the amount of E 16 707.00 at the Commission's offices at 4th Floor SNAT Co-ops Building in Manzini by the 30th May, 2010.

7.3 There is no order for costs.

DATED AT MANZINI ON THIS 4TH DAY OF MAY 2010.

VELAPHI DLAMINI

CMAC ARBITRATOR