

IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

HELD AT SIMUNYE REFNO: SIM 046/09

In the matter between:

JAMES NDLOVU APPLICANT

AND

VUVULANE IRRIGATION
FARMERS ASSOCIATION RESPONDENT

CORAM

ARBITRATOR: VELAPHI DLAMINI
FOR APPLICANT: IN PERSON
FOR RESPONDENT: NO REPRESENTATION

EX PARTE ARBITRATION AWARD

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DATE OF HEARING : 8TH MARCH 2010

VENUE : CMAC OFFICE, SIMUNYE

PLAZA

1. DETAILS OF HEARING AND REPRESENTATION

1.1 The case was held on the 8th March 2010 at the Conciliation, Mediation and Arbitration Commission offices (CMAC or Commission) situated at Simunye Plaza, Simunye.

1.2 The Applicant is James Ndlovu, and adult Swazi male of P.O.BOX 176 Vuvulane. He represented himself.

1.3 The Respondent is Vuvulane Irrigation Farmers Association (VIFA), a voluntary association of P.O.Box 176 Vuvulane. There was no representation on behalf of the association.

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2 BACKGROUND FACTS

2.1 The Applicant reported a dispute for unfair dismissal at the Commission offices at Simunye Plaza on the 2nd November 2009.

2.2 In his statement, the Applicant averred that he was employed by the Respondent on the 28th April 2009 as an operator at a gross wage of E 1980.00 per month.

2.3 Ndlovu asserted that on the 14th October 2009 his manager informed him that he was told by the Applicant's colleague Ndlovu stop work for 30 minutes between 4:00 am to 4:30 am that same day because he was imbibing intoxicating liquor. Despite explaining to the manager that he did stop work in order to take a rest because he had worked without rest for 18 hours the previous day and denied that he was drunk, the manager went on to dismiss him.

2.4 The applicant stated that he solicited the assistance of one of the board members so that he could lodge an appeal against his dismissal, however these efforts yielded no fruitful results.

2.5 Ndlovu alleged that no disciplinary inquiry was held prior to the termination of his services. He further maintained that he was not drunk, but was feeling sleepy and fatigued and to prevent an industrial accident he had to rest for 30 minutes.

2.6 The outcome that the applicant required at conciliation was the following; notice pay-EI 980.00, leave pay-E 396.00, overtime(May 2009)-E629.52, after work overtime (45 hours)-E494.55, off days-EI 386.00, rations-E750.00 and 12 months compensation for unfair dismissal-E23 760.00.

2.7 The dispute was conciliated by the Commission, however it remained unresolved and a Certificate of Unresolved Dispute no:757/09 was issued. On the 9th December 2009, the parties requested the dispute to be decided by arbitration under the auspices of the Commission. I was appointed on the 12th January 2010 to determine the matter.

3. VIFA'S NON-REPRESENTATION

3.1 ON THE 8TH February 2010, the Commission issued out an invitation to the parties to attend

arbitration at the CMAC offices at Simunye Plaza on the 8th March 2010 at 10:00 am.

3.2 When the matter was called at 11:07 am there was no representation on behalf of the Respondent. The applicant appeared in person to prosecute his case. It was then incumbent upon the arbitrator to peruse the record to satisfy himself that proper notification of the arbitration was made to the other party.

3.3 According to "CMAC Form20", which is the prove of service- hand delivery, the invitation of the parties which is "CMAC Form9", was personally served on Thamsanqa Masuku who is secretary to the board of the Respondent, on the 9th February 2010.

3.4 I am satisfied that the service of the notification upon the Respondent was effected in terms of Rule8(l)(a)(iii) of the CMAC Rules, that is to say it was effected on a person who appeared to be above 16 years of age and apparently in charge of the party's business

See Legal Notice 22 of 2008

3.5 further, I am satisfied that sufficient notice was afforded to the Respondent because the invitation was served on the 9th February 2010 for a matter

that was to be heard on the 8th of March 2010, some 18 CMAC days before the hearing. In terms of Rule 24 the Commission shall give parties at least 14 days notice in writing of an arbitration hearing, unless there is prior consent by the parties of a shorter period.

See Legal Notice 22 of 2008

3.6 Having considered the above factors regarding the notification, I was satisfied that the relevant CMAC Rules were substantially complied with and upon an application by the applicant to proceed *ex parte*, I granted same.

See Rule27(l)(b) of CMAC Rules; Wilton v Gatony and Another 1994 (4)SA 160 (W).

3.7 Now default of representation by the other party does not guarantee automatic success for the party in attendance. I am still duty bound to evaluate and examine the facts and evidence tendered by the party in attendance, before determining if a case has been made in support of his claims.

See *Ex Parte Bennett* 1978(2)SA 380 (W); Herbstein and Von Wissen, *The Civil Practice of the Supreme Court of South Africa* (4th Ed).

4. SUMMARY OF EVIDENCE

4.1 Under oath the Applicant testified and reiterated the statement he made in the report of dispute, which has been well documented above and does not require a repetition.

4.2 However; he elaborated about the circumstances that lead to him feeling fatigued. His evidence was that he was a loader operator, whose job was to load sugar cane into truck-trailers or tractor-trailers.

4.3 On the 12th October 2009 he was on duty and his shift had started at 12:00 noon and ended at 6:00 am the following day. He only rested for 12 hours and was called again to work at 6:00 pm on the same day and until he knocked off on the 14th October 2009.

4.4 It was the Applicant's evidence that, because of having worked for 18 hours and only rested for twelve hours and then went back to work for another 12 hours he felt exhausted at 4:00 am and informed the tractor drivers that he was going to take a nap for 30 minutes. At 4:30 am he was back on the job and worked until his shift ended at 6:00 am.

4.5 Whilst off duty and having a siesta, his manager came and woke him up at 10:00 am and ordered him to report at the office to answer an allegation that he was drunk on duty. When the Applicant arrived at the office, the manager notified him that he was dismissed for being found drunk and despite his denial of the accusation, the manager further advised him to wait for his final pay at the end of the month.

4.6 The Applicant stated that during his service the Respondent did not give him off days until they accumulated to 21 days, which he now claimed. Further the Applicant worked overtime which was never paid. Ndlovu is also claiming 6 leave days as well as E750.00 in respect of rations.

4.7 It was the Applicant's contention that his dismissal without notice or a disciplinary hearing was unfair and as such he was praying for notice pay and 12 months compensation for unfair dismissal.

5. ANALYSIS OF EVIDENCE AND THE LAW

5.1 The Applicant had the onus to prove that he was an employee to whom Section 35 of the Employment Act 1980, applied. He averred that he served continuously in the capacity of heavy mechanic operator for six months, from 28th April 2009 to 31st October 2009.

5.2 Ndlovu was not employed in a supervisory position and as such his probation could not extend beyond the 28th July 2009.

See Section 32 (2) of the Employment Act 1980

5.3 Further his evidence was that he was earning wages per month and worked more than seventy-two hours per week.

5.4 It is my finding that the Applicant was an employee protected by Section 35 of the Act, in

other words he was entitled to present a complaint for unfair termination of his services. He has discharged his onus. See Section 42 (1) of the Employment Act.

5.5 now an employer is required to prove that the reason for terminating the service of an employee is not permitted by Section 36 of the Employment Act; and that taking into all the circumstances of the case it was reasonable to dismiss the employee.
See Section 42(2) of the Employment Act

5.6 The Applicant's uncontroverted version is that, he was dismissed for taking a nap for 30 minutes during his shift, it being alleged by the Respondent that he was drunk on duty. Ndlovu's evidence was that no disciplinary inquiry followed this accusation.

5.7 As a result of the Respondent's default of representation, no explanation or lawful justification was advanced by VIFA for the Applicant's dismissal.

5.8 According to the Regulation of Wages(Agricultural Industry) Order Notice 2007, in particular regulation 5, the normal hours of work for all employees, except for watchman, stockman,

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irrigators, plant and pump house attendants, shall be fifty-four(54) hours of work spread over a period not exceeding six days in a week.

5.9 The Applicant argued that, on this particular day he worked for 18 hours on his shift only to be given 12 hours break, then in the evening of that same day at 6:00 pm he cloaked in for another 12 hours shift.

5.10 Not only were the hours in excess of the hours of work prescribed by law, it was inconceivable that the Applicant had worked for 18 hours without a break. The law provides that he should have worked 9 hours on this shift.

5.11 It is my finding that the Applicant's dismissal was substantiveiy and procedurally unfair.

See Thulie Nkambule v New Midway Supermarket t/a Intertech (IC case no: 133/05); Themba Tsabedze v Tex-ray Swaziland (Pty) Ltd (IC case no:559/06; Christopher H. Dlamini v Inter Africa Suppliers (SWD) Ltd (IC case no:55/97 and Alpheus Thobela Dlamini v Dalcrue Agricultural Holdings (Pty) Ltd (IC case no:123/05

5.12 I also make a finding that, in the circumstances of the case it was not reasonable for the Respondent to terminate the Applicant's services:

5.12.1 The Applicant had not had enough time to rest before his next 12 hour shift. The balance of convenience dictated that, if Applicant was fatigued, he should have taken a nap rather than risk an accident that would most likely cause loss of life and damage to property.

5.12.2 The prejudice suffered by the Respondent for the work stoppage of 30 minutes is outweighed by the potential prejudice of loss of human life and property.

5.13 Further, it is my finding that the Applicant is owed six leaves days for having worked for 6 full months before he was dismissed.

5.14. The Applicant is also entitled to the overtime and off days claimed.

5.15 Regarding the claim for rations for the sum of E750.00, I do not think that a case was made out for such. The Applicant did not state in respect of what month or week this ration was owed. Further he did not state in respect of what food items the amount of E 750.00 was for.

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5.16 Now, the third schedule stipulate the minimum weekly ration scale for obvious reasons, the food item that are listed therein are not costed, only the weights are mentioned.

6. CONCLUSION

6.1 I have found that the Applicant's dismissal was not for a fair reason and that in the circumstances of the case, it is not reasonable for the Respondent to terminate his services.

6.2 I have also found that the Applicant qualifies to succeed on his claims for leave, overtime and off days. However; he ought to fail on his claim for the sum of E750.00 in lieu of rations.

6.3 Now, regarding the compensation to be awarded to the Applicant, the following factors have been considered;

- (a) The Applicant had only worked for six months before he was dismissed.
- (b) However the Respondent was insensitive to the Applicant's mental as well as physical wellbeing. On the 14th October 2009, as the Applicant was taking a siesta the Manager

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ordered him out of bed and instructed him to go to the office.

- (c) The Respondent failed to hold a disciplinary inquiry before terminating his services.
- (d) The Applicant is married with nine children all attending school and has not been employed since his dismissal.
- (e) The Applicant had to spend his savings to ensure that his children continue attending school.

6.4 I hold that an award of 9 months wages as compensation is fair and equitable in all the circumstances of this case.

6.5 The following order is therefore made

7. AWARD

7.1 The Respondent is ordered to pay the Applicant the following:

- (a) Notice pay = E 1 980.00
- (b) Leave (6days) = E 396.00
- (c) Overtime(May 09 +45hrs) = E 1 124.07
- (d) Off days = E 1 386.00
- (e) 9 months wages compensation = E 17 820.00

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TOTAL AWARD =E 22 706.07

7.2 The Respondent is directed to pay the sum of E 22 706.07 at the Commission's offices at Simunye Plaza by the 30th May, 2010.

7.3 There is no order for costs

DATED AT SIMUNYE ON THIS THE 4th DAY OF MAY 2010

VELAPHI DLAMINI

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