



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

**HELD AT PIGG'S PEAK**

**SWMB 4/2014**

In the matter between:-

**Menzie S. V Manana**

**Applicant**

And

**Peak Strike Force**

**Respondent**

CORAM:

**Arbitrator** : Commissioner Siphon Nyoni

**For Applicant** : In person

**For Respondent** : Maqhawe Shiba

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**ARBITRATION AWARD**

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**Venue** : 1<sup>st</sup> Floor, Piggs Peak Civic Centre

**Dates of Arbitration** : 27<sup>th</sup> February, 2014, 4<sup>th</sup> March 2014  
& 25<sup>th</sup> March 2014

**Nature of Dispute** : Constructive Dismissal

**1. Details of Parties and Hearing:**

1.1 The Applicant is Menzie S.V Manana an adult Swazi Male of Piggs Peak within the District of Hhohho.

- 1.2 The Respondent is Peak Strike Force a company duly incorporated in terms of the law and having its principal place of business at Rockland's Piggs Peak District of Hhohho.
- 1.3 The arbitration hearing was held at CMAC Offices 1<sup>st</sup> Floor Piggs Peak Civic Centre.

## **2. Issue to be decided:**

- 2.1 The issue for determination is whether the Applicant was constructively dismissed.

## **3. Background to the dispute:**

- 3.1 Applicant is an ex-employee of the Respondent having been employed by the Respondent in March 2012 in the capacity of general labourer.
- 3.2 Applicant resigned from the employ of the Respondent on the 14<sup>th</sup> of October, 2013. The Applicant claims that his resignation constitutes a constructive dismissal because it was brought about by the Respondent's conduct towards him.
- 3.3 The dispute having been conciliated upon was certified as unresolved. The certified issues in dispute appear from the certificate of unresolved dispute and include the following: notice pay E 1,800.00 (one thousand eight hundred Emalangi), additional notice pay E 288.00(two hundred and eighty eight Emalangi), severance pay E720.00 (seven hundred and twenty Emalangi), arrear salary for October E216.00(two hundred and sixteen Emalangi), Leave pay E720.00 (seven hundred and twenty Emalangi), Funeral cover E14,250.00 (fourteen thousand two hundred and fifty

Emalangeni) and compensation for unfair dismissal E21,600.00(twenty one thousand six hundred Emalangeni).

3.4 The Respondent disputes that it dismissed the Applicant and states that the Applicant resigned freely and voluntarily.

#### **4. Issues not in dispute:**

4.1 A pre-arbitration meeting was held for the purpose of narrowing down the issues in dispute. The parties agreed as follows; that the Applicant was an employee to whom the provisions of **section 35 of the Employment Act 1980** applied, that at the time of the Applicant's resignation he earned a daily rate of E72.00 (seventy two Emalangeni) and that the Applicant worked five days a week.

#### **5. Summary of the evidence:**

5.1 The Applicant was the only witness who testified in support of his case. A summary of the most important aspects of the Applicant's evidence influencing the outcome of this matter is as follows;

##### **Menzie S.V Manana 'AW1'**

5.2 He testified under oath. He stated that he was employed by the Respondent in terms of a written contract on the 1<sup>st</sup> of March, 2012. The Applicant submitted a copy of the contract of employment as part of his evidence.

5.3 The Applicant stated that he worked a five day week. He stated further that as part of his terms and conditions of employment he was obliged to join and be a member of a

funeral plan offered by Afrisure a South African Insurance Company. He testified that he contributed an amount of E40.00 (Forty Emalangeni) per month which was deducted by the Respondent from his salary.

- 5.4 Applicant testified that when he was employed he was deployed to work under the fire fighting department where he worked up until the 7<sup>th</sup> of January 2013.
- 5.5 Applicant stated that whilst working under the fire fighting department he had certain problems with his supervisor and that he duly reported those issues in terms of the internal grievance procedure to the assistant operations manager. It was the Applicant's testimony that his grievance was not attended to by the Assistant Operations Manager and that he consequently reported it to the Operations Manager.
- 5.6 Applicant testified that on the 7<sup>th</sup> of January 2013 the Operations Manager approached his supervisor and enquired from him as to which employees he did not want to work with and that the supervisor pointed at him amongst other employees which were also elected.
- 5.7 It was the Applicant's testimony that after being elected as being one of the employees whom his supervisor did not want to work with, that he was removed from the fire fighting department and was not posted to another post for about three days. After the three days, the Operations Manager informed him together with the other employees who had been removed that they would not be dismissed but would now be deployed to work under the chemical department.
- 5.8 Applicant stated that he was not comfortable working in the chemical department because he had recently under gone an

operation and therefore requested to be removed from the chemical department. Applicant testified that his request was not granted notwithstanding his submission of a medical certificate confirming that he had undergone an operation.

- 5.9 The Applicant testified further that in September, 2013 during the cutting season he and other employees were put to work on standby to watch out for run-away fires. He stated that he worked on standby for only one week and after which they were removed by the Operations Manager from working on standby. The Applicant testified that he enquired from the Operations Manager as to what would happen in the event a fire were to break out after they had knocked off for the day and the Applicant stated further that the Operations Manager advised him that once it was 1530 hours it was time for them to knock off from work.
- 5.10 Applicant testified that a few days after they had been removed from working on standby a fire broke out at about 1400hours and that he together with his colleagues duly attended to the fire but when it was 1530 hours they knocked off and left. Applicant testified that on the following day they were given disciplinary charges and were told that they were to be notified in due course of the hearing dates.
- 5.11 Applicant testified, that three days after receiving the disciplinary charges that another fire broke out. He testified that he and his colleagues duly attended to fire and worked well beyond their knock off time of 1530 hours.
- 5.12 Applicant stated that he was again served with another charge on the following day while at work. The Applicant submitted as part of his evidence copies of the charge sheets that he had been served with on both occasions. The charges

were both similar and related to the refusal to construct a fire line at a fire at C1 and failure to follow a standing instruction by leaving a fire line without permission.

5.13 Applicant testified that the disciplinary hearings for both the charge sheets which he had been served with were postponed several times without the hearings starting. The Applicant stated that he then personally decided to stay off work and not report for duty because of the prevailing conditions at work. He stated that he did not report to work for a week and after which he was informed by the employees who were co-charged with him that the hearings were now proceeding. He stated that he duly attended to the hearing which was chaired by a certain Mr Chirwa who again advised them that the Operations Manager was ill and that the hearings would have to be postponed again. He testified that they were further advised that since they all faced similar charges, their hearings would be consolidated and there would not be individual hearings. The Applicant stated that he personally objected to the convening of a single hearing for all of them since their submissions would differ.

5.14 The Applicant stated that the day on which the hearing was postponed by Mr Chirwa was his last day working at Peak Strike Force. He stated that he received a phone call from another company Kusa Timbers offering him employment and that he reported for work at Kusa Timbers on the same day.

5.15 The Applicant stated that on the 14<sup>th</sup> October 2013 he wrote and submitted his resignation letter. He stated that when he submitted the resignation letter he was already working for Kusa Timbers. He stated that the reason why he wrote the resignation letter was because he received advice from his

colleagues that he would not be paid his benefits if he did not submit the resignation letter.

- 5.16 The Applicant stated that when writing his resignation letter he did not state that the reason for his resignation was due to ill treatment. He stated that the reason why he did not state that he was resigning due to ill treatment was because he was not sure how he would be received by his new employer and that he may wish to return back and further maybe his relatives may also wish to work for the Respondent in future.
- 5.17 The Applicant testified that after submitting his resignation he continued to occupy the accommodation provided by the Respondent. He stated that the Respondent owed him an amount of E216.00 (Two hundred and sixteen Emalangeni) being three days wages which were due to him. He testified that the Respondent initially assured him that he would receive the amount but such amount was not paid to him.
- 5.18 In relation to the funeral cover claim, the Applicant testified that his girlfriend had passed away in January 2013 and that at the time she passed away she was pregnant. He testified that he had initially requested that the Respondent gives him a salary advance of E700.00 (seven hundred Emalangeni) so as to enable him to cater for the funeral expenses. He stated that the Operations Manager advised him that the funeral cover would cater for the funeral expenses. It was the Applicant's testimony that he was requested to submit his identity card, the death certificate and an affidavit from the police. He stated that he duly submitted the documents as requested and was told that the money would be paid within twenty four hours.

- 5.19 He stated that he waited for the money but he never received it. He further testified that the Operations Manager also refused to give him back the original death certificate which he had submitted. The Applicant submitted a copy of the funeral policy as part of his evidence.
- 5.20 Applicant testified further that when he enquired about when he would receive the money, that he was threatened with police and also accused of trying to defraud the company.
- 5.21 With regards the leave claim the Applicant testified that he never went on leave ever since he was employed. He stated that the Respondent owed him ten leave days pay calculated from January 2013 to October 2013.
- 5.22 Under cross examination the Applicant was asked if he knew what the main or principal business of the Respondent was and the Applicant stated that he knew what it was and stated that it was fire fighting.
- 5.23 It was further put to the Applicant that he had voluntarily resigned and that he was not constructively dismissed. The Applicant maintained that he had been dismissed.
- 5.24 The witness was further asked as to what conduct on the part of the Respondent led to the resignation. The Applicant stated that it was the failure to pay the funeral cover benefit and also the charges levelled against him.

## **6. Respondent's Case /Version:**

- 6.1 The Respondent led only one witness in support of its case. The most important aspects of the witness's evidence

influencing the outcome of this matter is detailed herein below.

**Graham Charles Wright 'RW1'**

6.2 This witness testified that he is employed by the Respondent as the Operations Manager. He stated that he knew the Applicant and that he was employed on the 29<sup>th</sup> of February 2012 as a general labourer and was put to work with the fire fighting team. The witness stated that the crew leader of the fire fighting team requested in January 2013 that the Applicant be removed from his team.

6.3 The witness stated that the Respondent's primary duty is fire fighting and that in order to prevent labour turn over they also conduct semi silviculture operations.

6.4 It was the witness's testimony that in terms of the contract of employment of the Applicant there exist a clause which requires the Applicant to do emergency work. The witness stated that their work was primarily emergency work and that the Applicant is obliged to work when required to do so.

6.5 The witness further stated that by virtue of the nature of the work that they do there were many risks involved. That in an attempt to alleviate strain on the families of the employees should something happen to the employee whilst carrying out their operations, all employees were required to join and be members of a funeral scheme. The witness stated that as a bye product of the funeral cover, the families of the employees were also covered. The witness stated that the Respondent was a subsidiary of another South African company and that due to the size of that company (Mhlambanyatsi Group) it was easier for them to negotiate

better subscriptions for their employees with the insurance companies using the Mhlambanyatsi Group name.

- 6.6 With regard the Applicant's funeral cover claim, the witness testified to the effect that the Applicant had submitted certain documents claiming that his spouse had died and wanted to claim against the Afrisure policy. The witness stated that he requested the Applicant to submit an affidavit to the effect that the person who died was his spouse since there was no marriage certificate in proof of the relationship. The witness stated that the Applicant duly submitted the affidavit stating that the deceased was his spouse. The documents were according to the witness duly forwarded through email to Afrisure and subsequently the hard copies of the documents were also submitted. The witness stated that when he dropped of the hard copy documents with Afrisure he was advised that there were certain discrepancies with the age of the deceased and that investigations were being conducted.
- 6.7 The witness stated that when the Applicant requested back the original death certificate which he had submitted that he tried to explain to the Applicant that the documents were with Afrisure and that there were certain investigations that they were still conducting in relation to the claim.
- 6.8 The witness stated that as a company they had made several claims to Afrisure in the past and all those claims were duly paid out. The witness stated further that with the Applicant's case, the issue was with the affidavit which he had submitted. He stated that the affidavit did not cover all the issues and further the Applicant had failed to prove in a formal manner his relationship with the deceased.

- 6.9 With regards the claim for constructive dismissal the witness stated that there were two disciplinary hearings brought against the Applicant which related to two different fire break outs. The witness stated that the Applicant together with other employees had left the fire line which was against the company regulations. The witness stated that the Applicant had not completed the disciplinary hearings.
- 6.10 The witness submitted as part of his evidence a copy of the letter of resignation which had been submitted by the Applicant. The witness stated that in the letter of resignation the Applicant had stated that he would like to apologise to the company and management. The witness stated that the Applicant had voluntarily resigned.
- 6.11 With regards the claim for wages due, the witness stated that the Applicant had not been paid what was due to him because he had not returned the protective clothing which had been issued to him by the company. The witness further stated that the Applicant had continued to occupy a company house even after he had resigned and that the Respondent was paying the rent, lights and water for the house. He stated that the Applicant had occupied the house for two months after his resignation.
- 6.12 The witness stated that notwithstanding the facts stated above that the Applicant would be only entitled to payment for two and a half days wages in the amount of E180.00 (one hundred and eighty Emalangeneni).
- 6.13 With regard the leave claim the witness conceded that the Applicant had not taken his leave for the period January 2013 to October 2013.

6.14 The cross examination of this witness focused mainly on the funeral cover claim and the working of overtime in the event of a fire break out. The witness was asked if they were required to work overtime even when they were not requested to do so. The witness stated that in terms of the contracts of employment all employees were obliged to do emergency work when required to do so.

## **7. Analysis of the evidence and arguments:**

7.1 I have in this award considered all the evidence and arguments advanced by the parties. In view of the requirements of **Section 17(5) Industrial Relations Act 2000(as amended)** I herein below set out concise reasons to substantiate my findings.

7.2 From the outcome of these proceedings the Applicant seeks relief in the following respect: notice pay E 1,800.00 (one thousand eight hundred Emalangeni), additional notice pay E 288.00(two hundred and eighty eight Emalangeni), severance pay E720.00 (seven hundred and twenty Emalangeni), arrear salary for October E216.00(two hundred and sixteen Emalangeni), Leave pay E720.00 (seven hundred and twenty Emalangeni), Funeral cover E14,250.00 (fourteen thousand two hundred and fifty Emalangeni) and compensation for unfair dismissal E 21,600.00(twenty one thousand six hundred Emalangeni).

**7.3** The Applicant's claim is one for constructive dismissal and the relevant legislation is **section 37 of The Employment Act of 1980 (as amended)**, which provides thus; **“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.”**

- 7.4 The onus to prove that an employee has been constructively dismissed rests primarily with the employee. See: **Timothy Mfanimpela Vilakazi vs. Anti-Corruption Commission & Others (IC case No. 232/2002).**
- 7.5 In **Jameson Thwala vs. Neopac (Swaziland) Ltd Case No. 18/1998** at page 5, 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.”**
- 7.6 It is required of the employee to show that the conduct complained of was either unlawful or unfair. See: **Samuel S Dlamini vs. Fairdeal Furnishers (Pty) Ltd Case No. 145 of 2000.**
- 7.7 The question to be answered therefore in the present case is whether the Applicant has proved any conduct on the part of the Respondent which was either unlawful or unfair as to justify the Applicant’s resignation.
- 7.8 The Applicant testified that he resigned because the Respondent subjected him to several disciplinary hearings which kept on being postponed and further because the Respondent failed to process his funeral cover claim.

- 7.9 The Respondent on the other hand argued that the Applicant was not dismissed but that he resigned voluntarily. Evidence placed before me by the Respondent in support of its argument was the actual resignation letter written by the Applicant. The letter reads in part as follows; **“ I Menzie Sandile Manana (Team 17) hereby inform the company about immediate resignation. I would like to apologise in every hurt passed to the company management and employees accompanied with late inform due to some ethical reasons. May the company superiors re-employ me after my refreshment if I will be in need of a job”**
- 7.10 An employer has the prerogative to prescribe work assignments, working methods, processes to be followed, to supervise work and to ensure acceptable conduct at the workplace, see: **Hezekiel Soko vs. Swazi Paper Mills (IC Case No. 206/1998)**.
- 7.11 The two charges which the Applicant had been served with all relate to alleged misconduct committed by not only the Applicant but by several other employees all of who were also served with the charges along with the Applicant. The charges which were preferred against the Applicant did not emanate from nowhere. In fact the Respondent’s witness in his evidence stated that the Applicant had together with his colleagues allegedly failed to follow lawful instructions given and had also abandoned a fire line. Resignations in the face of disciplinary action which is reasonably justified have not been accepted by the courts as laying a basis for constructive dismissal, see **John Grogan; ‘Dismissal’ 2010 at page 58**
- 7.12 It is common cause between the parties that the disciplinary hearing was postponed several times at the instance of the

Respondent. The Applicant in his evidence stated that on the last postponement of the disciplinary he received a call from Kusa Timbers and that he started work with the said Kusa Timbers on the same day. It is only after obtaining alternative employment that the Applicant resigned.

7.13 The Funeral claim with Afrisure Insurance is a claim that the Applicant has with the Insurance Company and not the Respondent. The Applicant has not shown in his evidence that the non payment of the funeral cover benefit was due to any fault on the part of the Respondent. In fact the Applicant testified that the deceased was his girlfriend yet the affidavit he submitted referred to the deceased as being his spouse. The inconsistency in the status of the relationship the Applicant had with the deceased could possibly be a factor that led to the non-payment of the funeral cover benefit. It is advisable that the Applicant pursue the claim with the service provider. The decision to pay out or not to pay out the funeral benefit cover rests primarily with the insurance company and not the Respondent.

7.14 Having considered all the evidence adduced and also having regard to the resignation letter written by the Applicant it is my finding that the Applicant has failed to make out a case for constructive dismissal. The Applicant has not proved any conduct on the part of the Respondent which was either unlawful or unfair. In fact from the evidence adduced the most probable cause of the Applicant's resignation is the fact that he obtained alternative employment. The letter of resignation also shows that the Applicant prayed that the Respondent accepts him back in the event he was not well received by his new employer.

7.15 The Applicant resigned of his own accord and the Respondent is therefore discharged from having to prove the fairness of the termination.

## **8. Leave claim:**

8.1 The Applicant testified that for the period from January 2013 to October 2013 he never went on leave and that therefore the Respondent is obliged to compensate him for the leave days which he had accumulated. The Respondent in its closing submissions conceded that the Applicant had not gone on leave in the period mentioned and further conceded that he had not been compensated for the leave days.

8.2 The Applicant submitted his resignation letter on the 14<sup>th</sup> of October 2013 and had by that time already begun working with his new employers. The Applicant claims ten leave days calculated at one day per month from January to October.

8.3 I however find that the Applicant is only entitled to payment for nine (9) leave days because the Applicant never worked the month of October 2013 as he had already begun employment elsewhere.

8.4 The Applicant's daily wage was agreed by both parties to be E72, 00 (seventy two Emalangi). The Applicant is therefore entitled to payment of the sum of E648.00 (six hundred and forty eight Emalangi).

## **9. Arrear salary claim:**

9.1 The Applicant claimed that the Respondent owed him three days wages for the month of October 2013 in the total amount of E216.00 (two hundred and sixteen Emalangi). The Applicant however led no evidence to substantiate its claim.

9.2 The Respondent in its closing submissions conceded that the Applicant was only owed wages for two and a half days in the total amount of E180.00 (One hundred and eighty Emalangeni)

9.3 In view of the fact that the Applicant has not proved the basis of the three days claimed. I find that the Applicant is entitled to be paid the amount conceded by the Respondent to be due to the Applicant in the amount of E180.00 (one hundred and eighty Emalangeni).

**10. Funeral Cover claim:**

10.1 The Applicant seeks payment of the total amount of E14,250.00(fourteen thousand two hundred and fifty Emalangeni) which the funeral cover pay out benefit.

10.2 As mentioned above the payment or non payment of the benefit is dependent on a third party being the Insurance Company. The Applicant has not alleged that the amount was received by the Respondent and that it is the Respondent who neglected to pay over same to him.

10.3 This claim is dismissed. The Applicant is advised to follow up the payment of the funeral cover with the Insurance Company.

**11. AWARD:**

11.1 The award that I make is as follows;

11.2 The claim for constructive dismissal is dismissed.

11.3 The Respondent is ordered to pay the Applicant amount of E648.00 (six hundred and forty eight Emalangeni) being in respect of the leave days claim.

11.4 The funeral cover claim is dismissed.

11.5 The Respondent is ordered to pay the Applicant the amount of E180.00 (One hundred and eighty Emalangeni) being in respect of arrear salary for the month of October 2013.

11.6 The Respondent is ordered to pay the total amount of E 828.00 (Eight hundred and twenty eight Emalangeni) at CMAC Offices 1<sup>st</sup> Floor, Piggs Peak Civic Centre on or before the 6<sup>th</sup> of May, 2014.

**DATED AT MBABANE ON THE \_\_ DAY OF APRIL 2014**

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**SIPHO M NYONI**

**CMAC ARBITRATOR**