



**IN THE CONCILIATION MEDIATION AND ARBITRATION
COMMISSION**

HELD AT MBABANE

REF NO. SWMB 334/11

In the matter between:

KHUMBULA DLAMINI

APPLICANT

AND

**LIMKOKWING UNIVERSITY
(SWAZILAND)**

RESPONDENT

Coram

ARBITRATOR	:	VELAPHI Z. DLAMINI
FOR APPLICANT	:	IN PERSON
FOR RESPONDENT	:	MR. SIBUSISO ZIKALALA

ARBITRATION AWARD

DATES OF ARBITRATION :	28 th , 29 th FEBRUARY AND 13 th MARCH 2012
VENUE :	CMAC OFFICE 1 ST FLOOR ASAKHE HOUSE MBABANE

1. DETAILS OF PARTIES AND HEARING

The arbitration hearing was held on the above dates at the premises of the Conciliation Mediation and Arbitration Commission (CMAC) at First Floor Asakhe House, Mbabane.

The Applicant is Khumbula Dlamini, an Adult Swazi Male of P.O. Box 7242 Mbabane. Khumbula Dlamini appeared in person to conduct his case.

The Respondent is Limkokwing University (Swaziland) of P.O. Box 2336 Mbabane. The Respondent was represented by Mr. Sibusiso Zikalala, an Attorney from Currie & Sibandze Attorneys, in Mbabane.

2. ISSUE TO BE DECIDED

The issue for determination is whether or not the Respondent constructively dismissed the Applicant.

3. BACKGROUND OF THE DISPUTE

The Respondent is a tertiary institution and is based in Mbabane.

The Applicant commenced service with the Respondent as a General Worker cum Driver on the 27th May, 2011. He was in continuous employment until the 30th August, 2011 when he resigned alleging that he was constructively dismissed by the Respondent.

The Applicant's employment was based on a twelve (12) months fixed-term contract. At the time of tendering his resignation, the Applicant was earning a salary of E 3000.00 per month.

The Applicant reported a dispute for constructive dismissal, which was conciliated, however the dispute remained unresolved. The Commission then issued a Certificate of Unresolved Dispute No. 501/11. The parties referred the dispute to arbitration and I was appointed to decide same.

4. SURVEY OF EVIDENCE AND ARGUMENTS

I have considered all the evidence and arguments made by the parties, however because Section 17(5) of the IRA 2000 (as amended) requires concise reasons, I have only referred to the evidence and arguments which I deem to be relevant in substantiating my findings.

APPLICANT'S CASE

- a) Only the Applicant gave evidence in support of his case. He testified that whilst on duty on the 26th August 2011, the Respondent's Administrator Mr. Chen Meng Kong instructed him to give an explanation concerning the event of 25th August, 2011.
- b) The Applicant's evidence was that the Administrator demanded an explanation from him because he was accused of abusing the university's motor vehicle. Despite promptly giving a reasonable explanation on the 30th August 2011, the Human Resources Executive, Ms Lomini Dhlamini gave him a first written warning dated the 30th August, 2011 but was received by him on the 1st October, 2011. The warning was for using the University's vehicle for private use.
- c) The Applicant stated that on the 25th August, 2011, he did not abuse the motor vehicle, but there was a delay in picking up other members of staff who were at the Trade Fair. This delay was caused by Mr. Doctor Simelane, and other employees who were left behind but wanted to go to the trade fair, to change shifts with the others. These employees asked the Applicant to wait until they loaded all the items that were to be used at the trade fair.
- d) According to the Applicant on the 26th August, 2011, Mr. Chen Meng Kong in the company of the security personnel evicted him from the Campus at night whilst he was in the company of the mother of his child. Mr. Meng Kong also

took the motor vehicle keys and this was the last straw that broke the camel's back. On the 30th August, 2011, he then resigned because the Respondent's conduct towards him had become intolerable.

- e) The Applicant stated that the Respondent had treated him unfairly since May, 2011 when he was instructed to vacate his house on campus. Whilst he was still looking for alternative accommodation, on the 1st September, 2011 the Respondent gave him forty-eight (48) hours to vacate the campus. The Respondent unfairly discriminated him because other employees were not forced to leave campus.
- f) Under cross-examination, the Applicant admitted that he used the university's motor vehicle on the 26th August, 2011 to run personal errands, which included giving a lift to his girlfriend outside campus and entering the premises of the Respondent to spend some time together.
- g) The Applicant also admitted that he had an intimate affair with a student of the university, but qualified that she was the mother of his child and the relationship started before she enrolled at the university. However the Applicant denied that he was aware of the university's policy which prohibited intimate relationships between staff members and students.
- h) It was also admitted by the Applicant that he did discuss with Zacharia Mtsetfwa about job prospects at Salgaocar and Correctional Services; however he denied that he went as far as asking him what the procedure for resigning at Limkokwing University was. Further he denied that he resigned because he had secured a job at Salgaocar.
- i) The Applicant admitted that the university had requested him and other employees in May, 2011 to vacate campus to give way for expatriate academic staff.

- j) The Applicant submitted that he had proved that the Respondent's conduct towards him was intolerable and justified his resignation. He prayed for reinstatement alternatively payment of the remaining period of the contract.

RESPONDENT'S CASE

- a) The following witnesses gave evidence in support of the Respondent's case: Lomini Dhlamini, the Human Resources Executive; Doctor Simelane, the Operations and Resources Officer and Zacharia Mtsetfwa, the Student Services Executive.
- b) It was the Respondent's evidence that when the trade fair started in August 2011, the Applicant asked Zacharia Mtsetfwa what the procedure for resigning at Limkokwing was. The Applicant informed the Students Services Executive that he wanted to resign because he had been offered a job at Salgaocar. Mtsetfwa advised the Applicant to serve one month's notice.
- c) According to the Respondent's witnesses after the conversation with Mtsetfwa, the Applicant started abusing the university's motor vehicle by running personal errands, which included giving lifts to his girlfriend who was a student at the university.
- d) It was against university policy for employees to have intimate relationships with students. Although this policy was not written, the Applicant was verbally notified by Ms. Ida, the University Director about this rule.
- e) It was also the Respondent's case that the Applicant had refused to vacate his house on campus, which was reserved for expatriate staff. The Applicant had refused since May, 2011 until the day he resigned. Although the Respondent had been reasonable and had given him sufficient time to find

alternative accommodation, the Applicant continued to occupy the bed-sitter against the Respondent's instructions.

- f) On the 30th August ,2011, the Applicant was issued with a first written warning for abusing the university's motor vehicle .He had been given sufficient time to give an explanation, but he had failed.
- g) On the 26th August 2011, the Applicant was found at night on campus in the company of his girlfriend inside the company motor vehicle. Mr. Cheng Kong requested him to leave campus because his behaviour was now undermining discipline at the university. The Respondent denied that it took the motor vehicle keys and instructed the Applicant not to perform his duties. He was still a General Worker cum driver. The Applicant was assigned driving duties as and when the need arose.
- h) Although he had resigned on the 30th August, 2011, since he was still serving notice, on the 1st September, 2011, the Respondent gave him a second written warning for the misconduct of the 26th August, 2011.
- i) The Respondent requested the Applicant to serve his notice at home because he had now become incorrigible. The Respondent came to this decision because the Applicant attended a Smart Partnership meeting on a university ticket, yet he was not authorized to do so. Besides he had already resigned. Further after he had resigned, he refused to work overtime.
- j) The Respondent's counsel submitted that the Applicant bore the onus to prove, on a balance of probabilities that the Respondent's conduct towards him was such that he could no longer reasonably be expected to continue in his employment.
- k) It was submitted by the Respondent that the Applicant had failed to prove that its conduct towards him was unfair or

unlawful. Consequently the Applicant failed to prove constructive dismissal. The Respondent prayed for a dismissal of the Applicant's claims.

5. ANALYSIS OF EVIDENCE AND ARGUMENTS

Section 37 of the Employment Act 1980 provides that ;

“When the conduct of an employer towards an employee 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”

In the case of **Timothy Mfanimpela Vilakazi v Anti – Corruption Commission and others (IC case no. 232/02)** at 5 the learned **Nkonyane J** made the following statement of law:

“The burden of proof in constructive dismissal cases is therefore on the employee to show that the conduct of the employer was such that the employee could no longer reasonably be expected to continue in his employment. It is an objective test.”

The learned **Dunseith J P** in the matter of **Nana Mdluli v Conco Swaziland Limited (IC case No. 12/04)** at para 4 cited with approval the South African Labour Appeal Court decision in the case of **Pretoria South Society for the care of the Retarded v Loots (1997)18 ILJ 981 (LAC)**, which pronounced 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 an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned.”

It has been held by the Industrial Court that, the conduct that the employee complains about must be unlawful and unfair before the employee can invoke the provisions of Section 37 of the Employment Act. See **Nana Mdluli v Conco Swaziland Limited** (supra); **Samuel S. Dlamini v Fairdeal Furnishers (IC case No. 145/00)**

The Industrial Court has also held that before the employee invokes the provisions of Section 37 of the Employment Act, she must exhaust internal remedies. See **Jameson Thwala v Neopac (Swaziland) Limited (IC case no.18/1998)**. However the Court in the case of **Nana Mdluli** (supra) cited with approval the case of **LM Wulfohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre and others (2008) 29 ILJ 356 (LC)** where the court qualified the foregoing principle.

In the case of **LM Wulfohn Motors** (supra), the learned **Basson J** made the following observation:

“Where it appears from the circumstances of a particular case that an employee could or should reasonably have channeled the dispute or cause of unhappiness through the grievance channels available in the workplace, one would generally expect an employee to do so. Where, however, it appears that objectively speaking such channels are ineffective or that the employer is so prejudged (sic) against the employee that it would be futile to use these channels, then it may well be concluded that it was not a reasonable option in the circumstances.”

Applying the above principles, I now turn to examine the events and circumstances that led to the Applicant’s resignation, to determine whether he has discharged the onus of proof resting upon him.

According to the Applicant's letter of resignation, the reason for resigning was that he and his girlfriend were "kicked out" of his room on the 26th August, 2011 thus spending the night in the "cold."

It is common cause that the Applicant used the university's motor vehicle to pick his girlfriend outside campus and came into the premises of the Respondent. There is also no dispute that his girl friend was a student at the university.

There is also no dispute that the Human Resources Executive requested the Applicant to declare the relationship to the university authorities. This came about because the Applicant had indicated that he would not sever ties with her because she was the mother of his child. However the Applicant failed to make the declaration and was evasive about her full and further particulars.

Although the Applicant denied knowledge of a verbal policy that prohibited intimate relationships between staff and students. I find that the Respondent's version is the more probable one. The Applicant admitted that Ms. Ida and Lomini Dhlamini had discussed this issue with him. The Applicant's failure to come clean on the full particulars of his girlfriend was to his peril. The university cannot be faulted for enforcing its policy. If the university was perceived by other staff members and students as condoning the Applicant's actions, then this would have resulted in the deterioration of discipline at the institution. I find that the university acted lawfully and fairly by requesting the Applicant and his girlfriend to leave the campus on this day (26th August 2011).

If the Applicant felt aggrieved, he should have raised this issue with the university authorities first thing on the following Monday, the 29th August 2011, however he did not, instead he rushed to resign on the 30th August, 2011. I do not think the Respondent was prejudiced against the Applicant so as to render reporting a grievance by him ineffective. This was the same employer who had acted reasonably by giving the Applicant more than three (3) months to vacate campus, despite being under pressure to provide accommodation to expatriate Lecturers.

I did not consider that the first written warning issued by the Respondent against the Applicant was unfair. The Applicant was required to give an explanation on the 26th August 2011, about the events of the 25th August 2011. This date was on a Thursday and 26th August 2011, was a Friday. Assuming that he was too preoccupied on the 26th, he could have given the written explanation on 29th August 2011.

The Applicant claimed that the first written warning was given after he had given the explanation. Even assuming this was true, if he received the first written warning on the 1st September 2011, as he claimed then the first and second written warnings could not have influenced his decision to resign because he tendered his resignation on the 30th August 2011.

It is apposite for me to make the following observation. In the case of **Simon Dlodlu v Emalangeni Foods (IC case no.47/04)** at paras 14.1-14.2 the court held;

“Resignation is a unilateral act which brings about termination of the employment relationship without requiring acceptance by the other party. see-Rustenburg Town Council v Minister of Labour and others 1942 TPD 221; Du Toit v Sasko (Pty) Ltd(1999)20 ILJ 1253(LC); Van Jaarsveld & Van Leek; Principle of Labour Law para 214; John Grogan’s Work Place Law seventh edition at 108.”

Whether or not the Applicant had served the one month notice and during that period committed misconduct was immaterial. He had resigned on the 30th August, 2011.

The Applicant alleged that the motor vehicle keys were taken from him and thus he was prevented from working. The Respondent denied this, however the university, alternatively argued that in any event, the Applicant was a General Worker who was asked to drive the motor vehicle from time to time. His designation was not only Driver.

I find that, the Applicant has proved that the university had taken the motor vehicle keys from him, however in the circumstances of this case, it was lawful and fair to do so. The Applicant’s abuse of the motor vehicle was rampant. The university was within its rights to protect its property

from an unruly employee by taking motor vehicle keys and demanding an explanation how he was using it.

Although the Applicant denied that he informed Zacharia Mtsetfwa that he had been employed at Salgaocar and wanted to leave the university's employ, he admitted that they discussed job prospects at Salgaocar and Correctional Services. Mtsetfwa maintained that the Applicant informed him about the job offer. Mtsetfwa's narration of the conversation was so detailed and clear and the Applicant's was just a bare denial. I am more inclined to believe Mtsetfwa's version than the Applicant's on this aspect.

I find that the Applicant resigned because he had been offered a job at Salgaocar. His behavior from the 25th to the 30th August 2011 demonstrated that he no longer cared about his job at the university.

I also find that the Applicant has failed to prove that the Respondent constructively dismissed him.

The following order is made:

6. AWARD

I find that the Applicant was not constructively dismissed by the Respondent, but resigned voluntarily.

The Applicant's claims are dismissed in their entirety.

I make no order for costs

DATED AT MBABANE ON THIS ____ DAY OF APRIL 2012

VELAPHI Z. DLAMINI
CMAC ARBITRATOR