



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

HELD AT MANZINI

SWMZ 366/10

In the matter between:-

SENZO MBHAMALI

APPLICANT

And

DYNAMIC DISTRIBUTORS (PTY) LTD

T/A TOTAL MONENI SERVICE STATION

RESPONDENT

CORAM:

Arbitrator : Mthunzi Shabangu
For Applicant : Mr. Siphon Manana
For Respondent : Mr. Comfort Mkoko

Nature of Dispute : Constructive Dismissal

Date of Hearing : 24th and 30th September,
2010; 29th October, 2010;
12th November, 2010

ARBITRATION AWARD

1. DETAILS OF HEARING AND REPRESENTATION

- 1.1 The Applicant is Senzo Mbhamali and was duly represented during these proceedings by Mr. Siphon Manana, a labour consultant. His postal address is P.O. Box 33, Matata.
- 1.2 The Respondent is Dynamic Distributors (PTY) LTD t/a Total Moneni Service Station, a company duly registered and incorporated according to law whose postal address is P.O. Box 2309, Manzini. It is herein represented by Mr. Comfort Mkozi, its Legal Affairs Officer.
- 1.3 The arbitration hearing was held at CMAC-Manzini Office situated at 4th Floor, SNAT Co-ops Building, beginning from the 24th September, 30th September, 29th October and 12th November, 2010 not mentioning the pre-arbitration and aborted dates.

2. ISSUE TO BE DECIDED

- 2.1 The issue for determination pertains the fairness or otherwise of the Applicant's alleged constructive dismissal from the Respondent's employ.

3. BACKGROUND TO THE ISSUE

3.1 The Applicant is an ex-employee of the Respondent, having been employed as a Pump Attendant on the 22nd May, 2009 and allegedly constructively dismissed on the 11th May, 2010. His monthly wage was E1 020.00. He alleges to have been constructively dismissed on the 11th May, 2010 and is claiming compensation for unfair termination of employment contract.

3.2 The Respondent admits the former employment relationship between the parties as well as its material terms. It, however, denies the alleged constructive dismissal and contends that the Applicant was substantively dismissed consequent to fair disciplinary processes held in May, 2010. The Respondent, therefore, pleads for a dismissal of the Applicant's claim.

4. SUMMARY OF THE EVIDENCE AND ARGUMENTS

The Applicant's Version;

4.1 The Applicant's evidence which was given by him personally as AW1 under oath is that: he resigned from the Respondent's employ through a written letter dated 20th May, 2010 annexed on the Report of Dispute Form (CMAC Form 1).

4.2 The reason for the resignation was mentioned in paragraphs 3 to 5 of the foregoing letter as follows:

“Be advised that my resignation has been caused by both of your conduct and attitude towards me. In particular;

You have made the continuation of my employment totally intolerable by imposing unfair charges to me.

The problem started small and grew out of proportion.”

4.3 The nature and/or contents of the alleged charges were not stated in the resignation letter which reflects that the resignation was effective as from the 20th May, 2010 (per paragraph 2 thereof). The resignation was premised on the provisions of **Section 37** of The **Employment Act, No5 of 1980.**

- 4.4 The problem had started on the 11th May, 2010 when the Applicant was called upon to make a written report of his involvement and/or lack thereof pertaining to a customer's lost paraffin within the company premises at Moneni Filling Station. Before being required to make a written report, the Applicant had made a verbal report to his Supervisor, being one Mr. Mduduzi Mdluli.
- 4.5 The Applicant declined to make the report on the 11th May, 2010 notwithstanding having been given a piece of paper and a pen. When he reported for work the following day, i.e. the 12th May, 2010, the Applicant was advised not to proceed with work before he could make and submit the report, to which he again failed. He did not report for work on the 13th and 14th May, 2010 as he was not picked from home by the Respondent per custom when he had to knock-on at night. He reported for duty on the 17th May, 2010 when again his employer demanded the report in lieu of proceeding with work. For the third time, the Applicant failed to make the report.
- 4.6 That is the day (i.e. 17th May, 2010) when Applicant resorted to write the Respondent a letter threatening to resign under the provisions of Section 37 of the

Employment Act. A copy of that letter is also annexed on the Report of Dispute Form.

4.7 Under cross-examination, the Applicant stated that he knows what a report is, that it is a mere narration of certain events. He further admitted that he knows how to write. He also conceded that there were no particular specifications given as to how he had to write the report, nor that it had to be in English.

4.8 However, notwithstanding the foregoing, the Applicant submitted that he had difficulty with the employer's request to do a written report since he had already given a verbal one. He viewed the employer's request as unreasonable, unlawful and as a conduct befitting a repudiation of the employment contract under the auspices of Section 37 of the Employment Act, 1980.

The Respondent's Version;

4.9 Two witnesses were paraded for and on behalf of the Respondent, one Mr. William Mduduzi Mdluli as RW1

and Mr. Mandla Mkhathjwa as RW2. They both narrated how a certain customer, one Mr. Tsabedze, lost his paraffin container (after a fill-up) on the 10th May, 2010 at Moneni Filling Station. The company's surveillance cameras depicted that the customer had been assisted by the Applicant when filling up his paraffin. He then entered the shop situate within the Filling Station, placing his paraffin container outside the shop. When leaving the shop, the customer forgot to pick his paraffin.

4.10 When another customer approached the Filling Station to fill up paraffin, the cameras show that he was also attended by the Applicant. By the paraffin pump, the Applicant is seen pointing this second customer to the paraffin container that had been forgotten by Mr. Tsabedze next to the shop. Following this pointing out, the second customer is observed running to pick-up Mr. Tsabedze's paraffin container which was emptied into the second customer's container by the Applicant, against some cash payment.

4.11 These are the observations, so goes the evidence of RW1 and 2, which instigated a request that the Applicant should write a report about his involvement and/or absence thereof pertaining to Mr. Tsabedze's

lost paraffin. Before being required to make a written report, he had been verbally asked to explain his involvement, if any, to which he denied any involvement in the matter. He was then asked to reduce that into writing and was given a clean sheet of paper and a pen.

4.12 This is the request that brew the trouble. Beginning from the 11th May, 2010 the Applicant adamantly refused and/or neglected to make the written report. He was instructed to produce the report in lieu of proceeding with his normal duties.

4.13 Disciplinary charges were then preferred against the Applicant which he refused to sign for in confirmation of receipt. That was mid-May, 2010. A disciplinary hearing was held in his absentia chairmanised by an external somebody in the person of Mr. Ndabenhle Dlamini, who was introduced as an Attorney. The outcome of the disciplinary proceedings was a dismissal of the Applicant on those counts for which he was found guilty. Copies of the charge sheet which was clipped under a suspension letter dated 14th May, 2010 as well as the verdict were handed over as part of RW1's evidence and were marked RW1 (a) and RW1 (b) respectively.

4.14 The charge sheet reflects that the Applicant was charged with six (6) counts of misconduct - being two counts of insubordination (charges 1 and 3), two counts of desertion (charges 2 and 4), one count of absenteeism (charge 5) and one count of theft (charge 6). He was found guilty on the two counts of insubordination, one count of desertion (being charge 2) as well as on the theft count. He was acquitted on the second count of desertion (charge 4) as well as that of absenteeism (charge 5).

4.15 The insubordination charges stemmed from the Applicant's refusal to obey lawful instructions given to him by his supervisors, being to prepare a written report pertaining the events of the 10th May, 2010 relating to the loss of a customer's paraffin. The charge of desertion related to the fact that the Applicant on failing to prepare the report on the 11th May, 2010 abandoned his work station without permission and left for home. The charge of theft related to the fact that the Applicant did not remit the money that was paid to him by the second customer after selling him Mr. Tsabedze's paraffin.

4.16 RW1 testified further that the Applicant had wrongfully absconded on those days he failed to pitch up for work since it had not been said to him let him not report for work but, instead, it had been said he should write the report in lieu of proceeding with his normal duties. When probed during re-examination as to what did they want to do with the report, the response from RW1 was that they wanted to consider it and see if the matter was worth to be forwarded to the Company's legal office or could be dealt with and finalized at the plant level.

4.17 It was RW2's evidence further that the company employees were well aware of the presence of the surveillance cameras within the Filling Station.

4.18 The Respondent concludes by arguing that the Applicant has failed to prove a case of constructive dismissal and that thus his application should fail.

5 ANALYSIS OF THE EVIDENCE AND ARGUMENTS

5.1 The Applicant's action against the Respondent is based and/or founded on constructive dismissal in terms of **Section 37** of the **Employment Act, No 5 of 1980** as opposed to any conventional unfair dismissal in terms

of Section 35(2) read with Section 36 of the Employment Act. Consequently, the burden or onus of proving the alleged constructive dismissal is upon the Applicant employee, regard being had to the provisions of Section 37 of the Act, which reads as follows:

“When the conduct of an employer is proved by that 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.” (My emphasis).

See also: Timothy Mfanimpela Vilakazi vs. Anti-Corruption Commission & Others - Industrial Court Case No. 232/2002 for onus of proof on constructive dismissal cases.

- 5.2 In **Samuel S. Dlamini vs. Fairdeal Furnishers (Pty) Ltd, Case No.145 of 2000 (Industrial Court)**, his lordship N. Nduma stated the position of the law as follows regarding the issue of who bears the onus of proof:

“The onus of proving constructive dismissal is on the one who alleges. The Applicant must show that the conduct of the employer towards him was such that he could no longer reasonably be expected to continue in his employment and thus he had to leave his employment...” (At page 3).

- 5.3 Ascertaining whether or not an employee was constructively dismissed is a question of fact to be determined by a judge or arbitrator or tribunal of fact.

See: Simon Nhlabatsi vs. VIP Protection Services - Case No. 84/2002 (Industrial Court (At page 23).

- 5.4 In the **Simon Nhlabatsi** case (*supra*) as well as in **Samuel S. Dlamini vs. Fairdeal Furnishers (Pty) Ltd - Case No.145/2000 (Industrial Court)**, his lordship the then Judge President of the Industrial Court), his lordship the then Judge President of the Industrial Court- Justice Nderi Nduma, explored various case law on the issue of constructive dismissal. He cited with approval the English Case of **Woods vs. VM Car Services (Peterborough) Ltd (1982) IRCR 4B (CA)** at 415 where Lord Denning made the following remarks:

“The circumstances of constructive dismissal are so infinitely various that there can’t be, and there is no rule of law saying what circumstances satisfy it and what do not. It is a question of fact for the tribunal of fact.”

5.5 This is the approach which was followed with approval in the **Samuel S. Dlamini** case and that of **Simon Nhlabatsi** (*supra*), hence the justification to be adopted in casu.

5.6 The test to be used in measuring the severity of the conduct complained of by the employee is an objective one in that it must be shown that no reasonable employee would be expected to put up with such conduct of an employer. In **Jameson Thwala vs. Neopac (Swaziland) Limited - Case no. 18 of 1998 (Industrial Court)**, the court stated that:

“The employee has to prove that in his eyes and the eyes of a reasonable employee in his position, the conduct by the employer towards him was such that he could not reasonably be expected to continue the employment relationship, hence the severance of the relationship.” (At page 5).

5.7 In other words, the employer's conduct is to be looked at as a whole and determine whether it is such that its effect judged reasonably and sensibly is such that the employee could not be expected to put up with it. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed.

5.8 At page 7 of the Judgment in the case of **Samuel S. Dlamini vs. Fairdeal Furnishers (Pty) Ltd** (*supra*) his lordship concluded as follows:

“It follows that in terms of Section 37 of the Employment Act, the employee must show that the conduct complained of was either unlawful or unfair such that he could no longer reasonably be expected to continue in his employment, hence he left with or without notice. If the employer succeeds in showing that his conduct was lawful and not unfair in the circumstances of the case, the Applicant has not discharged his onus and the court shall not deem the employee to have been unfairly terminated.”

5.9 The conduct complained of by the Applicant in this case is the request by his employer to make a written report

tabulating his involvement and/or lack thereof in the events of the 10th May, 2010 at Moneni Service Station pertaining to the loss of a customer's paraffin from within the premises of the Filling Station. The Applicant was instructed not to proceed with his normal duties before he could submit the report or statement to his Supervisors.

5.10 The question is, what was unlawful or rather unfair about such a request or instruction? It is not denied that a complaint had been made by a customer who had bought some paraffin from the Filling Station, named a Mr Tsabedze. It was also not denied that that customer had been assisted or attended by the Applicant when filling-up paraffin on the morning of the 10th May, 2010. It was further not denied by the Applicant that there was installed from within the company premises at Moneni Service Station close circuit television cameras which captures any movements and actions from within the Filling Station premises. Nor was it argued that those cameras were malfunctioning at the material time.

5.11 It is also not argued or contested that pursuant to the customer's complaint, some investigations had to be conducted and, that during the course of those

investigations facilities that were available and verily installed to trace any thievery or criminal tendencies such as the television or surveillance cameras could be resorted to by the company.

5.12 Even worse, it is not argued by the Applicant that during the course of the investigations, those relevant and/or suspected or implicated employees could not be asked and/or probed. As a matter of fact, before the Applicant was requested to reduce his report into writing, he had already given a verbal report.

5.13 The Applicant did not come out clear and convincingly with regard to the difficulty he had about making the written report. He mentioned, amongst other reasons, that he did not understand why his Supervisors were seeking for a written report since he had already given a verbal one. It was further argued on his behalf that it was not within his job description to write reports.

5.14 There is no merit in any of these excuses that were advanced by the Applicant. It is common cause that the Applicant knew how to write. It is also common cause that no particular specifications were given to the Applicant on how to write the report that it could be said that same were difficult or complex to comply with.

The Applicant was not called upon to make a confession nor was he called upon to make a sworn statement. It is inconceivable as to what difficulty he had about the employer's instruction, more particularly because he had already given a verbal statement about what he knew and did not know regarding the matter under investigation.

5.15 I must mention at this juncture that audio and video evidence is admissible, but if challenged it must be proved. In other words, an employer is entitled to install surveillance close circuit television cameras although employees should be informed that cameras will be placed. They are not entitled to know exactly where the cameras will be placed but the placing of the cameras must be done with due regard to employees' rights to privacy and dignity. In the present case, it was testified that the employees were well aware of the presence of surveillance cameras within the Filling Station.

5.16 Consequently, using such cameras during an investigation pertaining a customer's complaint to see any implicated person or employee was not wrongful. Nor was the request for a written report or statement by any suspected or implicated employee unlawful or unfair.

5.17 In the circumstances, I find that the conduct complained of by the Applicant was neither unlawful nor unfair. The Applicant has thus failed to prove a case of constructive dismissal against the Respondent. The Respondent is therefore discharged from proving the fairness of the termination of the employment contract between the parties since the Applicant resigned on his own accord.

6 AWARD

6.1 The Applicant's resignation is found to have been voluntary and on the Applicant's own accord.

6.2 The Applicant has therefore failed to prove a constructive dismissal case in terms of Section 37 of the Employment Act, No.5 of 1980.

6.3 The Application is dismissed with no order for costs.

DATED AT MANZINI ON THEDAY OF JANUARY, 2011.

MTHUNZI SHABANGU

CMAC COMMISSIONER