



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

HELD AT MBABANE

SWMB 170/10

In the matter between:-

BETHUSILE DLAMINI

APPLICANT

And

THABSILE NKAMBULE

RESPONDENT

CORAM:

Arbitrator : Khanyisile Msibi

For Applicant : John Dlamini

For Respondent : Thabsile Nkambule

ARBITRATION AWARD

1. PARTIES AND REPRESENTATION

- 1.1 The Applicant is Ms Bethusile Dlamini, an adult Swazi female, whose postal address is P.O. Box 235 Luyengo. She was represented by Mr. John Dlamini, a labour consultant in these proceedings.
- 1.2 The Respondent is Ms Thabsile Nkambule an adult Swazi female. The Respondent's postal address is P.O. Box 1225 Mbabane. Ms Nkambule represented herself in these proceedings.

2. ISSUE TO BE DECIDED

The issue to be decided is whether the Applicant is entitled to the amount of E2500.00, being an amount paid on her behalf, by the Respondent, to Swaziland Building Society and also to a grocery purchasing scheme, hereinafter referred to as a stokvel, in the form of monthly subscriptions.

3. THE BACKGROUND TO THE DISPUTE

3.1 The Applicant was employed by the Respondent as a house maid on the 20th March 2006 or 2007. The Applicant alleges that she was earning a salary of E950.00 per month from which the Respondent deducted the total amount of E250.00, out of which the amount of E150.00 was paid into a stokvel and an amount of E100.00 was paid into permanent shares at the Swaziland Building Society which account was held in the Respondent's name.

3.2 The Applicant resigned from the Respondent's employment in October 2009.

4. SUMMARY OF EVIDENCE AND ARGUMENTS

4.1 The Applicant gave oral evidence and also submitted documentary proof in support of her case. The Respondent also gave oral submissions and presented documentary evidence. Both parties did not present any witnesses.

4.2 THE APPLICANT'S CASE

4.2.1 The Applicant stated that the Respondent never advised her that she would forfeit this amount were she to resign from the Respondent's employment.

4.3 THE RESPONDENT'S CASE

4.3.1 The Respondent testified that the Applicant was earning a salary of E700.00 per month and that she had decided to assist her by giving an extra amount of E250.00 per month, which amount she would pay into a stokvel and also into her account at Swaziland Building Society.

4.3.2 The Respondent submitted that she erroneously notified the Applicant in writing that she was earning the amount of E950.00 per month when this was not the correct position.

5.1 ANALYSIS OF EVIDENCE AND ARGUMENTS **SUBSTANTIVE FAIRNESS**

5.1 The Applicant is claiming payment of the total amount of E2500.00, which amount was allegedly paid by the Respondent every month, on her behalf to a stokvel and also to the Swaziland Building Society. This

amount Applicant alleges was deducted from her salary in the amount of E250.00 per month.

- 5.2 The Applicant has not alleged that she authorized the Respondent to deduct this amount; however it was Respondent's contention that this amount was a surplus over and above the salary of the Applicant because she pitied her.
- 5.3 An employer is generally prohibited from making any deductions from an employee's remuneration, unless the employee agrees in writing to such deduction or where the deduction is permitted by law in respect of a collective agreement, repayment of debts or a court order.
- 5.4 It is imperative to point out that such an amount could not have been a deduction made on the Applicant's wages. It is of paramount importance to note from the employment relationship that issues of importance were communicated to either party in writing. This appears explicitly from the different communication between the parties that were presented as evidence.
- 5.5 In the present case, the accession seems to point out that even though the Respondent considered this

amount as some form of assistance paid to the Applicant, her very own correspondence dated the 8th October 2010, seems to override this very notion. The Respondent states in the very correspondence that she “cannot afford to pay the Applicant the amount of E950.00 per month, if the Applicant is not serious with her work.”

5.6 This statement alone seems to indicate that the Applicants monthly salary was the amount of E950.00 per month. Remuneration is defined in our law as being inclusive of benefits. The Applicant was therefore earning a monthly salary of E950.00 per month.

5.7 I am inclined to apply the doctrine of fictional fulfillment which applies, where a party seeks to terminate the contract on the ground of his or her own inability to perform. This position was pointed out in, **Orda AG v Nuclear Fuels Corporation of South Africa (Pty) Ltd 1994(4) SA 26(W)** which case was cited with authority in **Diamond Core Resources(pty) ltd v River corporate finance(pty) ltd (642/2009) [2009] ZANHC 78** where the Head Note at 29G-H captures the principle relating to the impossibility defence in these terms:

“Although the general rule was that, if performance was impossible through no fault of the debtor (the Respondent in the present case) the debtor's obligations under the contract were extinguished, whether this would in fact be the effect would depend upon the nature of the contract, the relationship between the parties, the circumstances of the case and the cause of the impossibility. (At 82J-83A.) If the causes of the impossibility were in the contemplation of the parties, they were in general bound by the contract; if, however, the causes were such that no human insight could have foreseen them, then their obligations under the contract were extinguished. (At 83B.)

5.8 I am therefore inclined to state that in the present matter the parties remain bound by the contract. The resignation of the Applicant does not alter the material terms that bind the parties. The Respondent remains indebted to the Applicant for the amount paid to the stokvel, because this amount was deducted from the Applicant's wages and the Applicant remains entitled to same on termination of the contract of employment.

5.9 Further, the Respondent is also liable to pay to the Applicant the amount of E100.00 that was deposited into the Swaziland Building Society. The Respondent paid this money into the bank on behalf of the Applicant, from amounts deducted from the Applicants wage.

6. CONCLUSION AND AWARD

6.1 The Respondent is therefore ordered to pay to the Applicant the amount of E2250.00 being the amount deducted from January to September 2009. This is because no evidence was presented to the effect that this amount was deducted in October 2010.

6.2 The said amount should be paid to the Applicant in two equal installments of E1125.00, payable on or before the 30th November 2010 and 30th December 2010 respectively.

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

**KHANYISILE MSIBI
CMAC ARBITRATOR**