



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

**HELD AT MBABANE**

**SWMB**

**99/14**

In the matter between:-

**OSCAR THABISO SIMELANE**

**APPLICANT**

**And**

**GREEN CHILLI RESTAURANT**

**RESPONDENT**

CORAM:

**Arbitrator** : Mr Bongani.S Dlamini

**For Applicant** : In person

**For Respondent** : Mr M.H Chowdhury

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**ARBITRATION AWARD**

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1. **PARTIES AND REPRESENTATION**

- 1.1. The Applicant is Mr Oscar Thabiso Simelane an adult Swazi male of Mahwalala area in Mbabane, Swaziland. During the arbitration hearing, the Applicant appeared in person and had no legal representation.
- 1.2. The Respondent is Green Chilli Restaurant, a food outlet operating at the Corporate Place, Swazi Plaza, Mbabane, District of Hhohho. The Respondent is under the directorship of Mr M.H Chowdhury who at all material times was the person defending the Respondent in these proceedings.

## 2. **ISSUE IN DISPUTE**

- 2.2. This is a case of alleged unfair dismissal. The Applicant's case is that he was unlawfully dismissed from his employment after he had tabled a number of grievances to the Respondent on behalf of the employees of the Restaurant.
- 2.3. The Respondent on the other hand argued that the termination of Applicant's services was fair and reasonable in all the circumstances of the matter as the Applicant was still on probation and had failed to meet the expectations of the Respondent in carrying out his duties during the probationary period. The Respondent also argued that the Applicant had, during his short tenure as Acting Manager of the Restaurant acted

unprofessionally by making sexual advances to the female employees of the Respondent.

2.4. The matter was first reported to the Conciliation, Mediation and Arbitration Commission (CMAC) on or around the 24<sup>th</sup> March 2014. In the Certificate of Unresolved Dispute, the following forms of relief are requested by the Applicant;

- i) Notice pay (E 3 800.00)
- ii) Balance of salary (E2 800.00)
- iii) Maximum compensation for automatic unfair dismissal (E 91 200.00)

2.5. After the matter had gone through conciliation, a Certificate of Unresolved Dispute was issued by the Commission on the 06<sup>th</sup> June 2014. On the 23<sup>rd</sup> September 2014 the parties signed a Request for Arbitration Form, thereby voluntarily subjecting themselves to arbitration under the auspices of CMAC in accordance with the Industrial Relations Act, 2000 (as amended).

2.6. I was appointed as Arbitrator in the matter on the 22<sup>nd</sup> October 2014 and I concluded the matter on the 24<sup>th</sup> November 2014 after which I reserved my ruling on the issues till further notice.

### **3. NATURE OF EVIDENCE PRESENTED DURING HEARING**

3.1. The Applicant was the first person to give testimony in the case and further called three witnesses to give testimony on what they knew of the events leading to Applicant's dismissal.

3.2 Similarly, the Respondent relied on the evidence of its Director, Mr M.H Chowdhury and two other witnesses who are in the employment of the Respondent.

### **4. THE APPLICANT'S CASE**

Mr Oscar Simelane's testimony was that he was employed by the Respondent on the 31<sup>st</sup> December 2013 as Manager within the Respondent and was to earn the sum of E 3 800.00 per month. The Applicant stated that for the first month, it was agreed between himself and the Respondent's Director that Applicant was to earn the sum of E 1200.00 as the Restaurant had just started operations. According to the Applicant, the agreement was that in the following month, the difference between the sum of E 3 800.00

and the sum of E 1200.00 would be paid to him as the business would have picked up by then. The Applicant's testimony was that his services were terminated by the Respondent on the 4<sup>th</sup> March 2014.

Giving an account of the events leading to his dismissal, the Applicant's testimony was that the Respondent's business started being fully operational in February 2014. At the end of the month of February 2014, the employees of the Respondent had been paid half of their salaries and this had prompted the employees to approach him as Manager to request that their grievances be addressed.

The Applicant's testimony was that he then approached the Respondent's Director and informed him about the grievances by the employees. The Applicant stated that he informed the Respondent's Director that the employees had indicated that they would all leave their work place if they were not paid their salaries in full.

In response to the grievance as related to him by the Applicant, the Respondent's Director was unhappy and enquired from Applicant as to who exactly among the employees had said that they wanted to leave. The Response from the Applicant was that it was all the employees.

According to the Applicant, the Respondent's Director had then said that the Applicant was lying and that he was the one intent on causing disharmony at the Restaurant. The Respondent's Director had then informed the Applicant that he was being dismissed on the spot.

The Applicant's testimony was further that he later learnt that some employees in the Restaurant had been made to sign letters to the effect that he (Applicant) was sexually harassing them at the workplace and that he learnt about this after he had commenced processes of reporting the Respondent to the Conciliation Mediation and Arbitration Commission.

During cross-examination, the Respondent's Director sought to establish that the Applicant was not qualified for the position of Manager since he was clueless about the preparation of Indian menu dishes and also that he did not have any expertise about managing a restaurant. The Respondent's Director also sought to prove that the Applicant was lying when he alleged that the employees of the Restaurant were complaining about not being paid their full salaries and that they were threatening to leave the Restaurant. The Applicant was also cross-examined about the allegations of sexual abuse and the fact that he was

still on probation and that he had failed to demonstrate any knowledge of managing a Restaurant which had resulted in him not being confirmed to the position of Supervisor or Manager of the Restaurant. The Respondent's Director also cross-examined the Applicant at length about the alleged salary of E 3 800.00 in terms of which the Respondent denied that there was an agreement of that nature. All of these issues were denied by the Applicant.

The second witness to give testimony in favor of the Applicant was one Nduna Sakhe Nsimbini. This witness's testimony was that what he knows in relation to the matter before CMAC is that the Applicant was dismissed for carrying out a mandate given to him by the employees of the Respondent. Mr Nsimbini stated that as employees they were unhappy about the arrangement of being paid half of their salaries. As employees, they then assigned the Applicant as Manager to convey their grievances to their employer. The witness further stated that after the dismissal of the Applicant, they then got wind of allegations that the Applicant was being accused of sexually molesting the female employees of the Respondent which according to this witness were a fabrication against the Applicant.

The third witness to give testimony on behalf of the Applicant was Nomfundo Sithole. The evidence by this witness was that she was employed by the Respondent and was working in the Kitchen. The witness stated that as employees they had a number of grievances including not being allowed to take off days and being given half pay. The employees had then decided to approach their Manager about their grievances. The Applicant had then called all the employees to a meeting to establish the cause of complaint. According to this witness, during the meeting, the Respondent's Director showed up and demanded to know what the meeting was about and who had convened it.

The Applicant had owned up to calling the meeting so that

he could address the employees on their grievances. The Director had demanded who was complaining and what the complaint was about. None of the employees owned up to having registered a complaint with the Applicant since the Respondent's Director showed signs of being angry. The Applicant was therefore left alone to defend himself. The Respondent's Director had then concluded that it was the Applicant who was perpetrating acts of sabotage against the Respondent and for that the Applicant was dismissed on the spot.



It was further stated by this witness that she is one of the employees who had been approached by the Respondent's Director to accuse the Applicant of sexual misconduct but she declined to be part of an unlawful scheme. According to this witness, the Respondent's Director had called the female employees to an open space and had urged them to write that Applicant was sexually abusing them. Some of the employees had agreed to do this while others declined to do so.

During cross-examination of this witness, the Respondent's Director sought to establish that the witness was a girlfriend to the Applicant and therefore that she was bound to lie for him. The witness admitted that she was involved in a love relationship with the Applicant but denied that she was lying in her testimony about the sequence of events leading to Applicant's dismissal.

The last person to testify on behalf of the Applicant was Lucky Shongwe. This witness stated that during the time of Applicant's dismissal, he was an employee of the Respondent and was working as an Assistant Chef. It was stated by this witness that as employees of the Respondent, they had assigned the Applicant the

responsibility of dealing with their grievances, in particular the failure by the Respondent to pay them their full salaries. This witness stated that they were surprised to learn that the Applicant had been dismissed for attempting to assist in resolving their dispute with the Respondent. The witness also stated that after Applicant's dismissal, allegations started circulating that he had been involved in sexually molesting the female employees of the Restaurant, something which had not happened whilst Applicant was still in the employment of the Respondent.

5. **THE RESPONDENT'S CASE**

The Respondent's Director gave his testimony on the events leading to Applicant's dismissal. In summary, the testimony by the Respondent's Director was that the Applicant was to be paid the sum of E 1200.00 as his salary since he was still on probation. It was stated by this witness that the discussions between himself and the Applicant was that in the event that the Applicant was able to pass the test of managing the Restaurant during the probationary period, further discussions would be held between the parties on how the Applicant would be remunerated. This witness denied that he could ever agree to paying a sum of E 3 800.00 without even knowing what expertise that

person had in running an establishment such as that run by the Respondent.

According to this witness, during the period of less than one month in which he personally observed the Applicant working in the Restaurant, he observed that the Applicant had no idea whatsoever about the operations of the Restaurant and what was expected of him. In particular, the Applicant could not cook or give advice on the preparation of special Indian dishes, was unable to assist the Waiters in the taking of proper orders from customers or teach the employees about proper standards of treating customers of the Restaurant. It was stated by this witness that the Applicant lacked the qualities of a Manager and was in fact failing in all the areas of managing the Restaurant. The Respondent's Director further stated that the Applicant was expected to be the last person to leave the Restaurant so that he could ensure that switches are turned off, the Restaurant is properly locked and that everything was in order. However the Applicant, according to this witness was the first person to leave the Restaurant and would also be absent without explaining his whereabouts.

This witness also stated that he had received complaints of sexual abuse from the female employees

of the Restaurant against the Applicant in which it was alleged that the Applicant was teasing them and that he was touching them on their buttocks.

During cross-examination, the Applicant sought to establish that the Respondent's Director had bribed the female employees to make the false allegations against him because the Director was unhappy that a complaint of unfair dismissal had been made against him at CMAC. The Applicant wondered why the accusations only surfaced after he had left the Respondent's employment. It was also put to the Respondent's Director that one of the employees who had been coerced into writing a letter of complaint had approached the Applicant to apologise for the false accusations made against him. The Applicant further put it to the Respondent's Director that if he had been incompetent in the performance of his duties as alleged by this witness, then he ought to have been called to a disciplinary hearing. The Respondent's Director denied that he was under an obligation to call the Applicant to a disciplinary hearing since Applicant was not yet an employee but was still on probation.

The Respondent's Director then called two witnesses, one Bonga Mthimkhulu and Ntsiky Phieby Cebe. Both these witnesses gave testimony to the effect that they

were sexually assaulted by the Applicant who had the tendency to tap them on their buttocks. Ntsiky Cebe stated that the Applicant was sending her text messages in her cellphone in which the Applicant would profess his love for her and further invited her to his place on weekends. The Applicant denied all the allegations made against him by these witnesses.

## 6. **ANALYSIS OF EVIDENCE AND ARGUMENT**

The question to be decided is whether or not the dismissal of the Applicant was fair and reasonable in terms of the standards considered to be acceptable in employment matters. When the assessment is made as to whether a dismissal is fair or unfair, reasonable or unreasonable, attention is paid to two important factors namely, the **procedure** adopted by the Employer in terminating the services of the employee as well as the **substance** or the grounds for the termination of the employee in question.

When an employee is aggrieved by the decision of his or her employer, the Court or Arbitrator is called upon to independently determine whether the correct procedure was applied by the employer in terminating

the services of the employee and also to determine whether the reason or ground for terminating the services of the employee can be said to be fair and reasonable given the circumstances of the case. The determination by the Court or Arbitrator is guided only by the facts and the evidence adduced at the hearing of the matter and nothing else outside of these two considerations.

In this matter, clearly the procedure for terminating the services of the Applicant cannot be said to have been fair. The fact that a person is still serving probation does not mean that the principles of a fair hearing must be dispensed with.

The Respondent's Director argued vehemently that he was under no obligation to conduct a disciplinary hearing against the Applicant since the latter was still on probation. This assertion by the Respondent does not find support in the law. The Respondent's position is founded in Section 32 (1) of the Employment Act, 1980 (as amended) which states that;

***“During any period of probationary employment as stipulated either in the form to be given to an employee under Section 22, or in a collective***

***agreement governing his terms and conditions of employment, either party may terminate the contract of employment between them without notice.”***

On a similar note, Section 35 (1) of the Employment Act provides that;

***“This Section shall not apply to-***

- (a) An employee who has not completed the period or probationary employment provided for in Section 32.***
- (b) An employee whose contract of employment requires him to work less than twenty-one hours each week***
- (c) An employee who is a member of the immediate family of the employer***
- (d) An employee engaged for a fixed term and whose term of engagement has expired.”***

These provisions of the Employment Act have been correctly held to be unconstitutional in ***THULISILE MNGOMEZULU v SWAZILAND FRUIT CANNERS (PTY) LTD IC CASE***

**NO.496/2009** (Unreported). In dealing with the law, the Court in this case had this to say;

***“It is clear from the above provision [on equality as enshrined in the Constitution] that all people should get a fair treatment before and under the law. It follows therefore that probation is not an exception to this requirement of the supreme law of the land. In light of this provision of the Constitution, probation is no longer a license for the employer to dismiss an employee without any lawful reason just because that employee was still on probation.”***

On the issue of the merits of Applicant’s dismissal, it appears to me that what prompted the termination of Applicant’s dismissal is the convening of the meeting of employees by the Applicant in order to address their grievances. It is every Manager’s duty to receive complaints from employees of the organization and try to address those complaints. The Applicant cannot be faulted for seeking to address genuine concerns raised to him by the employees of the organization.

The Respondent’s Director expected the employees to understand his financial position and why he could not pay their salaries in full, by the same standard he was also expected to be understanding and tolerant to the



employee's grievances as opposed to flying into a rage when the Applicant was trying to address the concerns raised by the employees to him. It is difficult to understand how all the complaints relating to the alleged sexual misconduct suddenly arose after the termination of Applicant's services. For purposes of this award, I wish to emphasize that in my findings, the dismissal of the Applicant was prompted by the attempt on the part of the Applicant to resolve the grievances lodged to him by the employees of the organization. This is because according to the Respondent's own testimony, by calling the meeting of employees, the Respondent's Director concluded that it was the Applicant who had the intention of causing disruptions at the work place. If other issues did arise, they were of a secondary nature and did not play any role in the dismissal of the Applicant.

Having so said, my findings in the matter are therefore that the dismissal of the Applicant was both procedurally and substantively unfair. The next question to decide is whether the parties had agreed on a salary of E 3 800.00 per month and whether the Applicant is entitled to make a claim of automatic unfair dismissal.

On the evidence presented during the hearing, I am convinced by the Respondent's Director that no agreement

was reached for the payment of a sum of E 3 800.00 per month as salary for the Applicant. It is highly improbable, given the fact that the Respondent struggled to pay even the normal salaries of the employees that he would agree to pay a sum of E 3 800.00 per month to one person. The Restaurant was still new and virtually had no customers at that stage. I am inclined to agree with the Respondent's version on the figure to be paid as a salary to the Applicant.

On the issue of the claim itself, a dismissal that is automatically unfair is defined in Section 2 of the Industrial Relations Act, 2000 ( as amended) as follows;

***“automatically unfair dismissal means a dismissal where the reason for the dismissal is-***

- (a) That the employee participated in or supported, or indicated an intention to participate in or support a strike or protest action that complies with the provisions of Part VII;***
- (b) That the employee refused , or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Part VIII or was locked out, unless that work is necessary to prevent an***

***actual danger to life, personal safety or health;***

***(c) To compel the employee to accept a demand in respect of any matter of mutual interest between the employer and the employee***

***(d) That the employee took action, or indicated an intention to take action, against the employer by-***

***(i) Exercising any right conferred by this Act; or***

***(ii) Participating in any proceeding in terms of this Act***

***(e) The employee's pregnancy , intended pregnancy or any reason related to her pregnancy***

***(f) That the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.***

***(g) Despite subsection (f) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job.”***

The facts and the evidence adduced at the hearing do not support any of the grounds stated herein above. The approach by the Applicant was that since false allegations of sexual impropriety were being made against him following his report of dispute to CMAC against the Respondent, that he is entitled to make a claim of automatic unfair dismissal. The facts of the matter however do not support such a claim. Accordingly the claim of automatic unfair dismissal by the Applicant is hereby rejected.

## **7. LEGAL CONCLUSION**

I have already alluded to the fact that the Applicant's dismissal was unfair and unreasonable both procedurally and substantively. At the time of dismissal, the Applicant had worked not for more than three months for the Respondent. However the fact that the Applicant had worked for only a short period of time does not render the unfairness of the dismissal any better for the Respondent.

In the same way, the award must also take into account the interests of the Respondent especially the fact that the latter is new in business and also labored under the false understanding that he was not obliged to conduct a hearing prior to terminating the services of the Applicant. The Respondent cannot entirely be blamed for this state of affairs given the language used in the Employment Act, 1980 (as amended).

## **8. AWARD**

Having considered all the evidence presented during the hearing, the conclusion I make is that the applicant is to be compensated by the Respondent on the following basis;

**(a) Notice pay in the sum of E 1 200.00**

**(b) 5 months compensation in the sum of E  
6 000.00**

The Respondent is to pay the above sums of money to the Applicant through CMAC in Mbabane on or before the 15<sup>th</sup> January 2015.

**THUS DONE AND SIGNED ON THIS .....DAY OF  
DECEMBER, 2014.**

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**BONGANI S DLAMINI  
CMAC ARBITRATOR**