



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

**HELD AT SITEKI**

**STK 153/09**

In the matter between:-

**THANDI THEMBI MAZIYA**

**APPLICANT**

And

**FRANK BUTLER**

**RESPONDENT**

CORAM:

**Arbitrator** : Mthunzi Shabangu

**For Applicant** : In person

**For Respondent** : In person

**Nature of Dispute** : Unfair Dismissal

**Date of Hearing** : 31<sup>st</sup> May, 2010

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**ARBITRATION AWARD**

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**1. DETAILS OF HEARING AND REPRESENTATION:**

- 1.1 The arbitration was held on the 31<sup>st</sup> May, 2010 at CMAC offices, Siteki.
- 1.2 The Applicant is Thandi Thembi Maziya, an adult female Swazi of P.O. Box 58, Siteki.
- 1.3 The Respondent is Frank Butler, and adult male Swazi of P.O. Box 1088 Siteki.
- 1.4 Both parties represented themselves during the arbitration proceedings.

## **2 ISSUE TO BE DECIDED**

- 2.1 The issue to be decided concerns the fairness of the dismissal of the Applicant.
- 2.2 The Applicant is challenging the procedural and substantive fairness thereof and is seeking compensation.

## **3 BACKGROUND TO THE ISSUE**

- 3.1 The Applicant has been under the Respondent's employ as a House attendant since sometime in 2007. She earned a monthly wage of E220-00 which was increased in October, 2009 to E400-00. She was verbally dismissed by the Respondent on the 5<sup>th</sup> December, 2009.

## **4 SURVEY OF EVIDENCE AND ARGUMENTS**

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

- 4.1 The Applicant testified under oath that her employment relationship with the Respondent dates back to 2001. This initial employment contract got terminated sometime in 2004 when the Respondent lost his job at Crookes Plantation (Pty) Ltd.
- 4.2 The Applicant then went to work for one Nozwethi who had housed even the Respondent after the latter had lost his job at Crookes Plantation. However, Nozwethi was the one responsible to pay Applicant's wages.
- 4.3 Around October, 2004 the Respondent secured his own private dwelling house and moved out of Nozwethi's place. That was followed by a re-engagement of the parties' employment relationship which subsisted until its termination sometime in 2005. The second termination came about owing to the Applicant's sickness which was diagnosed to be tuberculosis (TB) and required her to be on medication for a period of two months. On return to resume her normal duties, the Respondent told Applicant that her position

had been filled up.

- 4.4 The Applicant subsequently secured herself employment at a McFadden family situated at Big-Bend where she worked for one month and was called back by the Respondent for a re-engagement. The parties' second re-engagement got terminated sometime in 2007. This termination, which was at the instance of the Respondent, was not challenged by the Applicant who simply secured herself employment at Mpangele Butchery, Siteki branch.
- 4.5 The Applicant worked for Mpangele Butchery for a period of five months and went back to the Respondent to seek for a third re-engagement after the owners of Mpangele Butchery had closed the Siteki branch. The Respondent agreed to the re-engagement and the parties' employment relationship was again revived till its final termination on the 5<sup>th</sup> December, 2009.
- 4.6 The Applicant admits to having been late for work on the 5<sup>th</sup> December, 2009 but with 5 minutes only. She contests that her dismissal was fair, arguing that she was not given any written warning or notice nor afforded a fair opportunity to state her case in a proper disciplinary hearing.

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

- 4.7 Testifying under oath, the Respondent contends that the Applicant came late for work on the 5<sup>th</sup> December, 2009 by some 30 minutes. When probing her about the reasons for the lateness, a quarrel ensued but the parties eventually agreed to amicably terminate the employment relationship. It is Respondent's evidence that the Applicant had developed this late coming tendency as a habit.
- 4.8 The Respondent, however, concedes that he did not constitute a disciplinary hearing before the dismissal for the Applicant's late coming neither on the 5<sup>th</sup> December, 2009 nor for any of the previous knock-in time transgressions or violations.
- 4.9 Regarding the Applicant's prayers, the Respondent argued that the Applicant is overburdening him by claiming compensation even for months or years when she was not under his employ but under the employ of some other people the likes of Nozwethi, McFadden and Mpangele butchery. In other words, the Respondent disputes that the parties have been

under a continuous employment contract since July, 2001 up to the 5<sup>th</sup> December, 2009 as stated in the report of dispute form, paragraph 3.1.

4.10 The Respondent further argued in mitigation that he is suffering from hypertension, has a heart attack, is presently unemployed, he is married and has two small children, he is the sole breadwinner and family provider as his wife is also unemployed. He earns a living by doing free-lance motor mechanic.

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

5.1 It is common cause that the parties' employment relationship had about three (3) breaks before the one that took place on the 5<sup>th</sup> December, 2009.

5.2 It is common cause further that the employment contract that was terminated on the 5<sup>th</sup> December, 2009 had started sometime in 2007, perhaps on the last half or quarter thereof as the Applicant testified that on that year she worked for Mpangele butchery for a period of five (5) months before going back to the Respondent. The proper duration of the parties' last employment

contract, therefore, could roughly be estimated to have been about two (2) years.

5.3 It is also common cause that the previous breaches of the employment contract were not challenged by the Applicant by reporting disputes with the Commission on time, i.e. before they prescribed or expired.

5.4 The two year employment duration, however, does establish that the Applicant was an employee to whom Section 35 of the Employment Act, 1980 applied. Consequently, in terms of Section 42 (2) of the Employment Act, the Respondent bears the onus or duty of proving, on a balance of probabilities, that the reason for the Applicant's dismissal is permitted by section 36 of the Employment Act, and that it was fair in the circumstances.

5.5 It is common cause further that the Applicant came late for work on the 5<sup>th</sup> December, 2009. But what is in dispute is the exact degree of lateness. The Respondent says it was by 30 minutes and yet the Applicant says it was only by 5 minutes.

- 5.6 Nonetheless, it is common cause that the reason for the Applicant's dismissal was her lateness for work on the 5<sup>th</sup> December, 2009.
- 5.7 Owing to the admission by the Respondent of this fact, it is therefore also common cause that the Applicant's dismissal was not preceded by any disciplinary hearing. Further that there had not been any disciplinary enquiry held for the alleged previous knock-in time transgressions by the Applicant, hence there was no previous written warning.
- 5.8 Our Industrial Court has held that the principle of fair disciplinary hearing before any dismissal shall be enforced as a matter of policy. To quote word for word from the judgment of **Mphikeleli Sifani Shongwe vs. The Principal Secretary, Ministry of Education and 3 others - Industrial Court case No:207/2006** (Unreported) the former learned Judge President P.R Dunseith stated as follows (at paragraph 27, page 8):
- "It is now a well-established principle of labour relations that an employee who faces dismissal for alleged misconduct should be given the opportunity to state his case and***



***to answer the charges against him. The requirement of a fair disciplinary hearing is so fundamental in the context of labour relations that it will be enforced by the Industrial Court as a matter of policy, even where the case against the employee appears to be unanswerable.”***

5.9 It was also not contested by the Respondent and is therefore common cause that the applicant’s salary was increased from the initial E220-00 to E400-00 per month as at October, 2009. Hence the only issue for determination in this aspect is whether or not the Applicant’s wage of E220-00 and E400-00, respectively, was not below the minimum basic wage as stated in the Regulation of Wages Order for domestic employees. If an answer to this question is that it was below the gazetted minimum wage, that would mean the claim for underpayments is justified.

5.10 A quick reference to the Regulation of Wages (Domestic Employees) Order, 2006 indicates that the minimum basic wage for a House attendant was E450-97 per month (i.e. before the latest one of 2010). This means the Applicant’s monthly wage was below the gazetted minimum basic

wage by a sum of E230-97 before October, 2009 and by a sum of E50-97 after October, 2009. The claim for underpayments is therefore valid and justified.

5.11 Going back to the issue of the reason for the dismissal, otherwise known as substantive fairness, it is already on record that the reason was late coming to work. Having regard to the fair reasons for the termination of employment as captured in **Section 36 of the Employment Act, 1980** this reason may be associated with paragraph (a) thereof which reads thus:

***“(36) It shall be fair for an employer to terminate the services of an employee for any of the following reasons-  
(as because the conduct or work performance of the employee has, after written warning, been such that the employer cannot reasonably be expected to continue to employ him.”*** (my emphasis).

5.12 The Respondent had conceded that he never conducted any disciplinary enquiry before the incident of the 5<sup>th</sup> December, 2009 for the Applicant’s alleged unbecoming conduct of

coming late at work; hence there was no prior written warning that had been given to the Applicant to warrant an outright dismissal for subsequent conduct of time transgressions or violations.

5.13 This means that even if it would be said that yes of course the Applicant was late by the alleged 30 minutes on the 5<sup>th</sup> December, 2009 and not just the 5 minutes she admits, that would still not warrant that she should have been dismissed. Instead she should, per the reading of Section 36 (a) of the Employment Act, have been given a written warning.

5.14 Consequently, the reason for the dismissal was not one supported by Section 36 of the Employment Act.

## **6 AWARD**

6.1 I therefore find that the Applicant's dismissal was both substantively and procedurally unfair.

6.2 Having regard to a cumulative effect of the circumstances of this case which includes, amongst others, the duration of the employment

contract (i.e. roughly two (2) years), the nature of the employment contract - being a domestic employment involving just average people living in the rural arrears, the Respondent's candidness with the arbitration process by making admissions where need be and not being evasive, his open demonstration of remorse by indicating that a reinstatement can be ordered notwithstanding the fact that he has already employed someone else to fill-up the Applicant's position, his mitigating factors, I consider that four (4) months compensation for the unfair dismissal would be just and equitable.

6.3 The Respondent should accordingly pay the Applicant the following monies:

|     |                           |           |
|-----|---------------------------|-----------|
| (a) | Notice pay                | E 450.97  |
| (b) | Additional notice         | E 69.38   |
| (c) | Severance pay             | E 173.45  |
| (d) | Underpayments (18 months) | E3 617.46 |
| (e) | 4 months compensation     | E1803.88  |

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**TOTAL**

**E6115.14**

6.4 The above total sum of E6 115.14 must be liquidated in three (3) equal installments, each installment to be paid on or before the last day of each month, beginning from August, 2010 up to October, 2010.

6.5 Payment is to be done at CMAC Offices-Siteki.

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

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**MTHUNZI SHABANGU  
CMAC COMMISSIONER**