



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

HELD AT MANZINI

SWMZ 301/11

In the matter between:-

MOSES MFANYANA MKHWANAZI

APPLICANT

And

GRIDLOCK SECURITY SERVICES (PTY) LTD

RESPONDENT

CORAM:

Arbitrator

: Commissioner Mthunzi
Shabangu

For Applicant

: In Person

For Respondent

: Ms. Nolwazi Msibi

Nature of Dispute

: Constructive dismissal

Dates of Hearing

: 24th November, 2011; 1st &
15th December, 2011; 5th
12th January, 2012.

ARBITRATION AWARD

DETAILS OF THE PARTIES AND REPRESENTATION

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1. The Applicant is **Moses Mfanyana Mkhwanazi**, an adult male Swazi who voluntarily chose to represent himself during the course of these proceedings, his rights to legal or any representation having been duly explained to him.
 2. The Respondent is **Gridlock Security Services (Pty) Ltd**, a company duly registered according to the company laws of Swaziland, represented during these proceedings by its Human Resource Officer, named Nolwazi Msibi (Ms.) to whom also the right to legal representation was explained.
 3. The arbitration hearing was held at CMAC- Manzini office and had five (5) sittings as follows: 24th November, 2011; 1st and 15th December, 2011; 5th and 12th January, 2012.

ISSUE TO BE DECIDED

4. The issue for determination is whether or not the Applicant was constructively dismissed from the Respondent's employment, in terms of **Section 37** of the **Employment Act, No. 5 of 1980**.

BACKGROUND TO THE ISSUE

5. The Applicant is an ex-employee of the Respondent, having been employed as a Security Guard on the 2nd June, 2010 and allegedly constructively dismissed on the 30th May, 2011. At the time of termination of employment he was earning a basic wage of **E1, 431.30** as reflected on his pay slip filed as of record and marked "**MM2**". Applicant resigned from his employment through a written resignation letter dated 30th May, 2011 under the provisions of **Section 37** of the **Employment Act No. 5 of 1980** alleging that his continued employment had been rendered intolerable by the Respondent. He is claiming compensation for unfair termination of employment contract.

6. The Respondent admits the former employment relationship between the parties as well as its material terms. It, however, denies that the employment relationship had been rendered intolerable to justify the Applicant's resignation on that basis. The Respondent contends that the employment relationship got terminated purely at the instance of the Applicant who disappeared without any notification to the employer sometime mid-June 2011, some days after the parties had ironed their differences as pertaining to the issues the Applicant and his co-workers had complained about. The Respondent, therefore, pleads for a dismissal of the Applicant's claim.

SUMMARY OF THE EVIDENCE AND ARGUMENTS

The Applicant's Version;

7. The most important and relevant aspects of the Applicant's evidence who testified as AW 1 is that Applicant resigned from the Respondent's employ through a written letter dated 30th May, 2011. The reason for the resignation was that the Applicant's continued employment had been rendered intolerable by the Respondent due to the following practices:
8. Firstly, arrear wages and delayed wages. It is alleged that the Respondent omitted to pay the Applicant's due salary for certain months, being February, March and May 2011. It is further alleged that the fixed pay day, being the 10th day of every new month, was not consistently observed by the Respondent who would effect payments later than that day in some other months, to the gross inconvenience of the Applicant. A month that was precisely mentioned was January, 2011 which its salary was allegedly not paid on the 10th February, 2011 but some one day or so later than the 10th (Applicant was not specific). No other month was mentioned on which salary had been delayed.
9. Secondly, underpayments. Applicant alleges that he was being paid on Grade A instead of the salary grades fixed in

the Regulation of Wages for the Security Industry Order and by virtue of the fact that he was a Patrol Supervisor. He, therefore, claimed to have been unlawfully underpaid.

10. Thirdly, unlawful deductions. Applicant alleges that his employer unlawfully effected certain deductions on his salary e.g. for unproven allegations of sleeping on duty, uniform and SNPF deductions without remitting the contributions to the Swaziland National Provident Fund.
11. Fourthly, unpaid public holidays, overtime and off-days. The allegation was that the Applicant reported for duty even on public holidays and yet he was not paid for that. Further, that he did not consistently get his off-days as there would be no reliever at times. During May, 2011 Applicant alleges to have worked some overtime in that he was reporting for duty at 1700 hours and knock-off at 0700 hours, thus accumulating some two (2) hours overtime per day.
12. The above summarized factors are those that the Applicant says gives birth to his claim of constructive dismissal.
13. During the month of May, 2011 the Applicant testified that he engaged into extensive discussions with the Respondent's Director - Mr. David Nyathi, pertaining to the foregoing grievances. The fruits of these discussions were

that Applicant eventually received his unlawfully deducted monies in the sum of **E1, 100.00**. Applicant says he got this money end of May, 2011 after he had already resigned from the Respondent's employ.

14. It is Applicant's further evidence that his resignation was preceded by certain correspondences or letters to the Respondent, one of which is dated 27th May, 2011 which was written in a group form in that its signatories include not only the Applicant but three of his co-workers, being Doctor Ndlangamandla (who testified as AW 2), Timothy Dlamini and Mbongiseni Dlamini. A copy of this letter was filed by Applicant as part of his evidence and was marked "**MM1**". This letter contains, amongst others, some of the grievances which formed the basis of Applicant's resignation.
15. The Applicant, however, as well as AW2 - Doctor Ndlangamandla, failed to come up with the other '**previous**' correspondences they allegedly wrote to the Respondent raising their grievances. Mr. Ndlangamandla only undertook to file these previous letters in due course but by the time the Respondent closed its case and by the date the parties motivated their closing arguments, none such had been filed as of the record.

16. During cross-examination the Applicant conceded to have been present in a meeting which was called by the Respondent's Director - Mr. David Nyathi, to address the Applicant and his co-workers' grievance letter dated 27th May, 2011. He, however, argued that inasmuch as he attended that meeting, he had already resigned and no longer an employee for Respondent by then.

17. The Applicant was further confronted on the issue of alleged unpaid holidays since from the only single pay slip he submitted as part of his evidence, i.e. **"MM2"** dated 10th May, 2011, there is a reflection of payment for public holidays. To this one the Applicant challenged or queried the authenticity of the pay slip, saying it was fraudulently made to reflect that he was paid some money for a public holiday and yet he was not paid in reality, though confirming that the net pay therein indicated is the one he found in his bank account.

18. The Applicant further conceded that the overtime he allegedly worked in May, 2011 had been agreed upon between him and the Respondent's Director - Mr. Nyathi and thus was not forced on him.

19. It further transpired during cross-examination, to which fact the Applicant belatedly agreed though he started by

vehemently denying, to have received an amount of **E1,089.55** which was deposited into his bank account by the Respondent on the 5th July, 2011. It was put to Applicant that this money was in respect of the days he worked in June, 2011 before allegedly disappearing without notifying the employer (Respondent). Doctor Ndlangamandla (AW2) confirmed that the Applicant remained under the Respondent's employ till sometime in June, 2011, though he could not be specific as to what day exactly did he stop going to work in June.

20. AW2 further confirmed that the Applicant was present in that meeting which was called by the Respondent's Director at the end of May, 2011 to address the employees' grievances as contained in their letter of the 27th May, 2011 signed by AW2, Applicant and the two other work-mates mentioned hereinabove.

The Respondent's Version;

21. Mr. David Nyathi (the Respondent's Director) testifying as RW1, stated that towards the end of May, 2011 the Applicant, together with three other work-mates, wrote to him a grievance letter, complaining, amongst other things, about shortfalls in their salaries and late payments. In response to that grievance letter, which was hand-delivered

to him and another copy posted, he called the employees into a meeting which was held at Better Parts Site in Matsapha. Mr. Nyathi stated that he does not recall the exact date of the meeting, save only to say that it was soon after the grievance letter dated 27th May, 2011 had been served on him by the employees.

22. Mr. Nyathi concedes that in that meeting, wherein the Applicant was also in attendance, he did acknowledge the workers' grievances and undertook to reform by clearing the outstanding short-falls and ensure that the wage delay and shortfalls does not happen again. The parties reached a consensus on that aspect.
23. Over and above the joint meeting with the aggrieved employees, Mr. Nyathi says he then gave the Applicant a special audience because the latter had already dropped a resignation letter, the one dated 30th May, 2011. Nyathi says he wanted to find out if Applicant is going to maintain his resignation or withdraw it since they had amicably addressed and settled the grievances that allegedly made the Applicant to resign. It is in that separate encounter with the Applicant where the latter confirmed that he would abandon the resignation and go back to work, saying he was angry at the time of writing the resignation letter, according to Nyathi's evidence.

24. True to his word, so says Nyathi, the Applicant did proceed with his duties pursuant to that meeting and continued working till sometime mid-June, 2011 when he suddenly disappeared without any notification to the employer. Non-the-less the company did prepare Applicant's wage for the days worked in June, 2011 and deposited it into his bank account. This is the sum of **E1, 089.55** which was deposited into Applicant's bank account on the 5th July, 2011. Besides this bank deposit, Mr. Nyathi testified that an earlier deposit had been made into Applicant's bank account, that being in respect of the salary short-falls for the previous months. This should be the sum of **E1, 100.00** which the Applicant confirmed in his evidence to have received.
25. Consequently, it was Mr. Nyathi's evidence that he did honor his undertaking to settle the employees' wages shortfalls and he did that immediately after the meeting he had with the employees and further ensured that payment of salaries in future are not delayed. He, therefore, dispute that the Applicant's disappearance later on was linked to the grievances which were amicably addressed in the meeting he had with the employees jointly and with the Applicant separately. Nyathi says he did trace the Applicant by making phone calls to him, though unsuccessfully since Applicant's

cell-phone number was either off-network or would ring without being picked-up.

26. Mr. Nyathi further disputed the alleged supervisory role of the Applicant whilst under the Respondent's employ, saying the well known procedure in the company is that if an employee is promoted to being a Supervisor, an official memorandum is issued to alert the other workers so that they could give him the deserved respect. He further disputed that his employees were not paid for working on public holidays and that some were denied their off-days, saying there is always an extra person who serves as a reliever for employees who are due to take their off-days.
27. Nothing much turned out from the cross-examination of this witness which displaced his evidence in chief.
28. What is pertinent for mention from RW2's evidence – Mr. Mlondi Dube, is that he also confirmed the evidence that Applicant did remain at work for the Respondent till sometime mid June, 2011 and that thus his last day at work was not 31st May, 2011. He says he was posted together with the Applicant at Bayabonga Complex towards the end of May, 2011 where he worked together with the Applicant till his disappearance in June, 2011.

ANALYSIS OF THE EVIDENCE

29. The Applicant's claim against the Respondent is based and/or founded upon **Section 37** of the **Employment Act No.5 of 1980**. He is arguing that his continued employment was made intolerable by the Respondent through its conduct as contained in his evidence. He therefore claimed that the termination of employment was at the Respondent's instance and prays for compensation for constructive dismissal, notice pay, underpayments, unpaid off-days, unpaid public holidays, leave pay, overtime, uniform deductions and unpaid wages.

30. **Section 37** of the **Employment Act** 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." (Emphasis added).

31. The Commission's function, therefore, is to look at the employer's conduct as a whole and determine whether its

effect, judged reasonably and sensibly, is such that the employee could not be expected to put up with it. The test 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 and the onus of proof is on the Applicant. Refer to **Samuels S. Dlamini vs. Fairdeal Furnishers (Pty) Ltd, Case No. 145 of 2000 (Industrial Court)** where his Lordship the then Judge President of the Industrial Court N. Nduma stated the position of the law as follows:

“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 thereof).

See also: Jameson Thwala vs. Neopac (Swaziland) Limited - Case no. 18/1998 (IC) (Page 5).

32. Trengove AJ (as he then was) in **Mafomane vs. Rustenburg Platinum Mines Ltd [2003] 10 BLLR (LC)** stated that:

“The requirement that the employee prove that his or her continued employment had become intolerable, has the following implications:

The test is an objective one. It means that the employee must prove at least two things. The first is that the circumstances had become so unbearable that the employee could no longer reasonably be expected to endure them. The second is that there was no reasonable alternative to escape those unbearable circumstances, than to resign.

When the latter issue is considered, it must be borne in mind that the termination of an employment relationship is usually only appropriate as a remedy of last resort. An employee who resigns to escape an oppressive working environment despite the fact that there are other avenues of escape open to him or her will usually find it hard to characterize the resignation as a constructive dismissal... (Emphasis added) at page 1012.

See also: Old Mutual Group Schemes vs. Dreyer (1999) 20 ILJ (LAC), at paragraphs 9, 16 to 18.

33. In the present case, the conduct complained of by the Applicant pertained some alleged unpaid wages, delayed payment of wages, underpayments, unpaid public holidays, denied off-days, unlawful salary deductions and unpaid overtime.
34. From these grievances, the Respondent's Director conceded with some, being in respect of certain shortfalls in payment of wages once in a while and the delay in effecting payments at times. The rest are disputed and Applicant was put to strict proof thereof.
35. Non-the-less the Respondent denies that these grievances could justify the Applicant's resignation on the basis of constructive dismissal, more because Applicant was not the **only** affected employee as evidenced by the collective employees' grievance letter of the 27th May 2011 signed by the Applicant and three other co-workers.
36. Moreover, the parties had had a joint meeting with all the affected employees, including the Applicant who had tendered a resignation letter by then, wherein the employees' grievances were thrashed and amicably settled. That this meeting was indeed held is common cause from the evidence adduced by both parties.

37. What is disputed is the separate one-on-one encounter between the Applicant and the Respondent's Director at the end of the joint staff meeting. Further in dispute is whether or not the Applicant did continue in service of the Respondent after that staff meeting.
38. The Applicant, when giving his evidence in chief did unequivocally state that during the month of May, 2011 extensive negotiations or discussions over the alleged grievances were held between him and the Respondent's Director - Mr. Nyathi. He stated that at the time he was still stationed at Bayabonga complex. Mr. Nyathi only mentioned that a joint staff meeting was held pursuant to the collective employees' complaint contained in their letter of the 27th May, 2011. It was at the end of this joint meeting that a private discussion was held between him and the Applicant. Furthermore, the only evidential documentary evidence which demonstrates that the Applicant did raise his grievances to the employer is the joint letter of the 27th May 2011 followed by his individualistic letter dated 30th May, 2011.
39. The trail of evidence that is before me is such that it therefore begs question as to which are these extensive discussions Applicant is referring to if not those held during the staff meeting of the end of May, 2011? He confirms that

he had already resigned when that meeting was held, though he did attend. The further question then becomes as to what was his business in that staff meeting if he no longer had interest in the address of the employees' grievances? What were the alleged elaborate discussions between him and Mr. Nyathi all about if they were not about settling the grievances? The Applicant never testified that his meetings or discussions were held before the joint staff meeting and the venue where they were held was not mentioned.

40. The Applicant, in his own letter dated **30th May 2011** (paragraph 3 thereof from the bottom) where he highlighted the amounts claimed from the Respondent, being in respect of underpayments, leave pay, overtime and arrear wages, he expressly stated that:

“Should the company wish to discuss this matter with myself, I would gladly avail myself whenever requested to.”

41. This is an unambiguous invitation to the employer to consider the Applicant's grievances as at the end of May, 2011 the very same date he tendered his resignation letter also dated **30th May, 2011**.

42. The Respondent Director's evidence was coherent and logical. It is very logical that if at the time the joint staff meeting was held the Applicant had already tendered his resignation letter, the Director had to have a special discussion with the Applicant about the resignation- to find out whether he was continuing with it or would abandon it. The resignation was in writing and the employer could not play blind to it, more especially because the Applicant was in attendance to a staff meeting which was held after he had delivered his resignation letter and was thus no longer an employee (or staff) by then. This reasoning, coupled with the ambiguity as to the elaborate discussion referred to by the Applicant, persuade me to find that the employer's evidence is the one more probable than that of the Applicant in this regard.

43. My finding also get support from the evidence adduced by Applicant's second witness - Mr. Doctor Ndlangamandla, who confirmed without doubt that the Applicant was present at work till sometime mid-June, 2011. This piece of evidence is corroborated by Mr. Nyathi as well as by RW2.

44. Therefore, if Nyathi is saying, to confirm that Applicant and him were able to settle the issues in the meeting held end of May, Applicant did abandon his resignation and proceeded with work till his disappearance sometime mid-June, 2011,

he undoubtedly falls to be judged correct. Applicant himself confirmed to have received both the shortfalls in his salaries immediately after the meeting of end of May, 2011 as well as some other payment in July, 2011. The Respondent explains this latter payment as remuneration for the days worked by Applicant in June, 2011, before his unnotified disappearance.

45. Now, the big question is: was Applicant entitled in law to belatedly maintain his resignation on the basis of the very same issues that had been settled by the parties without giving the Respondent an opportunity to reform? An appropriate answer to this question can only be in the negative. Consequent to the meeting of the end of May, 2011 the employer rightfully deserved, in my judgment, a fair chance to prove himself that he has changed or reformed.
46. Signs of reformation were apparently manifest in that immediately after that meeting the arrear wages' shortfalls were made good. It therefore had to be seen if there was not going to be some change even as with regards to the other grievances, something which had to be observed over time.
47. In **Aarons vs. University of Stellenbosch [2003] 7 BLLR 704 (LC)** the learned Judge Waglay held that employees

who claim constructive dismissal must prove, amongst other factors, that they resigned because they did not believe that the employer would rectify the situation.

48. In the leading case of **Pretoria Society for the Care of the Retarded vs. Loots (1997) 18 ILJ 981 (LAC)** the test was formulated as follows:

“When an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfill what is the employee’s most important function, namely to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating unbearable work environment....” (Emphasis added.) At page 948 E-F.

49. Furthermore, referring to the case of **Mafomane vs. Rustenburg Platinum Mines Ltd** (already cited herein above) where it was held that the employee must also prove that he or she had no other reasonable alternative or option to escape the unbearable circumstances than to resign, it

was still well within the Applicant's legal right to report a dispute at CMAC to enforce his statutory rights. Even this the Applicant unexplainably did not do despite the fact that it was a cost-free and reasonable option that was available to him.

50. The issues complained of are not interest dispute issues but rather issues of right derived from statute, i.e. either the Employment Act or the Wages Regulations for the Security Industry. If unjustifiably deprived of a legal right derived from statute and/or duly gazetted wages regulations, an employee need not simply resign, but should approach the lawfully established agencies, CMAC being one, to vindicate his rights. Alternatively, if the exigency of the matter so demands, approach the Industrial Court on urgent basis for the appropriate remedy, in particular as with regards to the issue of alleged unpaid wages. No excuse was advanced by Applicant as to why these options were not explored in lieu of the resignation.

51. In **Smithkline Beecham (Pty) Ltd vs. CCMA & Others [2000] 3 BLLR 344 (LC)** the Court emphasized that:

“A constructive dismissal can only take place in circumstances where, objectively speaking, the employer's intolerable conduct left the employee with

no option but to resign. The subjective perceptions of the employee are not permitted to colour the assessment or otherwise of the employer's actions."

See also: Lubbe vs. ABSA Bank Bkp [1998] 12 BLLR 1224 (LAC).

52. Ntsebeza AJ in **Kruger vs. CCMA & Another [2002] 11 BLLR 1081 (LC)** concluded that:

"...When there are remedies available to an employee which had not been exhausted,..., the employee had not discharged the onus that she was constructively dismissed. An employee may not choose constructive dismissal while other options are available."

53. It must be mentioned that inasmuch as the conduct complained of could ultimately result to constructive dismissal if perpetrated unabatedly and with impunity by the employer, employees should be very slow to opt for resignation simply because they want to push a claim for compensation. Authority is more than enough for the proposition that a decision to resign merely to lay basis for a claim of damages against the employer cannot be construed as constructive dismissal. ***"The Courts have consistently required very strict proof of constructive dismissal,***

and have not readily found that circumstances complained of by employees constitute such a dismissal.” (Per Judge Yekiso in **Murray vs. Minister of Defence [2006] 8 BLLR 790 (HC)** at page 801, Paragraph 29).

54. In order for the employee, therefore, to succeed on a claim founded on constructive dismissal, and based on the authorities cited above, the employee must be able to prove that he or she has terminated the employment contract; that the conduct of the employer rendered the continued employment intolerable; that the intolerability was of the employer’s making; that the employee resigned as a result of the intolerable behavior of the employer and that the resignation or termination of employment was a matter of last resort. Finally, the employee bears the onus to prove that there has been constructive dismissal and that he or she has not in fact resigned voluntarily.

See: Murray vs. Minister of Defence [2006] 8 BLLR 790 (HC) at 801, paragraph 31.

55. In this case the Applicant cannot be said to have met the above test and his claims against the Respondent should accordingly fail. Consequently, the following award is made:

AWARD

56. The Applicant has failed to prove a case of constructive dismissal against the Respondent.
57. In the premises, the application should fail and is accordingly dismissed in its entirety.
58. No order for costs is made.

DATED AT MANZINI THIS DAY OF MARCH, 2012

**MTHUNZI SHABANGU
COMMISSIONER - CMAC**