



**IN THE CONCILIATION, MEDIATION & ARBITRATION
COMMISSION (CMAC)**

HELD AT SITEKI

STK 054/10

In the matter between:-

BONGANI MAVIMBELA & 5 OTHERS

APPLICANTS

And

INDUSTRILEC (PTY) LTD

RESPONDENT

CORAM:

Arbitrator : Mthunzi Shabangu
For Applicant : Zakhele Dlamini
For Respondent : Joseph Zitha

Nature of Dispute : Unfair Dismissal

Date of Hearing : 21st September, 2010;
5th October, 2010

ARBITRATION AWARD

1. DETAILS OF HEARING AND REPRESENTATION:

- 1.1 The Applicants are Bongani Mavimbela and 5 others. The 5 others are Bongani Tsabedze, Mbongiseni Tsikati, Phelelani Magagula, Wandile Tsabedze, and Mbuso Dlamini. The Applicants' chosen postal address is P.O. Box 109, Mhlume.
- 1.2 The Respondent is Industrilec (PTY) LTD, an electrical construction company with limited liability duly registered according to the company laws of Swaziland based at Tshaneni, Lubombo Region. Its postal address is P.O. Box 298, Mhlume.
- 1.3 During the arbitration hearing, the Applicants were represented by Mr. Zakhele Dlamini, an Attorney from the offices of Magongo, Dlamini Attorneys, a firm of attorneys based at Manzini. The Respondent was represented by one of its Directors in the person Mr. Joseph M. Zitha. That was by choice since the right to legal representation was explained to both parties during pre-arbitration hearing.
- 1.4 The arbitration hearing was held at CMAC – Siteki Offices on the 21st September, 2010 and 5th October, 2010 respectively, not mentioning the aborted dates.

1.5 When the matter adjourned on the 5th October, 2010 the parties were advised to prepare written submissions in support of their prayers based on the evidence led and any legal authorities, decided cases and statutory enactments and file same with the Commission, at least, within four (4) days from that date, i.e. before close of business on Monday the 11th October, 2010. As to what closing submissions entails was clearly explained to the parties. It is regrettable to note that both parties neglected and/or failed to file their submissions neither on the 11th October, 2010 nor at some other time later on. Even by the time this award was prepared, still no submissions had been filed by either party.

2 ISSUE TO BE DECIDED

2.1. The issue for determination is in two-fold: First, it has to be decided whether or not the Applicants' services were terminated by the Respondent. Secondly, if the first question is decided in the affirmative, whether or not their services were fairly terminated.

3. BACKGROUND TO THE ISSUE

3.1. The Applicants are ex-employees of the Respondent, having been employed at different intervals during 2008, 2009 and 2010 as follows:

- 3.1.1 Bongani Mavimbela - April, 2008
- 3.1.2 Bongani Tsabedze - September, 2008
- 3.1.3 Mbongeni Tsikati - March, 2008
- 3.1.4 Phelelani Magagula - July, 2008
- 3.1.5 Wandile Tsabedze - June, 2009
- 3.1.6 Mbuso Dlamini - January, 2010

3.2 The Applicants' job designations or capacities were that of General Labourers. They allege that they were dismissed *en masse* on the 23rd April, 2010 under the guise of a temporary cessation of work for the Respondent company. They were not furnished with written letters of the dismissals. They are claiming compensation for unfair dismissal.

3.3 The Respondent on the other hand, inasmuch as it admits the employment relationship between the parties as well as the Applicants' dates of employment, job designations and monthly remuneration, however, denies the alleged dismissals complained of by the Applicants.

3.4 The Respondent contends that it is a construction company which relies on the availability of tenders and/or sub-contracts for its ability to sustain and keep its work-force or personnel. As and when work ceases or becomes insufficient they lay off some of its work-force. Hence the argument is that in this case, the Applicants were layed-off rather than dismissed. The Respondent is, therefore, praying for a dismissal of the Applicants' claim.

4 SUMMARY OF THE EVIDENCE AND ARGUMENTS

The Applicant's Version;

4.1 Two witnesses testified for and on behalf of the Applicants. These are Bongani Mavimbela (AW1) and Mbongiseni Tsikati (AW2). AW1 gave evidence to the fact that they were not given any written particulars of employment when employed by the Respondent. He testified that he and his co-Applicants were all simultaneously stopped by the Respondent's Director, Mr Joseph Zitha from coming to work on the 23rd April, 2010 without being given any prior written notification to that effect.

4.2 The verbal instruction was that they should not report for work the following Monday and any day thereafter

until they are telephonically called by the Respondent. This message was communicated early that Friday morning of the 23rd April, 2010 following which they were dispersed to resume that day's work. That day's work was characterized by digging a cable trench at Mananga and an installation of an electric cable in that trench. That was followed by a removal of globs from Mananga Border Post to be repaired and re-fixed the following week.

4.3 The re-fixing of those globes was never done by Applicants since they had been unceremoniously stopped from coming to work.

4.4 This witness suspected some malice on the part of the Respondent to be the main cause for their dismissal. He says the dismissals came immediately or the very same day the Respondent acceded to their demands to be remunerated according to the hourly rate or tariff stipulated in the **Regulation of Wages (Building and Construction Industry) Order, 2008** which was E5.31 per hour as opposed to the E4.50 per hour on which the Respondent was paying them. On that Friday when the Respondent conveyed the bad news that they should not come to work the following Monday or anytime thereafter the Respondent started by paying the Applicants their

back-pay, being the difference between the gazzetted hourly rate of E5.31 and the E4.50 hourly rating on which they had always been paid.

- 4.5 The suspected malice, so goes this witness's evidence, is confirmed by the fact that during the course of the struggle and/or negotiations for the upgrading of the Applicants' hourly rate, the Respondent's Director, Mr Zitha, had once told the Applicants that if they were not satisfied with the hourly rates the Company was using (i.e. those of E4.50/hour) they should go home.
- 4.6 Mr. Mavimbela further gave evidence that after about a month or so from the date of their dismissal, other employees were employed by the Respondent to do the very same job the Applicants were doing. These include one Wonder Mavimbela and Sidumo Mhlanga.
- 4.7 Mr. Mavimbela denied, during cross-examination, that he was layed-off at some previous time save only one instance where the Respondent Company had minimal work to do and that fact was evidently clear even to the employees. He says that lay off was unequivocally explained to the workers rather than this one which was ambiguous and spiteful insofar as

it tallied with the Applicants' demands for an appropriate wage and they were not told for how long should they remain at home without any salary.

4.8 In fact, Mr Mavimbela denied that lay-offs had been agreed upon as a material term or condition of their employment.

4.9 AW1 concluded his evidence by stating that in lieu of reporting a dispute to the Commission, they wrote the Respondent a letter wherein they asked to be compensated for the unfair dismissal. A copy thereof was annexed on the Report of Dispute Form and is dated the 3rd May, 2010. He says that letter was hand-delivered at the Respondent's offices situate at Tjaneni by Mbongiseni Tsikati (AW2) upon the company's secretary. They never received any response from the Respondent.

4.10 AW2, Mr Mbongiseni Tsikati corroborated AW1 in all material respects. In particular, he confirmed that their dismissal came after they had lodged a complaint about their hourly rating which was below the gazzeted one. Further, that the Friday they were stopped from coming to work anymore was preceded by the paying of their back-pay in line with the

gazzeted **Regulation of Wages Order (Building and Construction), 2008** as per their demand. The Director, Mr. Zitha, then thanked them for working with his company till then and told them that there is no longer any work for them.

- 4.11 AW2 further stated that their dismissal was soon followed by the employment of other workers, for example, Mbongeni Nxumalo, Bhekani Gamedze, Sdumo Mhlanga, Sipho Nxumalo and Wonder Mavimbela.
- 4.12 This witness further denied that they were given any written down notification in lieu of their dismissal or even on the fateful day in question i.e. the 23rd April 2010.
- 4.13 Mr. Tsikati also confirmed being the one who served the Applicants' letter dated the 3rd May 2010 upon the Respondent secretary, one Nomsa whose full and further particulars were unknown to him. He also denied that when employed it was communicated to them that occasional lay-offs would be part and parcel of their employment.

4.14 Mr. Tsikati also testified to the fact that for the whole duration of his employment with the Respondent he never went on leave and thus, he is claiming for unpaid leave dues on top of his claim for compensation for unfair dismissal.

The Respondent's Version;

4.15 Mr. Howard Middleton, one of the Respondent's Directors gave evidence for and on behalf of the Respondent as the sole witness. He testified to the fact that the Respondent is an electrical construction company. It does electrical and line construction for Swaziland Electricity Company and other companies. They scout for work or tenders and operate as and when they had some tenders or sub-contracts.

4.16 Mr. Howard (RW1) stated that at times they do prepare written particulars of employment for their employees, in particular those who are permanent. In respect of the Applicants in this case Mr. Howard said he cannot recall if any written particulars of employment were prepared for them, but otherwise there should have been.

- 4.17 RW1 further testified that all he knows about this matter is that his colleague, Mr. Zitha, layed-off the Applicants temporarily due to shortage of work, after which they ran to CMAC to complain that they have been fired. He says the laying-off of employees was not happening for the first time as the company had been doing this since it started operating around 1997.
- 4.18 RW1 confirmed that the Applicants' hourly rate was initially E4.50 but later improved to over E5.00 pursuant to complaints from the Applicants who said they were under-paid.
- 4.19 Mr Howard confirmed during cross-examination that for any temporal lay-off there should be a cut-off date because there would have been minimum wage applicable during that period. He, however, pleaded his innocence with regards to what exactly was said to the Applicants by his colleague, Mr. Zitha, as he (Howard) was not present. He non-the-less confirmed that the lay-off instruction was communicated to Applicants verbally and not in writing.
- 4.20 Mr. Howard further confirmed that after the Applicants' alleged dismissals, there had been a few

employments of new people whom he said were casual employees, though he did not mention any by name.

5. ANALYSIS OF THE EVIDENCE AND ARGUMENTS

- 5.1 The Applicants have instituted proceedings for determination of an unresolved dispute claiming that they have been wrongfully and unlawfully dismissed from their employment with the Respondent without any lawful cause or excuse. They claim payment of maximum compensation for unfair dismissal, additional notice pay, severance allowance and leave pay. There is no claim for one month's notice pay.
- 5.2 The Respondent argues that the Applicants were not dismissed but layed-off.
- 5.3 It is common cause that the Applicants were employees to whom section 35 of the **Employment Act, 1980**, applied. This is to the inclusion of Mbuso Dlamini who was agreed between the parties to have been employed in January, 2010. It was not argued by the Respondent that this employee had not completed his probationary period in terms of section 32 of the **Employment Act 1980**. Accordingly, the

services of the Applicants should not be considered as having been fairly terminated unless the Respondent proves-

5.3.1 That the reason for the termination was one permitted by section 36 of the Employment Act, and that taking into account all the circumstances of the case, it was reasonable to terminate the services of the Applicants.

See: Section 42 (2) of the Employment Act.

5.4 It was agreed between the parties during pre-arbitration hearing that since the Respondent denies having dismissed the Applicants and argues that they were rather temporarily layed-off, the onus of proving the lay-offs rests upon the Respondent. It now remains to be seen if the Respondent has been successful in discharging this onus on a balance of probabilities so that if yes, the Applicants' case could accordingly fail.

5.5 In an attempt to discharge this legal burden, the Respondent led one witness in the person of Howard Middleton, a Co-Director in the Respondent company. I must hasten to mention that Mr Howard seemed to

have a tough time convincing the arbitration hearing that their action of stopping the Applicants from reporting for work any longer after the 23rd April, 2010 was in line with the proper procedure for affecting a lay-off.

5.6 He unequivocally admitted that the duration of the lay-off period should have been specified. By implication he meant that in the absence of the time frame or cut-off date for the lay-offs, the alleged lay-offs were bound to be ambiguous since an inference could reasonably be drawn by the Applicants that they were being dismissed. In fact that is exactly the conclusion that the Applicants came to.

5.7 The alleged lay-off had come at a time when the Applicants had made certain demands against the Respondent, being to be remunerated according to the hourly rates set on the **Building and Construction Regulation of Wages Order, 2008**. The employer had demonstrated not to be happy with this demand since at some point in time when pressure was put to bear by the Applicants, he (Mr. Zitha) uttered some words to the fact that if they were not satisfied with the rates the company was using, they should go home. This statement, taken

together with the conduct of the Respondent's Director, Mr Zitha, on that Friday 23rd April, 2010 when the alleged lay-off news was communicated to the Applicants strengthened the Applicants' inference of dismissals.

- 5.8 It was testified by the Applicants that on that day the Respondent paid the Applicants their back-pay as per the aforesaid **Regulation of Wages Order** and then thanked them for working with his company till then. After that, Mr Zitha broke the news that the Applicants should not report for work the following week or anytime thereafter. He then took the Applicants' contact numbers with a promise that he will call them.
- 5.9 That was not preceded by any prior consultations with the Applicants whatsoever, nor any prior notification.
- 5.10 It was not put to the Applicants' witnesses during cross-examination that they were not dismissed but rather they were layed-off. Even the reasons for the alleged lay-off were not put to the two Applicants' witnesses by the Respondent during cross-examination. Worse still, the fact that occasional lay-offs were agreed during the engagement stage to be

part and parcel of the parties' employment contracts was also not put to the Applicants' witnesses for them to admit or deny it. It was only during the opening statements that the Respondent had stated that lay-offs were an agreed term of the parties' employment contracts. In short the Respondent's case was not built at all upon the Applicants' witnesses who testified before the Respondent's witness.

- 5.11 The Applicants denied that lay-off was a term or condition of their employment contracts. The Respondent had not prepared written particulars of the parties' employment contracts in terms of Section 22 of the **Employment Act**. This could have come in handy in assisting the Respondent in its endeavor to discharge its onus since this term could have been inserted therein. In the decided case of **Patrick Masondo vs. Emalangeni Foods, Industrial Court Case No. 45/2004**, accusing the employer's failure to comply with the provisions of Section 22 of the **Employment Act**, the Industrial Court stated as follows:

“The Respondent [Employer] also failed to produce in evidence the statutory employment form prescribed by section 22 of the Employment Act. This form should by law have been completed and signed by the

parties within two calendar months of the engagement of the Applicant.... The purpose of the Section 22 form is to record the essential terms of employment and thereby avoid subsequent disputes.... The form constitutes prima facie evidence of the matters contained therein. The primary obligation to ensure compliance with section 22 rests on the employer, to the extent that non-compliance constitutes a criminal offence on the part of employer.”(my emphasis).

5.12 **The Regulation of Wages (Building and Construction Industry) Order, 2008** does contain a provision for lay-offs in the building and construction industry, when there is unavailability of working materials or due to temporary cessation of work. Section 14 (1) thereof stipulates that in any of the foregoing instances;

“the employer may, subject to that employer giving the employee not less than twenty four hours notice, lay-off the employee without pay for a maximum period of thirty calendar days....” (My emphasis).

- 5.13 Again, there was no compliance with this provision by the Respondent in this case. The Applicants were not given the twenty four hours notice in lieu of the alleged lay-offs. This is another serious transgression on the part of the Respondent. No explanation was offered for failing to comply with this provision at all.
- 5.14 Undoubtedly, the foregoing analysis cannot lead one to a finding that the Respondent has been successful in discharging its onus of proving the alleged lay-offs of the Applicants. The inference drawn by the Applicants that the manner and circumstances under which they were stopped from reporting for work anymore until being called by the Respondent amounted to their dismissal is reasonable, was the only inference to draw in the circumstances and further, it finds support from relevant proven facts. I therefore find that the Applicants were indeed dismissed.
- 5.15 Insofar as the Applicants were dismissed under the disguise of a lay-off, automatically their dismissal cannot be said to have been for a fair reason in terms of **Section 36 of the Employment Act**. Their dismissal, insofar as it was hidden under that cover of

a lay-off is devoid of the backing of the law and therefore null and void and/or both substantively and procedurally unfair.

5.16 The Applicants are entitled to the reliefs sought. Their dismissal came as a big surprise and it is highly condemned. The manner in which the Applicants were dismissed clearly demonstrates the outmoded chauvinistic style of subjection of labour or employees to the whims of management. The Respondent's conduct demonstrated zero concern whatsoever to the gross inconvenience, unfairness, prejudice and disorder his actions would have on the personal and family lives of the Applicants. The severity of the dismissal upon each Applicant was, however, not brought before the arbitration hearing.

5.17 In the circumstances, taking into consideration the duration of the employment between the parties, the fact that the dismissals have been found to be both substantively and procedurally unfair, the average age of the Applicants, the fact that as at the time of the hearing (i.e. September/October 2010) the Applicants or some of them had not secured themselves employment elsewhere (e.g. AW1 and AW2), the fact that the Applicants' dismissal

amounted to unfair discrimination insofar as it targeted those employees who had complained of the wrongful hourly rating, I am of the considered view that their compensation for unfair dismissal should stand as follows:

5.17.1 Bongani Mavimbela = 8 months salary

5.17.2 Bongani Tsabedze = 8 months salary

5.17.3 Mbongiseni Tsikati = 8 months salary

5.17.4 Phelelani Magagula = 8 months salary

5.17.5 Wandile Tsabedze = 6 months salary

5.17.6 Mbuso Dlamini = 4 months salary

5.18 The claim for leave pay as testified only by AW2 was not generalized to cover the other Applicants. AW2 personalized this claim and Applicants' legal counsel did not bother to enlist the leave pay evidence from both Applicants witnesses with regards to the other Applicants. Consequently this claim shall only be granted in favour of Mbongiseni Tsikati and shall be computed in terms of Section 7 of the **Regulation Of Wages (Building and Construction Industry) Order, 2008** which allocate this industry's employees a total of 13 leave days per annum. He gave evidence to the fact that ever since his engagement by the Respondent he never went on

leave. I would have no basis of assuming that this is the case even with the other Applicants in the absence of evidence to that effect.

6. **AWARD**

6.1 In the foregoing regard, I order that the Respondent should pay the Applicants the following monies:

6.1.1 Compensation for unfair dismissal as follows;

a) **Bongani Mavimbela**

| | | | |
|------|-----------------------|---|--------------------------|
| i) | 8 months salary | = | E8, 877.44 |
| ii) | Severance pay | = | E 504.40 |
| iii) | Additional Notice Pay | = | <u>E 201.76</u> |
| | | | <u>E9, 583.60</u> |

b) **Bongani Tsabedze**

| | | | |
|------|-----------------------|---|--------------------------|
| i) | 8 months salary | = | E8, 877.44 |
| ii) | Severance pay | = | none |
| iii) | Additional Notice Pay | = | <u>none</u> |
| | | | <u>E8, 877.44</u> |

c) **Mbongiseni Tsikati**

| | | | |
|------|-----------------------|---|--------------------------|
| i) | 8 months salary | = | E8, 877.44 |
| ii) | Severance pay | = | E 504.40 |
| iii) | Additional Notice Pay | = | E 201.76 |
| iv) | Leave pay (26 days) | = | <u>E1, 311.44</u> |
| | | | <u>E10,895.04</u> |

d) Phelelani Magagula

| | | | |
|------|-----------------------|---|--------------------------|
| i) | 8 months salary | = | E8, 877.44 |
| ii) | Severance pay | = | none |
| iii) | Additional Notice Pay | = | <u>none</u> |
| | | | <u>E8, 877.44</u> |

e) Wandile Tsabedze

| | | | |
|------|-----------------------|---|--------------------------|
| i) | 6 months salary | = | E6, 658.08 |
| ii) | Severance pay | = | none |
| iii) | Additional Notice Pay | = | <u>none</u> |
| | | | <u>E6, 658.08</u> |

f) Mbuso Dlamini

| | | | |
|------|-----------------------|---|--------------------------|
| i) | 4 months salary | = | E4, 438.72 |
| ii) | Severance pay | = | none |
| iii) | Additional Notice Pay | = | <u>none</u> |
| | | | <u>E4, 438.72</u> |

- 6.2 The foregoing amounts should be paid at CMAC – Siteki for each Applicant in two equal installments, the first to be made on or before the 31st January 2011 and the second and last installment to be made on or before the 28th February 2011.
- 6.3 I make no order as to costs.

DATED AT SITEKI ON THEDAY OF DECEMBER, 2010.

MTHUNZI SHABANGU
CMAC COMMISSIONER