

IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION

HELD AT SITEKI

CMAC REF NO:STK 033/11

In the matter between:

SIMANGA SHONGWE & 9 OTHERS APPLICANT

AND

B&W INSTRUMENTATION & ELETRICAL RESPONDENTS

(Pty) Ltd AND ANOTHER

Coram

ARBITRATOR VELAPHI Z. DLAMINI

FOR APPLICANT MESSRS SIMANGA SHONGWE,
SANDILE DLAMINI,
SAKHILE SIMELANE AND LWAZI SIMELANE

FOR RESPONDENT MR. TRIAS POTGIETER

ARBITRATION AWARD

DATE OF ARBITRATION : 19TH MAY 2011 NATURE OF DISPUTE : UNFAIR DISMISSAL
(BREACH OF CONTRACT)

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VENUE :CMAC OFFICE, SNPF BUILDING, SITEKI

1. DETAILS OF PARTIES AND HEARING

1.1 This arbitration hearing was held at the premises of the Conciliation Mediation and Arbitration's office (CMAC or Commission) at the Swaziland National Provident Fund (SNPF) offices at Siteki on the 19th May 2011.

1.2 The Applicants are Simanga Shongwe and Nine (9) others namely; Sandile Dlamini, Sakhile Simelane, Lucky Simelane, Lwazi Simelane, Kwanele Khumalo, James Sibiya, Simphiwe Dlamini, Phila Dlamini and Thamsanqa Khumalo. The Applicants' postal address is P.O. Box 27 Big Bend. Only four (4) Applicants appeared in person to prosecute their claims.

1.3 The First Respondent is B & W Instrumentation & Electrical (Pty) Ltd of P. O. Box 956 Alberton in the Republic of South Africa.

1.4 The Second Respondent is Ubombo Sugar Limited of P. O. Box 23 Big Bend.

1.5 The First Respondent was represented by Mr. Trias Potgieter, its Human Resources Manager, while the Second Respondent was not represented.

2. ISSUES TO BE DECIDED

Whether the Respondents breached the employment contracts of the Applicants.

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3. PRELIMINARY ISSUE

3.1 In view of the nature of the dispute and the relief that was sought by the Applicants, I enquired

from the Applicants what the reason for citing the two Respondents was. I wished to ascertain who their employer was.

3.2 The Applicants' submitted that they had concluded a contract of employment with the First Respondent, however the Second Respondent was cited for convenience because Ubombo Sugar Limited had entered into a contract with the First Respondent for the optimization and maintenance of the mill.

3.3 The Applicants conceded that, in the absence of a written agreement between the two Respondents in terms of which Ubombo Sugar bound itself to all legal obligations of the first Respondent, including payment wages of the latter's employees, in law no relief could be sought against the Second Respondent.

3.4 In light of the fact that the Applicants could not produce any agreement concluded by the Respondents, wherein the First Respondent ceded its rights and obligations to the second and Ubombo Sugar was surety, I ruled that the claim sought herein is not sustainable against the Second Respondent.

4. BACKGROUND OF THE DISPUTE

4.1 The Respondent is a South African based company which operates in the electrical and instrumentation industry. The company offers services, including plant erection, testing, earthing, lightning and surge protection services, commissioning, plant optimization and maintenance to plants in the industrial, utilities, mining, chemical, oil, gas and food beverages industries.

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4.2 The Applicants worked as electricians at the Ubombo Sugar Limited Project site from the 10th January 2011 until the 15th March 2011 when they were locked out of the workplace following a dispute over deductions in their wages.

4.3 The Applicants reported a dispute for unfair dismissal (breach of contract) to the Commission, which was conciliated, however the dispute remained unresolved, and a Certificate of Unresolved Dispute No: 153/11 was issued. The parties referred the dispute to arbitration and I was appointed to decide same.

4.4 The Applicants are seeking reinstatement or, alternatively, payment of wages in lieu of the remaining period of their contracts of employment. The Applicants' claims have been quantified as follows; Simanga Shongwe (E6,549.00), Sandile Dlamini (E14,076.00), Sakhile Simelane (E18,768.00), Lwazi Simelane (E7, 814.00), Kwanele Khumalo (E14,466.38), James Sibiya (E17,342.00), Simphiwe Dlamini (E7,814.00), Phila Dlamini (E18,714.00), Thamsanqa Khumalo (E7,814.00) and Lucky Simelane (E7,814.00).

5. SURVEY OF EVIDENCE AND ARGUMENTS

5.1 All the evidence and arguments that was led and raised by the Applicants have been considered, however because Section 17 (5) of the IRA 2000 (as amended) requires concise reasons. I have only referred to the evidence and arguments that I consider relevant to substantiate my findings.

5.2 The Applicants led the evidence of those present at the arbitration hearing, however the first Respondent elected not to lead any evidence nor make any submissions.

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5.3 APPLICANT'S CASE

5.3.1 The Applicants who were present at the arbitration all gave evidence. Their evidence was similar in all respects and as such I will not narrate it separately.

5.3.2 It was the Applicants¹ evidence that they were employed by the First Respondent on the 10th January 2011 on fixed-term contracts. Their workplace was at the Ubombo Sugar Limited project site.

The first Respondent had been contracted by Ubombo Sugar to optimize and maintain the Big Bend plant (mill) for a period of three (3) months.

5.3.3 The Applicants stated that they tendered their services and were paid wages forth-nightly. When the Applicants received their second payment, they noticed that their P.A.Y.E deductions were not consistent. The first time the First Respondent deducted 20% of their salaries, but the second payment reflected that 50% was deducted from their earnings.

5.3.4 The Applicants testified that as a result of the indiscriminate deduction of PAYE on their salaries, they lodged a grievance with the First Respondent's Management. However Management referred them to another company called Powerline Investment, whom they claimed was the Applicants' 'paymaster'. The Applicants refused to accept the First Respondent's excuse because they argued that B & W Instrumentation and Electrical was their employer and not Powerline Investment.

5.3.5 It was the Applicants' case that First Respondent's Management later promised to comply with the tax laws of the country and refund them what was deducted unlawfully. However on the following payday, the Applicants' salaries did not reflect that they had been refunded. The Applicants approached Management again during working hours and there was a work stoppage for a

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few hours. Again the First Respondent promised to pay back the deducted money.

5.3.6 The Applicants' case was that during this misunderstanding with the First Respondent, the employees decided to approach the Swaziland Revenue Authority, to investigate if their PAYE had been remitted. The Applicants discovered that their taxes were not remitted. The Applicants discovered that their taxes were not remitted and in fact B & W Instrumentation and Electrical was not registered as a Swazi Company. Even Powerline Investment was not registered as a Swazi employment broker.

5.3.7 It was the Applicants' evidence that they elected a committee of five (5) employees who held a meeting with Powerline, and in those discussions Mr. Perry (Racking Supervisor) and another employee from First Respondent were present. It was resolved in the meeting that the Applicants would be paid soon. However instead of paying them, on the 15th March 2011 the First Respondent confiscated their security cards and erased their fingerprints from the system. The Applicants were denied access to the premises and as such could not render their services until the end of the contract which was the 12th April 2011.

5.3.8 The Applicants testified that soon after they were locked out, the First Respondent employed other employees who were expatriates to replace them and work until the end of the contract between Ubombo Sugar and itself.

5.3.9 The Applicants argued that the First Respondent's conduct of locking them out of the workplace was tantamount to unilateral cancellation of their employment contracts. This constituted breach of contract which entitled them to claim the wages which would have been paid had they rendered their services until the contract expired.

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6 ANALYSIS OF EVIDENCE AND ARGUMENTS

6.1 John Grogan, Workplace Law 8th ed Jute & Co at p 44 remarks as follows about fixed term contracts:

"The life of a contract may be determined either by stipulating a date for termination, or by stipulating a particular event the occurrence of which will terminate the contract, or with reference to completion of a particular task. Where the parties have indicated that the contract will terminate on the occurrence of a particular event or the completion of a particular task, the onus rests on the employer to prove that the event has occurred or the task was in fact completed. Unless otherwise agreed, a fixed term contract cannot be terminated during its currency without good cause."

6.2 In *Buthelezi v Municipality Demarcation Board* (2004) 25 ILJ 2317 (LAC) at 2320 Para 9 the learned Jafta AJA made the following statement of law;

"There is no doubt that at common law a party to a fixed term contract has no right to terminate such contract in the absence of a repudiation or a material breach of the contract by the other party. In other words there is no right to terminate such contract even on notice unless its terms provide for such termination. The rationale for this is clear. When parties agree that their contract will endure for a certain period as opposed to a contract for an indefinite period, they bind themselves to

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honour and perform that respective obligations in terms of that contract for the duration of the contract and they plan, as they are entitled to in the light of their agreement, their lives on the basis that the obligations of the contract will be performed for the duration of that contract in the absence of a material breach of the contract. Each party is entitled to expect that the other has carefully looked into the future and has satisfied itself that it can meet its obligations for the entire term in the absence of any material breach. ...under the common law there is no right to terminate a fixed term contract of employment prematurely in the absence of a material breach of such contract by the other party."

6.3 The statement by the learned Jafta AJA was embraced by the Judge President of the Industrial Court of Swaziland in *Boniface Dlamini v Swaziland United Bakeries (Pty) Ltd* (IC Case no: 200/02) in the *Boniface Dlamini* case, the Court made the following remarks;

"The Labour Appeal Court in South Africa has held that an employer that retrenches an employee on a fixed term contract before the contract's expiry date commits a breach of contract - See *Buthelezi v Municipal Demarcation Board* (2004) 25 ILJ 2317 (LAC). This decision is clearly correct...."

6.4 Unfortunately the First Respondent elected not to challenge the Applicants' evidence. None of the Applicants were cross-examined nor did the First Respondent lead evidence to rebut their allegations. The uncontroverted evidence of the Applicants is that their contracts were prematurely terminated and that the

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Respondent had no right to do so. In the absence of evidence that the Applicants had materially breached their contracts thus giving Respondent the right to prematurely terminate their contracts, I find that the First Respondent had no legal right to terminate the Applicants contracts of employment. Accordingly I find that the termination before the end of their terms was unfair and constituted unfair dismissal and or breach of contract.

7. REMEDY

7.1 Only four (4) of the Applicants attended the arbitration hearing and testified in support of their cases. The rest failed to attend. I was not furnished with any reasonable explanation for their absence. I hold that only those Applicants who continued to pursue their claims by presenting evidence are entitled to the relief as claimed.

7.2 I deliberately say that there were four even though in the attendance register the Applicants present were five. There was one Wandile Sihlongonyane. According to the Report of Dispute and Certificate of Unresolved Dispute, Wandile Sihlongonyane was not part of the Applicants in the dispute registered as CMAC Ref STK 033/11. I do not have jurisdiction to deal with a dispute that was neither conciliated nor certified unresolved. In short Wandile Sihlongonyane never reported a dispute, he is not entitled to any relief.

7.3 When I enquired from the four Applicants how much wages would they be entitled to had they worked from the 15th March 2011 to the 12th April 2011, they stated that the amounts recorded in the Report of Dispute was what they were claiming.

7.4 I make the following order:

8. AWARD

8.1 I find that the first Respondent unlawfully and unfairly terminated the Applicants' fixed term contracts of employment.

8.2 The first Respondent is ordered to pay the following Applicants the following sums;

- (a) Simanga Shongwe -E6,549.00
- (b) Sandile Dlamini -E14,076.00
- (c) Sakhile Simelane -E18,768.00
- (d) Lwazi Simelane -E7,814.00

8.3 The First Respondent is directed to pay the aforesaid sums to the Applicants at CMAC offices, SNPF Building Siteki not later than Friday 27th May 2011.

8.4 I make no order as to costs

DATED AT SITEKI ON THIS 24TH DAY OF MAY 2011

VELAPHI Z. DLAMINI CMAC ARBITRATOR