

CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

Held at Manzini SWMZ 515/08

In the arbitration matter between: -

NHLANHLA MASEKO Applicant

AND

HI TECH SECURITY Respondent

RULING ON PRE-LIMINARY POINTS

DATE OF ARBITRATION: 24th July 2009

CORAM:

ARBITRATOR : Commissioner B.Ngcamphalala
FOR APPLICANT : Himself assisted by brother in law
FOR RESPONDENT : Mr. Simon Msibi

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1. DETAILS OF THE PARTIES AND HEARING

1.1 The Applicant is Mr. Nhlanhla Maseko an adult Swazi male of P. O. Box 2829 Manzini. I shall refer to the Applicant as the Applicant or Employee.

1.2 The Respondent is Hi Tech Security a company duly registered and incorporated in terms of the company laws of Swaziland of P. O. Box 7253 Manzini. I shall refer to the Respondent as the Respondent or the Employer.

1.3 This matter was heard on several occasions the first sitting on the 17th April 2009, 14th May 2009, 16th July 2009 and completed on the 31st July 2009. The reason for the delay in the completion of the matter was occasioned by the failure of both parties to attend hearings on agreed scheduled days. As a result numerous postponements were made.

2. BACKGROUND FACTS OF DISPUTE AND ISSUES TO BE DECIDED

2.1 The dispute before the commission relates to the failure

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by the Respondent to pay the Applicant his wages, further the Applicant is alleging that he was underpaid by the Respondent. The dispute was reported to the Commission in terms of section 76 of the Industrial Relations Act 2000 (as amended). The matter was referred to conciliation where the parties failed to reach an amicable settlement of the matter.

2.2 As a result of this a certificate of unresolved dispute was issued, and the parties agreed to refer the matter to arbitration. I was then appointed to Arbitrate. A pre-trial conference was held whereat both parties agreed to my appointment and the date of the actual hearing of the matter.

3. PRE-LIMINARY POINT

4.1 At the hearing of the matter the Respondent's representative, Mr. Msibi raised a preliminary point arguing that the Applicant is not an Employee of the Respondent and has never been employed by the Respondent.

4.2 Mr. Msibi for the Respondent in his opening submissions stated that he is the Managing Director of the

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Respondent. He submitted that the Applicant, Mr. Maseko was never employed by the Respondent, and further that he is not known to the company. He stated that he and the Applicant were from the same neighbourhood, and he had from time to time requested the Applicant in his personal capacity to do odd jobs for him here and there. He stated repeatedly that the Applicant was never employed by the Respondent. In support of his assertions he called the evidence of Mr. Mcebo Vusi Mahlalela, who is Respondent's supervisor and responsible for the hiring and dismissing of employees, and their welfare. He stated under oath that he has been employed by the Respondent for about 5 years.

4.3 He further stated that when employing individuals, each employee is provided with a Form, which form was submitted as part of Respondent's case and marked "Annexure 1". The form is filled by the Respondent, and a copy is given to the employee to keep. The copy filed by the Respondent is a Written Particulars of Employment form in terms of Section 22 of The Employment Act 1980.

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4.4 He went on to state that all the employees are paid their salary in envelopes prepared by him, with their earnings indicated on the front, as well as deductions made. A sample of the envelope was submitted and marked "**Annexure 2**". The witness testified that he does not know the Applicant, and has never seen him at the company premises, nor is he an employee of the company.

4.5 The Applicant in his opening submissions testified that he was employed by the Respondent as a Security Guard. He submitted that it was agreed between himself and the Respondent that he would earn a sum of E600.00 monthly, further it was agreed that he would work the 5:30am to 6:00pm shift.

4.6 The Applicant submitted that he was not dismissed by the Respondent but left after the Respondent failed to pay him his wages. The Applicant further submitted that he would be calling three witnesses to give evidence on his behalf.

4.7 The Applicant went on to submit under oath that he was employed as a Security Guard on the 1st November 2007,

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and that he stopped work on the 21st September 2008. It was his evidence that the reason he stopped working was as a result of the Respondent making his life difficult. He testified that when it was time for him to be paid he would not be paid. When he requested the Director to pay him, he was told by the Director to go to his house, and get some food. Sometimes he would be told to fetch food for a whole week.

4.8 It was his evidence that he was further told he would get his pay at Mbikwakhe, but that never happened. He further stated that this would confuse him because he failed to understand, why he should get his payment from Mbikwakhe whilst he was stationed at Elite Plastic (Pty) Ltd. He stated that he then decided to report the incident with the police at Sigodvweni police station in Matsapha.

4.9 It was at the police station where the Respondent promised to pay him his money, however he failed to honour that agreement, hence the lodgment of the dispute. It was his testimony that throughout his employ he was only paid the agreed amount of E600.00 once, and received the money from one Sidney Shongwe, who was a supervisor. He insisted that he was employed by the Respondent and that no papers of employment were

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given to him.

4.10 The Applicant called one Mr. Mabuza who he stated worked at Elite where he was stationed. However this individual refused to take the oath when called in to give evidence. What transpired left me totally confused. He submitted that the Applicant was not known to him, further that he was not aware whether the Applicant had been stationed at Elite or not. He further submitted that he had been approached by the Applicant, who told him that he needed him to help him testify and state that he was posted at Elite.

4.11 He went on to state that, on the day he was approached by the Applicant it was the first time that he was seeing the Applicant. He submitted further that he does not know the Applicant, therefore could not testify that he was indeed stationed at Elite. On the contrary he knew the Respondent.

4. ANALYSIS OF SUBMISSIONS AND ARGUMENT

4.1 Before I can deal with the merits of the case at hand I am called to determine a very important point, that is whether

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the Applicant was an employee of the Respondent or not. I will firstly deal with the submissions of the Applicant. It is of note that the Applicant during the hearing was incoherent and would occasionally become violent, and would be calmed down by his brother in law. He would mumble to himself and stare into space, leading me to believe by his actions that he was either mentally unstable or had taken something with a high alcohol content.

4.2 Aggravating the situation was his hearing disability, as he would stress that he could not hear. Though I acknowledge that the Applicant may have a hearing disability, I am however left unsure whether he is mentally stable, and whether he appreciates the difference in persona of the Respondent and its Director Mr. Msibi.

4.3 During his submission the Applicant stated that he had never been paid his salary by the Respondent, he submitted that had received E600.00 once from one Sidney Shongwe. He further submitted that when he approached the Director, he would tell him to go to his house, where he would be given food, further he stated that the Director would tell him that he would get his salary at Mbikwakhe.

4.4 The evidence adduced by the Applicant has given rise to

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more questions than answers, in particular whether he was employed by the Respondent or not. To assist me in answering this question, I shall begin by determining the definition of an employee in terms of The Employment Act 1980 and Industrial Relations Act 2000(as amended).

The Employment Act of 1980, defines an employee as; "employee means a person to whom wages are paid or are payable under a contract of employment."

4.5 Whilst the Industrial relations Act 2000 (as amended) defines an employee as;

"a person whether or not the person is an employee at common law, who works for pay or other remuneration under a contract of service or under any other arrangement involving control by, or sustained dependence for the provision of work upon, another person."

4.6 An employee for purposes of the Act is thus a person who works for pay or other remuneration, under a contract of service, or under arrangement not amounting to a contract of service involving control by another person or sustained dependence upon another person for the provision of work.

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4.7 In the case of Percy Lokoftwako and Swaziland Television Broadcasting Corporation t/a Swazi TV Industrial Court Case No.151/07, Judge President P.R Dunseith stated that the definition of an employee in terms of the Industrial Relations Act 2000 gives rise to a two step enquiry to determine whether a litigant is an employee. The first enquiry is whether the person works for pay or remuneration under a contract of service. In other words is the person a common law employee.

4.8 If the first enquiry concludes that the relationship is not a contract of service, the court makes a second enquiry, namely whether the person works for pay or remuneration under an arrangement other than a contract of service involving control by, or sustained dependence for work upon, another person.

4.9 From the evidence adduced by the Applicant I have failed to conclude that the Applicant and the Respondent entered into any form of contract of employment. The Applicant has failed to state whether the contract entered into was verbal, or done in writing, if it was done in writing to provide documentary proof that indeed a contract of employment was entered into between the parties. If verbal he has failed to state where, when and who represented the Respondent

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when he was employed

4.10 From his own admittance he stated that during his duration of employment he only received the agreed amount of E600.00 once thereafter he was not paid by the Respondent. He stated that he would get the odd two hundred here and there but did not state under what circumstances.

5. RULING

5.1 Based on the evidence submitted by the Applicant I am not convinced on a balance of probabilities that the Applicant was an employee of the Respondent. The Applicant has failed to prove his case. He has failed to prove that he entered into a contract of employment with the Respondent and that he is an employee in terms of the definition contained in the two Acts, The Employment Act 1980 and The Industrial Relations Act 2000 (as amended).

5.2 It is therefore my finding that the Applicant has failed to prove on a balance of probabilities that he is an employee of the Respondent. The Applicant's claimed is dismissed in its entirety.

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DATED AT MANZINI ON THIS THE 28th DAY OF JANUARY, 2010 .

COMMISSIONER BANELE NGCAMPHALALA

ARBITRATOR

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