



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

HELD AT MBABANE

SWMB246/14

In the matter between:

THOKO VILAKAZI

Applicant

And

PINKY GLEEN

Respondent

CORAM:

Arbitrator : Commissioner Siphon Nyoni

For Applicant : In person

For Respondent : Mbhekwa Mthethwa

ARBITRATION AWARD

Venue : 1st Floor, Asakhe House Mbabane

Dates of Arbitration : 9th September 2014, 22nd September 2014,
29th September 2014, 6th September 2014 &
13th October 2014

Nature of Dispute : Unpaid wages

1. Details of Parties and hearing:

- 1.1 The Applicant is Thoko Vilakati an adult Swazi female of Fonteyn Mbabane, District of Hhohho.
- 1.2 The Respondent is Pinky Gleen an adult Swazi female of Fonteyn Mbabane, District of Hhohho.
- 1.3 The arbitration hearing was held at CMAC Mbabane Offices Asakhe House.

2. Issue to be decided:

- 2.1 The issue for determination pertains to whether the Respondent is liable to pay the Applicant the amount claimed as unpaid wages.

3. Background to the dispute:

- 3.1 The Applicant is a former domestic worker of the Respondent. The dispute between the parties pertains to unpaid wages.
- 3.2 The dispute was reported by the Applicant to the Commission and conciliated upon. At the conclusion of the conciliation process the dispute was certified as unresolved.
- 3.3 The certified issue in dispute as appears from the certificate of unresolved dispute is, unpaid wages in the amount of E 3,325.00.
- 3.4 The dispute was subsequently referred to arbitration with the consent of both parties and I was appointed to arbitrate the dispute.

4. Summary of the evidence:

4.1 The two witnesses including the Applicant testified in support of her case. A summary of the most important and relevant aspects of the Applicant's evidence influencing the outcome of this matter are detailed herein below.

Sibongile Ginindza (AW1):

4.2 The evidence of this witness was mostly hearsay and irrelevant. AW1's testimony was basically to confirm what she had been told by the Applicant concerning the Respondent. She testified that the Applicant had told her that the Respondent had employed her to do ironing for her. She further testified that the Applicant had subsequently informed her that she was having problems with the Respondent because the Respondent was not paying her as per the terms agreed upon when she was employed. Under cross examination the witness was asked if she was present when the Applicant and Respondent agreed on the terms of employment. AW1 confirmed that all that she had testified to was what the Applicant had told her and that she had never met the Respondent before.

Thoko Vilakazi (AW2):

4.3 She testified that she was employed by the Respondent to do ironing for her. She stated that it was agreed that she would work one day a week and would earn E50.00 (fifty Emalangeneni) per basket of laundry that she ironed.

4.4 AW2 testified that she started working for the Respondent in April 2013 and that for the first two months the Respondent paid her according to initial terms agreed upon. She stated that it was in June 2013 that the Respondent started to breach the terms of the agreement concluded.

4.5 AW2 testified that with effect from June 2013, the Respondent paid her E250.00 (two hundred and fifty Emalangeni) per month irrespective of the number of laundry baskets that she ironed. AW2 submitted a letter breaking down the amount she is claiming from the Respondent as unpaid wages. AW2 conceded that the statement which she submitted as evidence of the number of baskets ironed had not been verified by the Respondent as they never counted the laundry baskets that were to be ironed.

4.6 Under cross examination it was put to the Applicant that the terms that she alleged as being her terms of employment were not correct. It was put to Applicant that the terms of the agreement were to the effect that the Applicant would earn E50.00 (fifty Emalangeni) per day that she worked.

5. Respondent's case:

5.1 The Respondent was the only witness who testified in support of her defence. A summary of the most important and relevant aspects of the Respondent's evidence influencing the outcome of this matter is detailed herein below.

Pinky Gleen (RW1):

5.2 The evidence of the Respondent was very brief. She testified that she employed the Applicant to do her ironing and that she agreed with the Applicant that she would earn E50.00 (fifty Emalangeni) per day that she worked. It was further agreed that Applicant would only work one day a week. RW1 stated that she duly paid the Applicant as per the terms that had been agreed upon. RW1 denied the terms as alleged by the Applicant.

5.3 Under cross examination by the Applicant, it was put to the Respondent that the terms upon which she had alleged that the wages would be calculated was not correct and that the proper and true terms were that which she as Applicant had stated.

6. Analysis of the evidence and arguments:

6.1 I have in this award considered all the evidence presented before me by the parties. I herein below detail concise reasons to substantiate my findings.

6.2 From these proceedings the Applicant seeks relief in the following respect; payment of the total amount of E3, 325.00 (three thousand three hundred and twenty five Emalangeni) in lieu of unpaid wages.

6.3 The evidence of both parties was very brief and with each party merely denying the other parties version of events. The Applicant testified that upon employment it was agreed that she would be paid E50.00 (fifty Emalangeni) per laundry basket that she ironed. On the other hand the Respondent testified that it was agreed that the Applicant would be paid E50.00 (Fifty Emalangeni) per day that she worked. Respondent testified that she had paid the Applicant E250.00 (two hundred and Fifty Emalangeni) per month in complying with the terms of the agreement concluded.

6.4 I am therefore called upon to determine whether the terms as alleged by the Applicant are the true terms agreed upon by the parties.

6.5 The Regulation of Wages (Domestic Employees) Order Notice, 2010 requires of every employer to supply within two

calendar months to each employee in his employment a completed copy of the written particulars of employment. An employer who fails to complete and furnish a completed form of written particulars of employment bears the onus to rebut the terms asserted by the employee, **see: France Dlamini vs. A to Zee (IC case No- 86/2002) and Patrick Masondo vs. Emalangen Foods (IC case No- 45/2004).**

- 6.6** It is my finding therefore that the Respondent has failed to present evidence to rebut the terms of employment asserted by the Applicant.
- 6.7 The Applicant however bears the onus of proving the number of laundry baskets that she ironed in order to show that she was under paid by the Respondent. **According to AGGS W.H. : Wharton's Law Lexicon, 11th edition, (Stevens and Sons Co) 1911 at page 135 cited in Bongani Mdluli vs. Swaziland Electricity Company IC case 515/2013,** "The most prominent canon of evidence is that the point in issue is to be proved by the party who assert the affirmative,..."
- 6.8 The Applicant in her evidence submitted a written statement detailing the number of laundry baskets ironed by her since she was employed. It is my finding that the statement submitted by the Applicant is of little or no probative value in view of the fact that the Applicant conceded in her evidence that she personally counted the baskets that she ironed and did not have the Respondent confirm or verify the calculations during the course of their employment relationship. The statement submitted by the Applicant has not been corroborated by any other form of evidence.

6.9 The Applicant failed to present satisfactory evidence in proof of the number of laundry baskets that she ironed and consequently therefore a finding on whether the Respondent underpaid her by paying her E 250.00 (two hundred and fifty Emalangeni) per month cannot be made.

6.10 “When proof fails the defendant remains as he was before he was sued”, see **Bongani Mdluli vs. Swaziland Electricity Company IC case 515/2013.**

6.11 It is therefore my finding that the Applicant has failed to discharge the onus placed upon her and consequently the Applicant’s claim fails.

7. AWARD:

8.1 The award that I make is as follows:

8.2 The claim for unpaid wages is dismissed.

8.3 No order for costs is made.

**DATED AT MBABANE ON THE __ DAY OF NOVEMBER
2014**

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**SIPHO M NYONI
CMAC ARBITRATOR**

