



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

HELD AT MBABANE

SWMB 159/10

In the matter between:-

SIBUSISO DLAMINI

APPLICANT

And

SIMANGA DLAMINI

RESPONDENT

CORAM:

Arbitrator : Ms. K. Manzini

For Applicant : Mr. S. Dlamini

For Respondent : Mr. S. Jele

ARBITRATION AWARD

1. **PARTIES AND REPRESENTATION**

The Applicant herein is Mr. Sibusiso Dlamini, a Swazi male adult. The Applicant's postal address is P.O. Box 162, Kwaluseni. Mr. Dlamini represented himself in these proceedings.

The Respondent is Simanga Dlamini, a Swazi male adult whose postal address is P.O. Box 207, Ezulwini. The Respondent was represented by Mr. S. Jele from Mabila Attorneys.

2. **ISSUES IN DISPUTE**

According to Certificate of Unresolved Dispute No. 349/2010, the dispute at hand is one of alleged unfair dismissal. To this end, the Applicant claims the following:-

- 2.1. Notice pay - E1, 200.00
- 2.2. Two months outstanding salary - E2, 400.00
- 2.3. Severance allowance - E3, 600.00
- 2.4. Additional notice - E1, 440.00
- 2.5. Leave pay - E1, 200.00
- 2.6. Holiday pay - E880.00
- 2.7. Overtime - E330.00
- 2.8. Maximum compensation for unfair dismissal - E14, 400.00

3. **SUMMARY OF EVIDENCE**

The Applicant was the only witness who gave evidence in support of his case. The Respondent's representative also chose to call the Respondent as the sole witness.

3.1. **THE APPLICANT'S CASE**

3.1.1. **THE TESTIMONY OF MR. SIBUSISO DLAMINI**

The Applicant testified under oath that he was employed by the Respondent on or about September, 1999 as a taxi driver. The Applicant stated that in July, 2001 he had left the employ of the Respondent, and was later on re-employed in August, 2003. According to the Applicant, he had earned a monthly salary of E1, 200.00 at the time of his alleged dismissal.

The Applicant stated that on the 14th of March, 2010 an incident occurred that led to the Respondent's decision to dismiss him. Mr. Dlamini stated that he had been given the day off on the previous Thursday 11th March, 2010 and had also been given another day off on the Sunday of the 14th of March, 2010. The Applicant stated that he was entitled to two days off per week. He related how he had knocked off

from work at 7 a.m., after having reported for work at 6 p.m. the previous evening.

The Applicant stated that he had parked the taxi he had been driving at the employer's residence, and as per usual procedure, had proceeded to accompany one Andzile, a co-worker, who drove his own taxi to his place of abode at eLangeni. He stated that he normally accompanied Andzile home, so that he could drive Andzile's taxi back to the employer's place of residence, as he too resided there.

According to the Applicant, on this fateful day, Andzile had not driven straight home, but had proceed to Lobamba to pick up his girlfriend, and gone further to Matsapha to meet his friends for a drinking spree. Mr. Dlamini admitted that he too had desired to go to Matsapha, so he had not objected to the change of plans.

The Applicant testified that he had taken part in the imbibing of alcoholic beverages with Andzile's friends, and had then fallen asleep inside the taxi and had virtually blacked out as he had no recollection of the events that took place thereafter. He stated that he believed that they had left Matsapha at or about 2:00pm, and he had been asleep through out all this, but he had finally regained consciousness at or about 6pm that evening and found that

he was locked inside a strange house. He stated that he had then enquired from a female passerby that he spoke to through an open window where he was and was notified that he was in a certain Makhosi Nkambule's house.

He stated that he had been carried into the house by three men, who then proceeded to drive off.

The Applicant stated that he also learnt from the lady that he was actually in the vicinity of St. Mary's. He stated that he tried to get in touch with Andzile by sending him a "please call me" text message, but Andzile had not called him, but had simply sent him a similar message.

Mr. Dlamini stated that the Respondent had then called him, to enquire about the whereabouts of the vehicle he had been assigned to return to his place, and he had told him that he was locked inside the strange house, and that he had no idea of where the vehicle was. The Applicant stated that he had informed Respondent that Andzile probably knew where the taxi was, but the employer had told him that he was with the said Andzile, and he had told him that he had entrusted the vehicle to the Applicant.

The Applicant related how the police had been called, and how the said Makhosi had been tracked down. He stated that it had transpired that Makhosi had damaged the vehicle

when he collided with a minibus in Matsapha, and had proceeded to abandon the vehicle.

The Applicant stated that he had tried to report for duty on the Tuesday after the incident, but the employer had simply asked him to return the keys for the taxi that he normally drove.

The testimony of Mr. Dlamini was that the Respondent had refused to talk to him on a number of occasions after this, and had not paid him his salary for about two months after this. He stated that after the second month, the Respondent had sent someone to collect money for the rental of the house he was living in at the employer's homestead.

The Applicant stated that he had then proceeded to try and engage the employer in discussions about how he could require rent from him, knowing full well that he had not received a salary for the previous two months? The Applicant stated that the employer had refused to talk to him, and had merely told him that he simply wanted his taxi returned to him in good condition. The Applicant stated that as far as he was concerned he had not done anything wrong as his own "work tool" (the taxi he had been assigned to drive) had been safely parked at the employer's residence, and it was Andzile's taxi that had been damaged. He further stated that

the employer had hired a new driver to drive the taxi that had been previously driven by him.

Mr. Dlamini stated that the act of the employer of taking away his car keys, and refusing to pay him his salary for two months amounted to a termination of his contract of employment, and also stated that his dismissal had been procedurally flawed as he had not been subjected to a disciplinary hearing.

The Applicant stated that as such, he was claiming the following:-

- a) Notice pay
- b) Severance allowance
- c) Leave Pay
- d) Holiday pay
- e) Overtime- as he worked for 24 hours per day, instead of the legal 8 hours.
- f) 12 months compensation for unfair dismissal.

During Cross-examination, Mr. Jele put it to the Applicant that the Respondent had only hired him in 2005. The Applicant refuted this, and maintained that he had been employed in the year 2003. The Applicant was asked if it had been normal work procedure for him to drive home with Andzile so that he could return the vehicle to its parking

place at the Respondent's home? The Applicant admitted that this was the case.

The Applicant was asked why he had failed to return the vehicle on the 14th of March 2010 if his standing orders were that he should always return the taxi to the Respondent's home.

The Applicant stated that Andzile had refused to hand the vehicle over to him. He did however admit that he had not objected to accompanying Andzile to Matsapha so that they could join his friends in a drinking spree. He stated that it had been his plan to go to Matsapha in any case. The Applicant stated that the safety of the vehicle had not been of paramount importance to him as it had been assigned to Andzile, and emphasized that his own "work tool" had been safely parked at the employer's home.

Mr. Jele put it to the Applicant that this was not the case as he had standing orders to return the vehicle that was assigned to Andzile to the safety of the employer's homestead. Mr. Jele also asked the Applicant whether or not he was entrusted with the use of a single vehicle at work, or whether the various taxi drivers sometimes exchanged cars. Mr. Dlamini stated that he had a specific vehicle assigned to him, but would sometimes find that he had to drive another vehicle, as the other drivers would take his taxi on same

occasions. Mr. Jele put it to the Applicant that he could not in all honesty claim to have his own specially assigned “work tool” if he and the other drivers sometimes exchanged vehicles.

The Respondent’s representative asked the Applicant when exactly had the Respondent dismissed him from work?

The Applicant stated that the Respondent had taken away the keys to the taxi that he drove, and had hired a driver to drive it. He stated that this and the Respondent’s failure to pay him his salary were clear indications that he had been dismissed from work. Mr. Jele asked the Applicant if the Respondent had expressly told him, or written to him, informing of such dismissal? The Applicant stated that he had deduced that he had been dismissed from the Respondent’s actions.

Mr. Jele put it to the Applicant that the Respondent had instructed him that he had not dismissed him, but had simply asked for the return of his vehicle so that it could be used to generate money to pay the Applicant’s salary. The Applicant was further asked if he was aware at that point in time where the said vehicle was? Mr. Dlamini stated that he did not know where the car was at present, and that the last time he had heard, it was at the Matsapha police station.

The Respondent's representative put it to the Applicant that he had breached the agreement he had made with the employer to see to the repairs of the vehicle and then to resume work after returning the taxi in good condition to the Respondent.

The Applicant vehemently denied the existence of such an agreement, and maintained that his own "work tool" had not been damaged; hence he did not see why the employer had not allowed him to continue driving it so as to earn a living.

The Applicant was asked further about his allegation that he was fired from work, and how he could substantiate it? The Applicant stated that the evidence that he was dismissed could be found in the fact that the employer had failed to pay him his salary for two months, and that up to date he had not received his monthly salary.

The Respondent's representative also asked the Applicant what he meant when he had said that he was never allowed time off from work, and yet he had testified that he had been given the Thursday of the 11th of March, and also Sunday, the 14th of March, 2010 off. The Applicant stated that he had not meant that he was not allowed time off from work at all. He admitted that when he was given a day off, he was not

disturbed by his employer at all, and did not have to attend to ferrying customers.

3.2 THE RESPONDENT'S CASE

3.1.1 THE TESTIMONY OF MR. SIMANGA DLAMINI

The Respondent testified under oath that he had only employed the Applicant in the year 2005. He stated that in 2003 he had borrowed money to the Applicant, and that he had eventually employed the Applicant in the year 2005, in an endeavor to recoup his money that the Applicant was having difficulty repaying.

The Respondent stated that on the 14th of March, 2010 he had instructed the Applicant to take Andzile to his place of residence, and to return Andzile's taxi to his home. He explained that he too had worked all night, and had proceeded to sleep all day long. According to the Respondent, the Applicant had failed to return the vehicle, and Andzile had allegedly reported for duty that evening and had found that the Applicant had still not returned the vehicle.

According to the Respondent, Andzile had been dropped off at his home, and the Applicant had taken off with one Makhosi Nkambule after they had engaged in a drinking spree that day.

He stated that he had later traced the Applicant to a house that belonged to Makhosi and this was after the Applicant had failed to answer a number of his calls. The Respondent stated that he had then enlisted the assistance of the police after the Applicant stated that he did not know where the vehicle was.

According to the Respondent, he had later learnt from the Applicant that the vehicle had been damaged, and he undertook that he would see to it that the taxi was fixed and returned to him in good condition.

The Respondent stated that he had never dismissed the Applicant. He stated that he could not have terminated the services of the Applicant as he still entertained the hope that he would fix his taxi and return it to him. According to the Respondent, the Applicant had rented one of his flats, and he had duly asked for money for rent and electricity after two months. The Respondent stated that he had told the

Applicant that he would only start receiving a salary, once he had returned his taxi to him.

The Respondent further testified that it was not true that the Applicant had worked overtime without receiving payment.

Mr. Dlamini submitted a notebook wherein a number of payments were reflected that were marked and these were duly signed by the Applicant as overtime, in acknowledgement of receipt.

During cross-examination, the Applicant merely put it to the Respondent that as far as he was concerned he had been employed in 1999, and that he had been effectively dismissed by the Respondent's actions of not paying his salary each month. He also put it to the Respondent that the act of hiring a new driver to drive his taxi was clearly indicative of the Respondent's termination of his contract of employment. The Respondent refuted all of this.

4. **ANALYSIS OF EVIDENCE**

The Applicant's case as stated in both the Certificate of Unresolved Dispute and the Report of Dispute is founded on an allegation of unfair dismissal. Even the evidence led by him is to the effect that he was actually dismissed in a manner that was substantively, and procedurally unfair. In

his evidence he alleges that the fact that the Respondent took away his taxi, and failed to pay him his salary for two months is indicative of his dismissal. The Applicant acknowledged that the Respondent had never expressly dismissed him.

The evidence as led by the Applicant does not support an allegation of unfair dismissal per se, instead his evidence points to constructive dismissal. According to Section 37 of The Employment Act, 1980 a constructive dismissal is one where:-

“..... the conduct of an employer towards an employee is proved by the employee to have been such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves his employment, whether with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by his employer”.

In casu, the Applicant has not alleged constructive dismissal, and therefore it is not his case that the employer's conduct towards him was such that continued employment was rendered intolerable to him. ***(See the case of Pretoria Society for the Care of the Retarded vs. Loots (1997) 18 ILJ 981 (LAC).*** The Applicant has not stated that he was

then forced to resign because of the Respondent's intolerable behavior, or actions of failing to pay him his salary and taking away his taxi from him such that he was unable to render his services to his employer.

In light of the foregoing, I am unable to make a finding that the Applicant was dismissed in a manner that was both substantively and procedurally unfair. This is simply because the evidence led points to a different cause of action altogether from the one alleged.

The evidence led as regards the other claims made by the Applicant was also quite unsatisfactory. For instance, it was the Applicant's case that he was never given time off from work and yet he had stated in his evidence in chief that he was entitled to and was given two days off per week. He stated that he had been called upon to work overtime everyday as he worked twenty-four hours around the clock, a thing which is humanly impossible. He did not specify which public holidays of the year he actually worked on, and did not arm the arbitrator with enough evidence to make the necessary computations of his leave pay and overtime claims. Instead, he sought to inflate the sum that was stated as being his claim for overtime in the report of dispute from E330.00, to E3300.00. There were a lot of inconsistencies in

the Applicant's case as he also stated in his closing submissions that he actually worked twenty-three hours per day, and not twenty-four hours as he had initially stated in his evidence in chief.

The Respondent filed a notebook which reflected overtime payments that were received and signed for by the Applicant, and the Applicant admitted that he knew of these transactions.

AWARD

Having heard the evidence of both parties, it is my finding that the Applicant's evidence, as led, does not support the allegation of unfair dismissal.

I hereby dismiss the Applicant's claim in its entirety.

**THUS DONE AND SIGNED AT MBABANE ON THIS
.....DAY OF OCTOBER, 2010.**

**KHONTAPHI MANZINI
CMAC ARBITRATOR**