



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

**HELD AT SITEKI**

**STK 018/10**

In the matter between:-

**MUSA KUBHEKA**

APPLICANT

And

**SIPHO MADLENYA GAMEDZE**

RESPONDENT

CORAM:

**Arbitrator** : Mthunzi Shabangu

**For Applicant** : In person

**For Respondent** : In person

**Nature of Dispute** : Unfair Dismissal

**Date of Hearing** : 1<sup>st</sup> June, 2010; 15<sup>th</sup>  
June, 2010.

---

**ARBITRATION AWARD**

---

**1. DETAILS OF HEARING AND REPRESENTATION**

- 1.1 The arbitration was held at CMAC offices, Siteki on the 1<sup>st</sup> and the 15<sup>th</sup> June, 2010 respectively. The process was captured both on electronic and manual records.
- 1.2 The Applicant is Musa Kubheka, an adult male Swazi of P.O. Box 4, Lobamba.
- 1.3 The Respondent is Sipho Madlenya Gamedze, an adult male Swazi of P.O. Box 47, Big Bend.
- 1.4 During the arbitration process, both parties appeared personally representing themselves.

## **2. ISSUE TO BE DECIDED**

- 2.1** The issue to be decided pertains whether or not the Applicant was dismissed from the Respondent's employ and, if yes, whether or not the dismissal was fair.
- 2.2** The Applicant alleges that the Respondent's conduct of unilaterally selling the van he had been employed to drive resulted towards an unlawful termination of the employment contract.
- 2.3** He is claiming compensation for unfair dismissal coupled with the ancillary statutory remedies.

### **3. BACKGROUND TO THE ISSUE**

**3.1** The Applicant had been under the Respondent's employ from the 8<sup>th</sup> February, 2006 as a Driver of the Respondent's van or bakkie which was used for-hire, and was based at Siteki in the Lubombo Region. He earned E1 000.00 per month as salary. His employment came to an abrupt end on the 8<sup>th</sup> January, 2010 when the Respondent sold the van the Applicant had been employed to drive.

**3.2** The Respondent, in his personal capacity, operated a van or bakkie for hire trading as 'Mandlenya For-Hire' based at Siteki Town, driven by the Applicant. The van was registered SD 274 GN. He sold this van on the 8<sup>th</sup> January, 2010 without replacing it. He denies dismissing the Applicant, alleging that on selling the van he offered the Applicant an alternative job to go to Big Bend and drive a Quantum-kombi, which offer the Applicant is alleged to have declined.

### **4. SUMMARY OF THE EVIDENCE AND ARGUMENTS**

## **The Applicant's Version;**

- 4.1** The Applicant gave evidence under oath to the effect that he had continuously worked for the Respondent as a Driver from February, 2006 up to the 8<sup>th</sup> January, 2010.
- 4.2** He tabulated how he received numerous telephone calls on his mobile cellular phone from the Respondent on the 8<sup>th</sup> January, 2010. These calls began with one which he received sometime mid-morning wherein the Respondent instructed the Applicant to go and wash the car's engine, i.e. the Respondent's van which the Applicant was driving and was used for commercial purposes-being for hire.
- 4.3** Just before the Applicant could send the car for the engine wash, he was hired by a customer who wanted his goods to be ferried from Siteki, being the van's base station, to some place called Njotjane situated at Hlane area. It is within this trip, i.e. to and from Njotjane at Hlane that the Applicant received three (3) further telephone calls from the Respondent, at different intervals, enquiring

about the Applicant's whereabouts and further demanding him to rush back to Siteki.

**4.4** In all these calls which the Respondent made to the Applicant on the day in question, being the 8<sup>th</sup> January, 2010, no hint was given by the Respondent with regards to the intended sale of the van, or that he wanted the van's engine to be washed because some buyers were coming on that day to take it.

**4.5** On finally getting back to Siteki Town, the Applicant found the Respondent in the company of some two men and two women. The Respondent subsequently pointed the two men and women the van and said "this is the car I am selling you". All this happened without the Respondent having said a word to the Applicant with regards to the sale of the car, at least according to the Applicant's evidence.

**4.6** The Respondent then sent the Applicant to go and bring the van's blue book from his (i.e. Applicant's) house, which he did. The Applicant was further instructed to remove from the van the public permit, certificate of

fitness, T-Disk and such other personal documents.

**4.7** The foregoing events, apparently, were soon to be followed by the departure of the buyers of the van together with the van. In the Applicant's possession at the time was a sum of E450.00 which the Respondent told the Applicant to use for his debts and that marked the unexpected end of the parties' employment relationship.

**4.8** On getting home the very same day, i.e. the 8<sup>th</sup> January, the Applicant made a telephone call to the Respondent to register his dissatisfaction regarding the manner his employment has been terminated. The Respondent apparently responded by saying he owned the van and thus he could do anything with it as it pleases him.

**4.9** On the 18<sup>th</sup> January, 2010 the Applicant wrote a letter to the Respondent indicating that he was not pleased in the way he lost his job and thus was seeking terminal benefits. The Respondent did not respond to the Applicant's letter. A copy thereof was annexed on the Report of Dispute Form.

**4.10** The Applicant argued that by selling the van without prior consultations regarding his future employment status, the Respondent unlawfully terminated the employment contract.

### **The Respondent's Version;**

**4.11** The Respondent started-off his case by calling one Samson Simelane as RW 1, i.e. Respondent's first witness. There is nothing much pertinent that turns out from this witness's evidence save only that he got it from the Respondent as at around October, 2009 that he intended selling the van since it was no-longer making profit.

**4.12** Further, Mr. Simelane testified that he also got it from the Respondent around December, 2009 that he had since bought a kombi that plies the Manzini-Big Bend route as a public transporter.

**4.13** On getting into the witness stand, the Respondent himself (as RW2) confirmed the duration of the employment relationship between himself and the Applicant. He

further confirmed the job station or base point.

**4.14** The Respondent further confirmed the events of the 8<sup>th</sup> January, 2010 relating to the sale of the van driven by the Applicant. He did not deny having made numerous telephone calls to the Applicant before the sale of the van that day, e.g. pertaining to washing the car's engine and the need for the Applicant to hurry back to Siteki. The Respondent confirmed that in neither of those calls did he hint to the Applicant that the van is going away and/or is being sold.

**4.15** The Respondent, however, argues that before they could part with the Applicant on the 8<sup>th</sup> January, 2010 he (the Respondent) told the Applicant that his job has not come to an end, but that he will have to go to Big Bend to drive the Respondent's Quantum Kombi. This the Respondent argues to have said to the Applicant on the same day, but after the van was sold and taken away.

**4.16** The Respondent testified that the Applicant refused the alternative employment to go and drive the Quantum, arguing that he



could not go to Big Bend since he was a Pastor and had a church at Siteki. The Respondent says the parties parted ways on that day to allow the Applicant to consider the offer of an alternative employment of going to Big Bend to drive the Quantum.

**4.17** The Respondent admits having received a telephone call from the Applicant later that very day of the 8<sup>th</sup> January, 2010 and justifies the response he gave the Applicant by saying he was disturbed by the Applicant's complaint as they had talked over the matter and the Applicant had gone home to consider the offer of going to Big Bend.

**4.18** The Respondent closed his arguments by saying that it is the Applicant who neglected to come back to him with his responses after the discussion of the 8<sup>th</sup> January, 2010, hence the denial that the Applicant was dismissed.

## **5. ANALYSIS OF THE EVIDENCE AND ARGUMENTS**

**5.1** It is common cause that the Applicant was an employee to whom Section 35 of the

Employment Act, 1980 applied. Consequently, for his dismissal to be said to have been fair, the duty or onus of proof is on the employer (Respondent) to prove that he was dismissed for one of the fair reasons of termination of a contract of employment stated in Section 36 of the Employment Act or, alternatively, that he was dismissed due to operational reasons.

- 5.2** It is also common cause that the Applicant lost his job following the sale of the van for-hire he had been employed by the Respondent to be its Driver. That was on the 8<sup>th</sup> January, 2010.
- 5.3** The central question is whether there was any prior consultation between the parties about the sale of the van and the transfer of the Applicant from Siteki to Big Bend following the sale of the van.
- 5.4** The onus of proving that there had been prior consultations with regards to the above subject matter rested on the Respondent. In this regard the Respondent had merely argued that he had consulted with the Applicant in October, 2009. He further

argued that on the day of the sale of the van, being the 8<sup>th</sup> January, 2010 he did inform the Applicant that his job was not over, but that he would have to go and drive his quantum kombi at Big Bend.

**5.5** The Applicant only admits that the parties did talk about the van's poor performance in terms of income generating sometime in October, 2009 but denies that the issue of his transfer to Big Bend was ever discussed in proper consultative discussions. The Applicant further denies that the issue was discussed on the day of the sale of the van. The Applicant's argument is that if they discussed the issue, why would he call the Respondent telephonically later that very day to tell him about his dissatisfaction regarding the manner his job had come to an end.

**5.6** It is of note that the Respondent admits the Applicant's telephone call and that he responded by saying he owned the car and thus he could do anything with it as it pleased him. This response does not auger well for any mutual consultations.

**5.7** Further, the Respondent's failure and/or neglect to reply to the Applicant's letter of the 18<sup>th</sup> January, 2010 wherein the Applicant, now in writing, further registered his discontentment with regards to the manner he lost his job and claimed terminal benefits, is another pointer that the parties cannot be said were having mutual consultative discussions on the matter.

**5.8** The Respondent did not deny receipt of this letter. He had an obligation to reply thereto, more because he says when they parted on the 8<sup>th</sup> January, 2010 they parted to allow the Applicant some time to make up his mind regarding the offer to be transferred to Big Bend.

**5.9** Honestly speaking, if the Respondent, in his own words, says they parted on the 8<sup>th</sup> January with the Applicant not having made up his mind regarding the offer to go to Big Bend, it then troubles the mind as to why would the Respondent fail to courteously respond to the Applicant's telephone call and, further, completely ignore or neglect to respond to the Applicant's written letter? How else were the negotiations then

supposed to be furthered if the one party (the Respondent) suddenly decides to turn a blind eye to all the other party's (the Applicant) telephonic and written correspondences? The Respondent is not advancing an argument that the parties had rather fixed a date to personally meet and finalize the discussions, to justify his conduct of ignoring the telephone call and written letter.

**5.10** Notwithstanding the Applicant's two attempts to talk to the Respondent regarding this issue, the Respondent did not make even a single attempt to engage the Applicant after they parted on the 8<sup>th</sup> January, 2010. In fact, he openly admits that he never made any effort to get to the Applicant after the 8<sup>th</sup> January as he thought that the Applicant had since got employment elsewhere.

**5.11** The Respondent's conduct of failing to courteously respond to the Applicant's telephone call, taken together with his complete failure or neglect to reply to the Applicant's written letter leads to an inference that there were no consultations

between the parties. This negative inference is factually proven by the Respondent's own admission that he never made any attempt to talk to the Applicant after the 8<sup>th</sup> January, 2010.

**5.12** Consequently, the Applicant's evidence that there were no such consultations before nor on the 8<sup>th</sup> January is more probable or believable than the Respondent's version.

**5.13** I therefore make a factual finding that the Respondent did not engage the Applicant into proper consultations with regards to the consequences of the sale of the van, in particular the alleged offer for transfer to Big Bend. The Respondent has completely failed to discharge the onus of proof that was upon him in this regard.

**5.14** The process of consultation in the context of Industrial Relations has been defined as follows by the former Judge President of the Industrial Court in the case of **SAPWU vs. Usuthu Pulp Company, Industrial Court Case No. 423/2006** (unreported) (at page 26-27):

***“Consultation involves seeking information, or advice on, reaction to, a proposed cause***

***of action. It envisages giving the consulted party an opportunity to express his opinion and make representations, with a view to taking such opinion or representation into account. It certainly does not mean merely affording an opportunity to comment about a decision already made and which is in the process of being implemented.*** (My emphasis).

See also: **Hadebe & Others vs. Rantex Industrial Limited (1986) 7 ILJ 726 (IC)** at 735.

**5.15** Since in this matter no consultation was done the Applicant was deprived of his fundamental right to be heard with regards to the alleged transfer to Big Bend. This was in violation of the well established principle of natural justice of the *audi alteram partem*- which means afford the other party a chance to be heard.

**5.16** The transfer from Siteki to Big Bend, and from driving a van for-hire to driving a Quantum kombi, being a public transporter operating between Big Bend and Manzini

would constitute a material change or alteration of the terms and conditions of the Applicant's employment. There is no doubt that this demanded that the Applicant be consulted before a decision could be made.

**5.17** The foregoing factual finding, that there was no proper consultation, should consequently be followed by a finding that indeed the Applicant's services were unfairly terminated at the Respondent's instance, both substantively and procedurally.

**5.18** The Applicant does not seek re-instatement, but claims compensation for unfair dismissal. After taking into account the manner and circumstances under which the Applicant's services were terminated by the Respondent, the fact that the Applicant had not committed any misconduct, the Applicant's personal circumstances, in particular that he was married and thus had a family when he shockingly lost his job, I am of the considered view that eight (8) months' salary amounting to E9 120.00 constitutes a fair and reasonable compensation for the unfair dismissal.



**5.19** It is of note that if regard be had to Legal Notice No.182 of 2006, being the Regulation of Wages (Road Transportation) Order, at least the basic minimum wage for a driver is E285.00 per week which translates to E1 140.00 per month. This is in respect of the lowest grade or size of the motor vehicle. The parties did not adduce evidence as to the size of the bakkie driven by the Applicant; hence I will use the lowest grade, being grade II. The Applicant was therefore underpaid by a sum of E140.00 per month. His claim for underpayments should accordingly succeed.

**5.20** However, the Applicant's claim for unpaid leave days should not succeed. The reason being that whether or not annual leaves were taken is a matter of evidence and not a legal question. Evidence was supposed to be adduced in proof that no leave was taken by the Applicant during the course of his employment. In the absence of such evidence, this claim should accordingly fail.

## **6. AWARD/ORDER**

**6.1** In the premises, I make the following order:

**6.1.1** The Applicant's services were unfairly terminated by the Respondent, both substantively and procedurally.

**6.1.2** The Respondent is ordered to pay the Applicant the following monies:

- i. Notice pay = E 1 140.00
- ii. Additional notice = E 684.00
- iii. Severance pay= E 1 710.00
- iv. Underpayments (18 months)= E2 520.00
- v. 8 Months compensation for unfair dismissal = E9 120.00

---

**TOTAL** **E15**  
**174.00**

**6.1.3** The total sum of **E15 174.00** should be paid at CMAC Offices - Siteki in three (3) equal installments, beginning from August, 2010. The last installment

shall therefore be made in  
October, 2010.

**6.1.4** I make no order as to costs.

**DATED AT SITEKI ON THE .....DAY OF AUGUST,  
2010.**

---

**MTHUNZI SHABANGU  
CMAC COMMISSIONER**