



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

HELD AT MBABANE

SWMB 252/08

In the matter between:-

MDUDUZI COMFORT DLADLA

APPLICANT

And

TORNADO CONSTRUCTION

RESPONDENT

CORAM:

Arbitrator

: Mr. A. Dlamini

For Applicant

: Mr. L.K. Manana

For Respondent

: Mr. A. Lukhele

: Mr. Ndumiso Mthethwa

ARBITRATION AWARD

DATE HELD : 30th September 2009.

VENUE : CMAC OFFICES, MBABANE HOUSE

1. THE HEARING AND THE PARTIES

- 1.1 The Applicant in the matter is Mduduzi Comfort Dladla, an adult male of Mahwalala, one of the townships of Mbabane.
- 1.2 The Applicant was represented by Mr. Khetha Manana, an attorney from C.J. Littler and Company.
- 1.3 I shall refer to the Applicant as Mr. Dladla, the employee or simply the Applicant as and when circumstances dictates.
- 1.4 The Applicant is of young age of not more than twenty nine years.
- 1.5 The Respondent in the matter is Tornado Construction (PTY) Ltd, a company registered with the Kingdom of Swaziland to carry out mostly building construction throughout the country.
- 1.6 The Respondent's company was represented by Mr. Andreas Lukhele an attorney from P.R. Dunseith.
- 1.7 I shall refer to the Respondent as the employer, the company or simply the Respondent as and when circumstances dictate.
- 1.8 At the initial stage of the hearing the Respondent was represented by one Ndumiso Mthethwa from the same law firm as Mr. Lukhele.
- 1.9 This is an arbitration case by consent of the parties on the 15th of September 2008 in terms of Section 85 (2) and (3) of the Industrial Relations Act 2000 as amended.

2. BACK GROUND INFORMATION AND OVERVIEW

2.1 The Applicant in the matter alleges to have been unfairly dismissed by the Respondent on or about the 5th August 2008. He submitted that he was employed by the Respondent on or about June 2007 as a truck driver and was paid a monthly salary of E1, 700.00.

2.2 The Applicant contends that he was unfairly dismissed by the Respondent both procedurally and substantively.

2.3 The parties agreed that common cause items included inter alia;

- That the Applicant was an employee to whom Section 35 of the Employment Act applies.
- That the Applicant was employed in the capacity of a heavy duty driver.
- That he earned E1, 700.00 per month.

2.4 The Respondent on the other hand denied the allegations that Applicant was dismissed at all. Instead, submitted that the Applicant had a problem with his public permit.

2.5 According to the records the matter was referred to the CMAC for conciliation on the 15th September 2008, the outcome of which was that the matter was declared as an unresolved dispute on the same date. As a consequence of

- this the parties consented to a determination of the case through arbitration.
- 2.6 The Commission, on or about the 22nd October 2008, appointed Commissioner Bonsile Lukhele to arbitrate the case. It is further on record that the said arbitrator had set on the date for arbitration on a Saturday, an arrangement which was allegedly objected by the Respondent and as such the matter was returned to the appointing officer for appointment of another arbitrator.
- 2.7 On or about the 19th December 2008, I was the second arbitrator appointed to arbitrate the case.
- 2.8 The first set on date was the 14th January 2009 where both parties' legal representatives informed the Commissioner that they were not ready to continue with the pre-arbitration hearing and the matter was postponed to the 2nd February 2009. The Respondent counsel indicated that the matter could be settled between the parties as there was a gesture from the company that the Applicant was still welcome back as he was allegedly not dismissed.
- 2.9 This is contained in Respondent's counsel letter dated 13th January 2009 last paragraph referred to as annexure "A".
- 2.10 On the 2nd February 2009 the Respondent failed to appear and there was no valid reason why there was his non - appearance and the matter had to be postponed to the 9th

February 2009. The Applicant had appeared but was also not accompanied by his legal counsel.

2.11 On the 9th February 2009 the matter proceeded on pre-arbitration and a new date for arbitration was agreed as the 5th March 2009. On this date, yet again, the matter could not proceed because the Respondent counsel responsible for the matter was not available and it had to be again postponed to the 26th March 2009.

2.12 On the 26th March 2009 a new legal counsel for the Respondent namely Andreas Lukhele took over the matter in the place of Mr. Mthethwa who was not sure at what stage the proceedings were. This led to yet another postponement to the 3rd April 2009. The matter only meaningfully proceeded on this date.

2.13 The case of the Applicant is that he alleges to have been dismissed by the Respondent officer namely Mr. Nhleko who however issued him with a duplicate copy of the letter of dismissal while he kept the original. The Applicant contends that this dismissal was both procedurally and substantively unfair in all the circumstances.

2.14 It is Applicant's submissions that he was employed by the Respondent on or about June 2007 for one of the work site of Respondent at Mvakwelitshe, a suburb of Mbabane towards the west and along the Mhlambanyatsi road. He informed the hearing that his monthly wage was E1, 700.00 per month.

- 2.15 It is Applicant's version that the Respondent was subcontracted to WBHO Company and that the Applicant was residing at Mahwalala Township.
- 2.16 He submitted further that he was dismissed on the 5th August 2008 during which time he had been transferred temporarily to Matsapha Nkwalini and that he would use public transport to and from that work site such that on the day in question he had run out of the bus fare and decided to approach Mr. Obed Nhleko his supervisor who was close by to try and get some cash in order to board public transport to work. According to the Applicant the company had an obligation to provide him with company transport to Matsapha.
- 2.17 It is Applicant's submission that he was told on a Saturday that he would have to go to the Matsapha site as there were in need of services of a truck driver and he was expected to go there on the following Monday. According to the Applicant Mr. Nhleko was at the office with the secretary Bethusile Shongwe.
- 2.18 When he arrived at the office Mr. Nhleko handed over to him a letter but did not explain the contents. According to Applicant Mr. Nhleko stated that he was instructed to give same to him by Mr. Shongwe, the director.
- 2.19 Applicant read the letter with someone who also interpreted the said contents in the same way as Applicant. He further proceed to show the letter to the storeman.

2.20 The said letter marked "TEL 1" last paragraph read ***"You are welcomed in future to apply for such job only if you have sorted your performance behaviour and your public permit."*** Explaining the issue of the public permit, Applicant denied that there was a problem with his public permit as it was still valid and was to expire on the 28th September 2009 as per annexure A. ***"Public Driver's Permit"***.

2.21 Applicant further addressed the arbitrator on the allegation about the same letter wherein he was accused of allegedly coming late at work. He denied ever coming late at work but went on to state that if that did happen it was because of the transport problems from Matsapha to Nkwalini where most public transport would be ferrying school children in the morning hours.

2.22 According to Applicant he then took the letter to the CMAC in order to seek advice. After he had revealed his story to the officer at CMAC, he was advised that the employer's conduct was tantamount to a dismissal on his part. Such termination of service was both procedurally and substantively unfair.

2.23 It is Applicant's version that he decided to write a letter to Respondent dated 6th August 2008 in which he was demanding payment of 12 months wages in lieu of compensation for unfair dismissal. He proceeded to state

that the Respondent did not respond to his letter as stated above.

2.24 The version of the Respondent is that he confirmed that the Applicant was once employed by Tornado Construction (PTY) LTD as a Heavy Duty Driver.

2.25 The Respondent's former supervisor Mr. Nhleko informed the arbitrator the circumstances leading to Applicant leaving the employ of the Respondent.

2.26 It is the Respondent's case that Applicant had a tendency to report late for work and sometimes not at all. He would come late and provide an excuse that it was because of transport fare problems. He did on the day in question come to the office to demand the bus fare and was told by Mr. Nhleko that he did not know anything about a transport allowance arrangements.

2.27 According to Mr. Nhleko he advised Mr. Dladla to approach the Managing Director, Mr. Shongwe about that issue. It transpired though that Applicant did not approach Mr. Shongwe about his problem which was hindering him to go to work.

2.28 According to Mr. Nhleko the Applicant came to demand a reference letter from the company. It is Mr. Nhleko's submissions that indeed he wrote the letter as exhibits CL1 but did not at any stage hand it over to the Managing

Director as well as get the letter signed by him as per procedure.

2.29 It is the Respondent's witness version that Applicant picked up the letter at the reception before it was signed thinking that it was the reference letter he had asked for.

2.30 Mr. Nhleko denied ever dismissing the Applicant and further submitted that he could not have done that even if he wanted to as he did not have the authority to hire and fire. By the time he got a chance to discuss the matter with the MD, the applicant had already left and the discussions were based on a duplicate of the letter which itself was never signed by Mr. Shongwe.

2.31 According to the Managing Director, he personally employed the applicant as a heavy duty driver around June, 2007. Applicant had later on in 2008 reported to him that he could no longer continue with his services in the company because his driver's public permit had expired. He submitted that he kept him on for sometime because he needed him, notwithstanding that he had included that it would be difficult for him to obtain another because of his young age.

2.32 Mr. Shongwe submitted that he was told that applicant claimed that he was dismissed however, only one person had the authority to dismiss and that was himself so, it would have been impossible for anybody else to have terminated the services of the applicant.

- 2.33 The Respondent's Managing Director submitted that he never instructed or let alone authorized Mr. Nhleko to prepare a letter for the termination of services of applicant. The first time he heard about the purported letter of dismissal was when he had to appear before the conciliation meeting about this matter.
- 2.34 Mr. Shongwe submitted that his subordinate, Mr. Nhleko, did discuss the issue of the letter concerning applicant stating that he prepared it because applicant was non-cooperative only to find that applicant had unlawfully picked up the letter from the reception without his authority and without getting it signed.
- 2.35 According to the respondent MD, during that period, he was called by applicant over the phone who told him that there was a letter in the office which he needed the MD to sign. He stated that he told him that he did not do anything about the letter but instead advised applicant to come to the office in order to discuss his problems. Applicant never turned up.
- 2.36 The Respondent Managing Director further submitted that applicant had had problems before and would come to him to appeal but in this particular instance, he chose to ignore the procedure, that is if he believed that he was dismissed and moreso, if not happy with that decision, he never knew where to find him.

3. ANALYSIS OF THE EVIDENCE AND ARGUMENTS

- 3.1. The issues that needed to be determined are; whether the applicant was dismissed or not in the first instance.
- 3.2. Further, if the above question is answered in the affirmative then proceed to determine if the applicant is entitled to the listed claims of one month payment in lieu o notice and the compensation for unfair dismissal.
- 3.3. Should the determination be in the negative that would be the fall of the case for the applicant.
- 3.4. It is not in dispute that the applicant was employed by the respondent and that the said employment contract was entered into verbally between the parties. It would appear that though not much came to bear on whether it was a fixed term or permanent. For the benefit of this case, I will assume that the contract was continuous in nature.
- 3.5. It is trite law that an employee's contract of employment should not be terminated without a valid and fair reason. **Section 35 of our Employment Act of 1980 as amended** provides for the types of contracts which would fall under this consideration. Further, **Section 36 read with Section 42 (2) (a) and (b)** provide circumstances under which a contract of employment of an employee could be said to be fairly terminated.
- 3.6. It is trite that a conduct of a party in a contract of employment may imply a repudiation of the contract of

employment. In our law of employment in particular, **Section 37 of the Employment Act** provides for an employee to resign either with or without notice from an employment for a conduct by the employer towards the employee which renders continuing with the employment relationship intolerable.

- 3.7. In the case before us, the applicant testified that he was employed by one Mr. Sambo who was a supervisor. He stated that Mr. Sambo interviewed him through test driving the truck and he became successful.
- 3.8. He further testified that on the day in question, he had been informed that he was temporarily transferred to Matsapha Nkwalini for a period of two weeks. It is his testimony that he ran out of money for the public transport to go to Matsapha his new work site. He then decided to approach the office that morning of the 5th August 2008 in order to ask for some money for public transport.
- 3.9. There was no evidence by the applicant as to what transpired about his mission to the office. In fact, we were denied the opportunity to know whether he did ever ask for the money for transport at all. Instead, he testified that he was allegedly handed over a letter of dismissal by Mr. Obed Nhleko, a site supervisor of the respondent. The letter is marked **“TEL 1”** and contain certain allegations leveled against the applicant. He testified that Mr. Obed Nhleko stated that he had been given the letter to hand it over to him by the Managing Director Mr. Shongwe.

3.10. The letter reads **“Terminations of employment”**

“The management would like to notify you that due to misconduct, absenting yourself without reporting to proper supervisor in charge, endless late coming at work and also working in the company without public permit, putting the company at risk, your services is terminated as from 5th August 2008. There is no payment for August entitled to you as you were fully paid for July 2008 after that you started to absent yourself and also come late at workplace. You are welcomed in future to apply for such job only if you have sorted your performance, behaviour and your public permit”.

Applicant testified that his public permit at the time had not expired as it was due to expire on 29-09-2008.

3.11. The respondent on the other hand had argued that the above letter exhibit Tel 1 was not authentic because it was never handed over to applicant and further, the letter produced by applicant was not signed by respondent MD, let alone the said Obed Nhleko.

3.12. Further, at cross examination, applicant testified that the purported letter of dismissal was not written by Mr. Shongwe and that he admitted that for the letter to be authentic it must at the very least be signed by the author.

Applicant admitted that he was familiar with the organization structure of Tornado Construction.

3.13. It is the applicant's testimony that he noticed that the letter from the respondent was not signed but did not bother himself to enquire why it was not signed.

3.14. When he was asked whether he knew Mr. Shongwe the MD, applicant agreed that he knew him very well. When asked whether he had an opportunity to discuss anything with Mr. Shongwe, applicant first said no, until he had met him at CMAC. However, he changed his mind and admitted that he had met with Mr. Shongwe when he went to deliver a letter to the respondent and when he had accompanied the storeman who had gone to the respondent to ask for a reference letter. He admitted that when he asked for his own reference letter, he was told that he could not be issued with one because his matter was still not over. He however denied that Mr. Shongwe told him that he was not dismissed.

3.15. The testimony of Mr. Shongwe which was unrebutted by the applicant is that he was responsible for hiring and dismissing of all employees in the company. That as the MD of the respondent when he got to know that applicant had left the employ of the company was when the applicant phoned him about the letter exhibit CL1. He advised applicant to come to the office for discussions but applicant refused. He denied to have delegated any powers to Mr. Nhleko to effect dismissal to any employee.

3.16. The arbitrator noted that Mr. Shongwe's testimony in so far as as when he first heard that Applicant had left the employ of the company was when he received the above letter contradicted that of Mr. Nhleko. Mr. Nhleko informed the arbitrator that he had discussed Applicant's case with Mr. Shongwe.

3.17. I now have to deal with the question whether the applicant proved to the arbitrator that he was dismissed. Before answering this question, it is important to consider the question of onus in this case. The onus lied squarely with the applicant to prove that he was indeed dismissed and by whom on behalf of the respondent. It is common cause that Mr. Nhleko prepared the letter at the demand of the applicant who was demanding a reference letter from the office, after having failed to get money for bus fare to Nkwalini in Matsapha.

3.18. Onus in this context means that if the employer denies that the employee was dismissed, the employee must produce evidence to prove that dismissal occurred. "See John Grogan, second edition 2007, in his book "**Dismissal, Discrimination and Unfair Labour Practices**" page 168.

3.19. **Once this onus is discharged, the onus passes to the employer to prove that the dismissal was for a fair reason and in accordance with a fair procedure see Grobler vs. Naspers BP en W. Ander (2004) 25 ILJ 434 (IC).**

3.20. It is my considered view that whether Mr. Nhleko had the authority to dismiss or not that would not have been in issue had applicant produced such like document that was signed by the author. In the case before me, it is common cause that the dismissal letter was not signed by any author. Further, on the balance of probabilities at no stage was evidence adduced to suggest that Mr. Nhleko performed the functions performed by Mr. Sambo of hiring employees which could have made one to draw a conclusion that on the balance of probabilities because he could hire employee it would follow that he could fire as well. We only heard that it was Mr. Sambo who could employ people on behalf of the Managing Director.

3.21. Mr. Nhleko did not deny having prepared the document purported to be a dismissal letter and as such did not deny ownership; save to say that he still needed it to be signed by the Managing Director, Mr. Shongwe. The arbitrator will again re-iterate his view that this argument by Mr. Nhleko would not be acceptable had he signed the document.

3.22. The applicant failed to rebutt the evidence by Mr. Shongwe which was to the effect that the applicant refused to come to his office for discussions on the matter. The arbitrator has further referred himself to the case of **Makhosazane Dlamini VS Swaziland Trading House CMA Case No. SWMB 78/08 pages, 17, paragraph 4.2 to 4.4 and page 18. 9 (unreported)**

- 3.23. It is also my view that if the applicant was convinced that the letter he received was authoritative enough to suggest that his services were terminated and having considered this as unfair dismissal, he should have appealed to the office of the Managing Director.
- 3.24. In the above circumstances, I have come to the conclusion that the contract of employment of the applicant was never terminated and as such, the applicant is not entitled to these claims as he failed to prove any dismissal having taken place. **The claim is therefore dismissed.**
- 3.25. Having arrived at this conclusion, it is important to declare the present employment status of the applicant or at least at the time when the matter was heard at arbitration.
- 3.26. The Respondent witness Mr. Shongwe's evidence that on receipt of the Applicant's letter of demand containing allegations of having been dismissed, he called the Applicant to report to the company office in order that he could discuss the issue with him was not rebutted by Applicant. Further, there was no evidence presented to suggest that Applicant appealed against the purported termination of his services.
- 3.27. Notwithstanding that the Respondent denied having dismissed the Applicant, there was no evidence either to suggest that Mr. Nhleko had the authority to dismiss an employee neither was there evidence to the effect that he had done so in the past to any employee of the company.

3.28. It is the view of the arbitrator that non of the parties have to date terminated the contract of employment. It is further my view that Applicant's continued absence from work amounts to desertion from work which in itself by so doing does not amount to termination of his employment contract. Instead, Applicant's failure to report for work under the notion that he had been dismissed simply provided a fundamental breach or repudiation of the contract of employment by that party. That the party upon whom the right to cancel the contract of employment accrues has a right of election to cancel it or not and hold the other party to the contract and demand specific performance or claim damages. Furthermore, that cancellation of the contract of employment itself must be communicated by the innocent party to the guilty party in a clear and unequivocal manner. In the above analysis, I refer to the case of ***Workers Representatives Council vs. Manzini Council Case No. 3/94 wherein Justice Browde, reviewed the case of Tshabalala vs. The Minister of Health 1987 (1) SA 513 and further that of Justice J. Kotze in Cloete vs. Smith 1971 (1) SA 453 (E)*** cited there, in which the Learned Judge said ***"The termination of contractual relationships is not a trivial matter and the decision to terminate a contract changes the contractual relationship that the contracting parties have towards each other. This is a step which might cause serious material prejudice to the party against whom the cancellation is effective"***. This to me suggests that

the termination of a valid contract must be clear and unambiguous. It follows therefore, that an unauthorized document by its author cannot be said to be authentic and valid.

3.29. In revisiting the above arguments as stated in the case of ***Paul Siba Simelane vs. Tibiyo TakaNgwane Case No. 171/98 page 3***, the Respondent has not elected to cancel the contract of Applicant notwithstanding that Applicant had not reported for work from the 5th August 2008 to date of the hearing.

4. **THE AWARD**

- 4.1 Taking into consideration the facts, arguments and all the circumstances of the case, we have come to the conclusion that the Applicant on preponderance of the balance of probabilities has failed to make his case wherefore the application shall not succeed.
- 4.2. That the Respondent has also failed to exercise his right of election to cancel the contract of employment relationship despite the fundamental breach and or repudiation of the contract of employment by the Applicant therefore the said contract still subsists and Applicant is at liberty to resume work with the Respondent with immediate effect. There will be no salary benefits for the period he was not at work.
- 4.3. Should the Applicant opt not to resume his duties, he will continue to be in fundamental breach of the said contract.

**SIGNED AT MBABANE ON THIS.....DAY OF JANUARY,
2010.**

**AARON M. DLAMINI
CMAC ARBITRATOR**