



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

**HELD AT MANZINI**

**SWMZ 252/13**

In the matter between:-

**SWAUWU: DUMSILE MAZIYA**

APPLICANT

And

**BUHLE RESTURANT**

RESPONDENT

CORAM:

**Arbitrator** : Ms K. Manzini

**For Applicant** : Mr. P. Mamba

**For Respondent** : Mr. D. Msibi

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**ARBITRATION AWARD**

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1. **PARTIES AND REPRESENTATION**

The Applicant is the Swaziland United Workers Union (SMAUWU) on behalf of Ms Dumsile Maziya, who is a Swazi female adult, and former employee of the Respondent. The Applicant's postal address is P.O. Box 5907, Manzini.

The Respondent is Buhle Restaurant, a business operating as a restaurant, and operated by a Mrs. Thwala. The Respondent's postal address is P.O. Box 945, Matsapha.

The Applicant herein was represented by Mr. Patrick Mamba, an official from the Trade Union. The Respondent on the other hand was represented by Mr. David Msibi, a labour consultant.

## 2. **ISSUES IN DISPUTE**

The Certificate of Unresolved Dispute filed herein (No. 369/13) state that this is a dispute centered around an alleged unfair dismissal dispute. The Applicant claims the following:-

- a) Reinstatement with arrear wages, alternatively,
- b) Notice pay = E1,200.00
- c) Underpayment = E400.00
- d) Compensation for unfair dismissal = E14, 400.00

### **3. SUMMARY OF EVIDENCE**

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

The Applicant was the only witness who was called to testify in support of her case.

##### **3.1.2. THE TESTIMONY OF MS DUMSILE MAZIYA**

Ms Maziya testified under oath that she was employed by Mrs. Veronica Thwala, who is the proprietor of the Respondent on the 9<sup>th</sup> of June, 2012. She stated that she was employed as a waitress, but her duties also included washing the dishes, as well as the preparation of salads.

The Applicant testified that she had worked well in this position until the 14<sup>th</sup> of March, 2013 when the Manager Ms Philile Dlamini instructed her to clean Mrs. Veronica Thwala's office. She stated that this had taken place early on that morning. The Applicant stated that she asked two colleagues, one Bongani Dlamini, and a certain Mthupha to help her shift around the table in the office, and after this was done she was left alone in the office to clean. She stated that as she cleaned she had to re-arrange some books on the table, she had found some money on the table.

The Applicant stated that the money was contained in a Nedbank transparent money bag, and slip of paper was also

contained in the same packet with the figure E2,000.00 printed on it.

The Applicant testified that she had turned the money over to Philile after she had found it, and Philile had thanked her for finding it for her. The Applicant stated that at or about 3:00 p.m. that day she had been summoned to Mrs. Thwala's office by Philile and they (Philile and Mrs. Thwala) had asked her where the rest of the money was, as the money inside the money bag was incomplete. The Applicant stated that she had told them that she had given all of the money to Philile, but this response had not satisfied them. The Applicant stated that they threatened her, and told her they would force her to tell them where the rest of the money was.

The Applicant stated that she had remained steadfast in her denials relating to the missing money even when the employer called the security guard to question her. She stated that Mrs. Thwala even threatened her with physical violence to make her admit that she had taken the money, but she had maintained her innocence. The Applicant stated that Mrs. Thwala had even called the police, and they had also questioned her, and told her to return the money that her employer suspected her of stealing, but she had maintained her stance, and had told the police that she had not stolen the money.

The Applicant stated that after the police officer had left, Mrs. Thwala had told her that she should simply admit that she had stolen the money, and she would forgive and allow her to go back to work. The Applicant stated that she had told her employer that “ungamane ungicoshe, kune kutsi ngivume kutsi ngebile”, meaning she would rather be dismissed from work, than to admit to an offence of misappropriation of monies/funds.

The Applicant testified that Mrs. Thwala had then told her to go ahead and leave. The Applicant stated that she had proceeded to retrieve her handbag and had whilst she was bidding on of her co-workers goodbye, Mrs. Thwala had shouted from across the restaurant and said, “aseuhambe sigebengu - uyeba”, meaning go ahead and leave you thief.

The Applicant stated that whilst she was at home, she had realized that she had been unfairly dismissed, and had written a letter to her employer, wherein she claimed that she had been unfairly dismissed. She stated that she had posted this letter to the employer, and after she had not received a response, she had proceeded to seek legal counsel from a labour consultant by the name of Shadrack, and had filed a dispute with CMAC.

The Applicant stated that one of the claims she was pursuing is one of an underpayment in that she was paid E800.00 as her first salary, and yet in subsequent months she had been

paid E1,200.00. She stated that she was therefore demanding the difference of E400.00 for the first month.

The Applicant stated that her employer had previously accused her of verbally abusing customers, and ill-treating them whilst she had been stationed at one of the Respondent's restaurants which is situated at the Summer Place Complex. The Applicant stated that the employer had a habit of believing false accusations that were made against her without taking her time to test the veracity of the accusations. She stated that the problem that arose whilst she was at the Summer Place restaurant had stemmed from an incident where a certain policeman had molested her by touching her private parts, and she had confronted him about his unbecoming behaviour. The Applicant stated that the employer had accused her of ill-treating that customer, and had suspended her for three days.

The Applicant stated that whilst she had worked for the Respondent her relationship with both Philile, and Mrs. Thwala had been very good, and Mrs. Thwala had treated her like a daughter. She stated that Philile had also treated her well, and they had respected one another. The Applicant maintained that she wanted to be awarded the claims as stated in her Report of Dispute Form.

During cross-examination, the Applicant was asked if she still wanted to go back to work for the Respondent, as her Report of Dispute listed re-instatement as one of her claims.

The Applicant stated that she did not want to work for the Respondent any longer. She stated that she had decided this after she had left the employ of the Respondent. The Applicant stated that her reasons for these decision included, amongst other things, the fact that Mrs. Thwala was prone to believing all sorts of bad reports about her without bothering to verify the truth or otherwise of the said reports.

The Applicant was asked if indeed she had been employed on the 19<sup>th</sup> of July, 2012. The Applicant clarified that she had been employed on the 9<sup>th</sup> of June, 2012. The Respondent's representative asked the Applicant why she believed that she ought to have been paid the full salary for the month of June and yet she had started work when the month had already started, and had therefore not worked for a full month, like the other months where she earned E1200.00. The Applicant did not answer this question. The Applicant also chose to remain silent when the Respondent's representative put it to her that the Government Gazette that regulated the Hotel & Catering sector for 2012, provided that a waitress salary should not be less than E770.00, so even the E800.00 she was complaining about was above the legal minimum wage.

Mr. Msibi produced the Respondent's wage book which reflected that the Applicant had signed for her first salary on the 2<sup>nd</sup> day of August, 2012, indicating that she had been employed in the month of July, and not June, 2012. The Applicant acknowledged that she had indeed been mistaken, and that she had been employed in July, 2012. The Applicant stated that the wage book appeared to be in order, and that when she signed it, it had looked as it did at the arbitration proceedings.

The Applicant under cross-examination confirmed that she had been assigned to clean Mrs. Thwala's office by Philile, the Manageress, and this had not been the first time that she had cleaned this office. The Applicant further confirmed that she had called her co-workers Bongani Dlamini, and Mthupha to help her move a table as Philile had instructed her to move the table. She clarified that when she found the money, Bongani and Mthupha had already left the office, and she had been on her own.

The Applicant stated also that the money had been found in between two note-books, and had been contained in a transparent Nedbank money bag. She stated that she had not counted the money, but had read the figure of E2000.00



(Two Thousand Emalangi) from the slip of paper that was contained inside the money bag.

The Respondent's representative put it to the Applicant that his instructions were that the money had been left inside a bank deposit book, and no slip of paper had been put inside the money bag. The Applicant stated that she was only aware of money that she had found inside a money bag. The Applicant also stated that she had been told by Mrs. Thwala and Philile that E600.00 was missing from the money bag.

The Respondent's representative put it to the Applicant that she had been the one to simply up and leave her job when she was pressurized to return the money. The Applicant denied this, and said she heard Mrs. Thwala had said she should leave, and called her a thief in front of the customers in the restaurant. Mrs. Thwala has told her that she was dismissed from the employ of the Respondent? The Applicant stated that Mrs. Thwala had told her to admit to stealing the money, or face dismissal. Mr. Msibi put it to the Applicant that she had not said this in her evidence in chief, and neither had she stated this in the Report of Dispute Form. The Applicant chose not to answer.

The Applicant was asked if she had ever received a written warning at the workplace? The Applicant stated that she had indeed received a warning for allegedly having stolen money

from a customer. She stated that she had not actually stolen the money, but she had found it whilst she had been sweeping the floor. The Respondent's representative put it to her that he had been instructed that she (the Applicant) had noticed money that had been dropped by a customer, and had used a mop to push the money all the way to the bathroom. He stated that if she had not been seen by somebody whilst she did this, she would have stolen the money. The Applicant denied this, she did however state that she recalled that the money had been a E20.00 note.

The Respondent's representative also put it to the Applicant that she had not been molested by the policeman, but had shouted at him when she asked him for money and he refused to give her the money she had requested. The Applicant denied this.

The Respondent's representative also put it to her that he had been instructed that after the E600.00 had gone missing, a further E40.00 had gone missing the very next day and she alone had been given access to the office. The Applicant stated that she had not found E40.00 in the office. The Applicant was asked if the employer had not questioned her about a missing E40.00? The Applicant stated that she only knew of an amount of E600.00 that had gone missing and not E40.00.

The Applicant was asked why she had been removed from the restaurant at the Summer Place Complex, and to the Sophie Complex? The Applicant stated that Mrs. Thwala had said she should work where she (Mrs. Thwala) could keep a closer eye on her as she was allegedly phone to shouting at customers.

The Respondent's representative asked the Applicant if it was therefore not clear that Mrs. Thwala did not make hasty and impulsive decisions, but chose to satisfy herself of facts first before she made a decision. The Applicant agreed with this.

During the re-examination, the Applicant went on to dispute the figures that appeared in the wages book. The said wages book reflected that she had signed for E800.00 as her first salary on the 2<sup>nd</sup> of August, 2012, E1,100.00 as a second salary, E1,150.00 as her third, and it was only on the fourth month that she received E1,200.00. she said that she had received E1,200.00 as of the second month, and all the subsequent salaries were of the same amount. This she stated notwithstanding that she had agreed that the wages book was authentic during the cross-examination.

She also clarified that she deemed herself to have been dismissed when Mrs. Thwala told her that she would be forgiven and be allowed back to work if she admitted to stealing the E600.00. She stated that she had then said she

would rather be dismissed than to admit to something that she had not done. The Applicant stated that Mrs. Thwala shouted “hamba sigebengu” (leave you thief), at her and she deemed this to be a dismissal.

The Applicant also stated that even though she had signed the written warning, she had not stolen the customer’s E20.00 by using a mop to sweep it away. The Applicant also stated and re-affirmed that she did not wish to be re-instated because she did not believe that the employer would treat her fairly.

### 3.2. **THE RESPONDENT’S CASE**

The Respondent’s representative called Mrs. Veronica Thwala, Samkelisiwe Tsela, Jabulile Gama and Bongani Dlamini to testify in support of the Respondent’s case.

#### 3.2.1. **THE TESTIMONY OF MRS. VERONICA THWALA**

Mrs. Thwala testified under oath that she is the proprietor, and director of the Respondent. She stated that she also runs a catering training institution, where the Applicant had received training as a waitress. She stated that the Applicant had graduated on the 7<sup>th</sup> of July, 2012, and the Applicant had commenced working for her on the 9<sup>th</sup> of July, 2012.

The testimony of Mrs. Thwala was to the effect that the Applicant had been reported to her by her supervisor, Ms. Samukelisiwe Tsela. Mrs. Thwala stated that Samkelisiwe had complained that the Applicant was prone to asking for money from male customers. She stated that she had kept this information in mind, but chose not to take any immediate action. She stated that she had however been perturbed when Samkelisiwe reported to her that the Applicant had been involved in a heated verbal altercation with one of the customers that the Applicant was quite friendly with before hand. She stated that she had asked the Applicant to come and see her as the supervisor had been upset as the shouting match between the Applicant and the customer had taken place in the presence of other customers.

The testimony of the witness was to the effect that the Applicant had been summoned to her office to explain what had actually taken place, but the Applicant had refused to tell her what had taken place. Mrs. Thwala stated that she had then asked the Applicant to wait outside her office after she had asked her twice for an explanation, but had not received an answer. Mrs. Thwala stated that when she called the Applicant back into the office a few minutes later, she had been told by the other staff that the Applicant had already left.

The witness stated that the Applicant had returned after three days and asked for a letter of dismissal as her parents, and the officials from CMAC required this kind of proof that she had been dismissed.

The witness stated that she had told the Applicant that she had not dismissed her, and told her that she was actually going to move her from the restaurant at the Summer Place Complex, and station her at the Sophie Complex restaurant where her own office was so that she could keep a closer watch on her.

The witness stated that the Applicant had told her that she was not ready to go back to work as she still needed to sort out her issues with the customer who had insulted her, and it was only then that the Applicant told her that the customer had touched her private parts. Mrs. Thwala stated that the Applicant had walked off once again, only to return two days later. The testimony of the witness was that she opted to make the Applicant sign a written warning for walking off on her job, and for insulting the customer.

The witness stated that she had reprimanded the Applicant for going off to solve her issues, and leaving her job and had further suspended her for five (5) days. She submitted the written warning as part of her evidence. The witness stated that after a counseling session the Applicant had undertaken

not to commit these transgressions again, and further undertook to respect the customers, and to desist from asking for money from the male customers.

The witness stated that she had been forced to issue a second warning to the Applicant after she had arrived at the restaurant to find that a customer was quite upset and causing mayhem, as he demanded to see the proprietor of the establishment. She stated that she had learnt from the waiter, Bongani Dlamini to explain what was going on.

The witness stated that the Applicant had attempted to steal the customers E20.00 note, by pushing it to the bathroom with a mop, under the pretext of cleaning the floor. She stated that she was told that a lady by the name of Jabu Gama had seen the Applicant do this. The witness stated that she had called the Applicant to the office, and asked her what had happened. The Applicant, according to the witness had told her that she had found the money on the floor, and had not tried to steal it. Mrs. Thwala stated that she had asked the Applicant what the workplace rules dictated about money that was found on the premises? The Applicant had told her that she ought to have handed the money over to her supervisor, but she had not done this, and had instead handed it over to the other waiter, Bongani Dlamini.

The Respondent's witness stated that she had then issued the Applicant with a second warning, and she handed this warning in as part of her evidence.

The Respondent's witness stated that the following week, she had sent Bongani Dlamini to the bank at or about 3:40 p.m. to deposit an amount of E3,000.00. She stated that Bongani had returned the money, as he had found that the bank had closed by the time he had arrived there. She stated that she had given him E400.00 to buy some items for the restaurant, and an amount of E2,600.00 had remained.

The witness stated that she had left this amount inside the bank deposit book, and had kept in on top of her table inside her office. She further stated that she had forgotten to put the money inside the safe, but believed it would be safe overnight as she had been the last person to leave the office. She stated that had opened the restaurant the following day, and the Applicant, who had been on duty that month to clean her office, had entered the office to clean it. She stated that on that day, she had arrived on time to find the Applicant and Philile counting the money, and Philile told her that the Applicant had handed over the money to her and told her that she had found it inside her (Mrs. Thwala) office. The witness stated that the Applicant had told Philile



that she had found E2,000.00 and this had surprised her as she had left E2,600.00 inside the office the previous evening.

Mrs. Thwala testified that she had asked the Applicant what had happened to the E600.00, but she had denied all knowledge of this amount. She stated that she had admonished the Applicant and reminded her of her previous money-related transgressions at work, but the Applicant had continued to deny all knowledge of the money.

The witness stated that she had then decided to set a trap for the Applicant by placing an amount of E40.00 underneath her desk at the end of that working day.

She stated that she did this deliberately as she was aware that she would be the last person inside the office that day, she told the Applicant to ensure that she thoroughly cleaned her office the next morning as there was a smell.

The witness stated that the following day, after the Applicant had cleaned the office, she had checked under the desk, only to find that the money was no longer there. She testified that she asked the Applicant if she had found the money but she had denied all knowledge of it.

The witness stated that she had tried to pressurise the Applicant into admitting to the theft of both the E600.00 and the E40.00, but she had not bowed to the pressure. Mrs. Thwala stated that the Applicant had still remained steadfast

in her denials even when she called the police. She stated that when the police officers had left she had told the Applicant to go back home and fetch the money. She stated that she had not dismissed the Applicant but had merely told her to go and get the money so that she could return it. The witness stated that she could have dismissed the Applicant much earlier over the incidents when she shouted at a customer, and when she took the customer's money with a mop, but she chose to keep her on as she thought that she could rehabilitate her.

The witness stated that if she had meant to dismiss the Applicant, she would have asked her to return the uniform that she wore at work, but to date that uniform was still in the Applicant's possession. She stated that she had only asked the Applicant to go and fetch her money.

The Respondent's representative asked the witness if indeed she had shouted; "hamba sigebengu, uyeba" to the Applicant on the day that she left the workplace? Mrs. Thwala stated that shouting in front of customers was totally unheard of in as far as she was concerned. She stated that she tried to instill respect for customers in all her employees, and even in her students that she taught in the catering business. The witness stated that even when she had returned to the restaurant and found the Applicant engaged

in a verbal fight with one of the customers, she had opted not to enter the fray, but to go to her office and try and find out what the source of the disturbance was. She stated that she would therefore never shout at anyone in the restaurant that was full of customers, let alone the Applicant who she was still expecting to return her money.

During cross-examination, Mrs. Thwala explained that she and Bongani had counted and confirmed the amount of E3,000.00 before he went to the bank, and also counted and confirmed the E2,600.00 was left over after she gave him E400.00 to buy items for the restaurant.

She stated that she had locked the restaurant that evening when she left, and had handed the key to the restaurant to her son, Sibusiso Thwala, the next day so that Philile could open the premises. She stated that her office, door was not locked, but only the restaurant's main door was locked.

The witness stated that she had left the amount of E2,600.00 inside the deposit book, but had ensured that it was beneath all the other books that contained records from her other business. She listed the various businesses as follows:-

- a) Buhle Restaurant one - Sophie Complex
- b) Buhle Restaurant two - Summer Place Complex
- c) Clothing Boutique (at Dups Complex)
- d) Catering school in Manzini
- e) Catering school in Mbabane

She stated that the Applicant, in as far as she was concerned, had been told to go back and get the money that she stole. She stated that she was certain that the Applicant had taken the money as had been the only one to enter the office the next morning, and also she had been the only one to enter the office after she had laid the trap of leaving E40.00 under her desk. She stated that she had expected the Applicant to return so that they could talk things over, even when she had brought a letter of demand.

She stated that the Applicant was in the habit of leaving for periods of time and returning, and this was evidenced by her abscondment from work to go and solve her dispute with the customer. She stated that if the Applicant had returned without the money, she would still have taken her back to work, but she would have ensured that she signed a third warning.

The Applicant's representative put it to the Respondent's witness that she could not be sure that it was the Applicant who stole the E600.00 because her office door was not locked, and any of the employees could have taken the money. The witness stated that she was aware that it was only the Applicant who had access to her office on the said day, and a witness would testify of this.

### 3.2.2. **THE TESTIMONY OF MS JABULILE GAMA**

The witness testified under oath that she is a fruit and vegetable vendor who is based near the restaurant that belongs to Mrs. Thwala. She stated that she often goes to the relative as Mrs. Thwala is a relative of hers.

The witness stated that she had been present at the restaurant in February, 2013 when she witnessed the Applicant attempt to steal a customer's E20.00 note that had fallen from the table. She stated that she had been on her way to the bathroom.

She testified that she saw the Applicant take a mop, and pretend to clean the floor with it, and in the process she pushed the E20.00 note towards the toilet.

She said she then witnessed the customer starting to be distressed about his missing money, and he started to complain loudly. She stated that she then told Philile what she had witnessed, and it was Philile who then asked Bongani if he knew anything about the said money. The witness stated that she did not know how Bongani had ended up being in possession of the money, but he was the one who saw to it that the money was restored to the customer. The witness stated that Philile had thanked her for providing her with the information regarding the money, and she called the Applicant so as to speak to her.

Ms Gama stated that she had been aware that the money must belong to the said customer because it had been on the floor right under the table where he had been seated, so it was clear that it had fallen from the table, or from this person.

During cross-examination, the witness made it clear that she had known the Applicant very well when she witnessed the said incident, and had not been mistaken about the identity of the person that she witnessed pushing the money with the mop. She confirmed that she opined that the Applicant had been intentionally pushing the money away with the mop as she had been acting quite purposefully in that she fetched the mop, and started pushing the mop toward the money, whilst all along the money had been lying on the floor before then. She said the E20.00 note would clearly be seen even by her at a distance, so the Applicant who was even closer to it could not say she had not seen it.

She stated that when she saw the customer patting his pockets, looking for the money, she had told him that it had been on the floor, and whilst she was telling the customer this, the Applicant hurried towards the toilet whilst pushing the money with the mop.

### **3.2.3. THE TESTIMONY OF MS SAMUKELISIWE TSELA**

The witness testified under oath that she is a manager at the Respondent restaurant, and based at the Summer Place Complex. She stated that she started working there in the year 2008.

She testified that she had worked with the Applicant at the Summer Place complex until she was transferred by Mrs. Thwala to the restaurant at Sophie Complex because she had a problem with her manner towards customers. The witness stated that the Applicant was prone to shouting at customers.

The witness stated that Mrs. Thwala had spoken to the Applicant about this, and told her to improve on her attitude towards customers. Ms Tsela stated that Mrs. Thwala had finally decided to effect the Applicant's transfer to Sophie Complex after an incident when the Applicant was engaged in a heated verbal exchange with a customer, where expletives were exchanged between the two of them.

Ms Tsela stated that she had asked the Applicant what the cause of the commotion was, and the Applicant had told her that the said male customer had touched her private parts, and she had taken exception to this. The witness stated that she had reported all of this to Mrs. Thwala, and after some

discussions between the Applicant and Mrs. Thwala, she was transferred to the restaurant at the Sophie complex.

The witness was asked if she had spoken to the said customer about the Applicant's allegations that he had touched her private parts? Ms Tsela stated that she had indeed confronted the customer, and asked him why he was molesting the Applicant and pointed out to him that she was still young, so his actions were uncalled for. The witness stated that the customer had apologized and had said he had just been fooling around with her.

She said that as the customer was a regular at the restaurant, she had asked Mrs. Thwala to transfer the Applicant to the other restaurant since she did not believe that they could work well together after the incident.

#### 3.2.4. **THE TESTIMONY OF MR. BONGANI DLAMINI**

Mr. Dlamini testified under oath that he is currently employed as a supervisor at the Respondent's restaurant which is situated at the Sophie complex. He stated that he had previously worked as a waiter, and had worked with the Applicant.



The waiter stated that as part of his duties at the restaurant, he had been responsible for doing the banking. The witness related how Mrs. Thwala would hand him money which was to be banked, as highlighted how they would count it together, and he would then put the amount into the deposit book and fill in deposit slips at the bank.

He stated that he remembered of an incident which had caused some problems at work when Mrs. Thwala had sent him to the bank to bank E3,000.00 (Three Thousand Emalangi), and after they had counted it together he had put all the money in a deposit book and then put all of this into a little sack that had been provided by the bank. The witness stated that as he had left the restaurant late, he had found that the bank had just closed, hence he returned the money to Mrs. Thwala. He stated that Mrs. Thwala had received the money and gave him E400.00 to buy some items that would be used at the restaurant. He stated that she had confirmed that an amount of E2,600.00 had remained thereafter and he had left her in her office.

The witness also testified that the Applicant had not been a very good waitress because of her manner towards the customers. He stated that several of the customers had complained that she would ask for tips, and this was irrespective of whether they wished to tip her or not. He stated that he had witnessed this kind of behavior himself,

and he had tried to talk to her about this, and told her that she would upset the customers.

Mr. Dlamini testified that one customer had left for good after an incident where the Applicant had attempted to steal a customer's E20.00 note. He stated that he had met her at the toilet and she had entered to get the mop from the toilet. He related how she had been responsible for serving the said customer and his companion with their meal.

The witness stated that he had been entering the toilet whilst she was on her way out, and in her hand she carried a mop. He stated that whilst he was still in the toilet she re-entered and pushed the mop and bent down to pick up the E20.00 note that she had been pushing with the mop.

The witness testified that he had asked the Applicant where she had taken the money from, and she had told him that the money had been on the floor and it belonged to a customer. He stated that she had then handed the money over to him. He stated that he had found her actions quite odd, and wondered if she would have handed over the money if she had not found that he was still in the toilet when she returned with the money. He stated that he had also found it odd that she had not handed the money over to the supervisor as it was the workplace rule that if they found

any money, or if they were paid tips they were to surrender all this to the supervisor.

He stated that as he was taking the money from the Applicant with the intention of handing it to the supervisor, Philile, the customer started looking for his money, and at that time Jabu Gama spoke up and told the customer that the money had been taken by the Applicant. He stated that this particular customer had been so upset by the whole incident that he had vowed never to return, and had indeed not returned.

The witness was asked if the Applicant had explained to him why she had taken the money from the floor and into the toilet? Mr. Dlamini stated that she had not given him an explanation. He testified that this incident was however reported to Mrs. Thwala.

The witness was asked if indeed the E3,000.00 had been contained in a transparent money bag with a slip of paper with the figure E2000.00 written on it? The witness stated that as a norm he would only record the figures on the bank deposit slip, but as the bank had been closed, he had not recorded the figure on any kind of paper. He stated that he had been given E3,000.00 to bank, and had left E2,600.00 with Mrs. Thwala after she had handed E400.00 to him as the bank was closed. He stated that he was not aware of any

slip of paper with the figure E2000.00 on it. He stated that the bank he had meant to bank the money at was the Manzini Standard Bank Branch.

During cross-examination, the witness confirmed that he and Mrs. Thwala had counted the money before and after he left for the bank on that day, and had confirmed that it had been E3,000.00, and he was certain that she had remained with which she gave to him to buy items for the restaurant.

He was asked if the employer had informed him of what became of the E2,600.00? He stated that he could not recall this at all. He was asked of his reaction when he witnessed the Applicant pushing the E20.00 with a mop? The witness stated that he had found her behavior very odd, and did not understand why she had not handed it over to the supervisor when she found the money on the floor, and instead opted to push it into the toilet. He stated that he was not aware of the reasons that led to the Applicant leaving the employ of the Respondent.

The witness was also asked if indeed he and a certain Mthupha had helped the Applicant to move a table in Mrs. Thwala's office on the morning after he had returned with the E3,000.00 from the bank. The witness stated that he had never been asked by the Applicant to shift a table in Mrs. Thwala's office.

#### **4. ANALYSIS OF EVIDENCE**

The dispute at hand is one of alleged unfair dismissal wherein the Applicant claims that she was unfairly dismissed by the Respondent, and prays for an award in terms of the Report of Dispute, and the claim laid out therein.

The Respondent, on the other hand refuted the Applicant's claims that she was dismissed.

The Applicant testified in the evidence in chief that she had been dismissed by Mrs. Thwala, the proprietor of the Respondent when she shouted across the crowded restaurant the following words:-

“Hamba sigebengu, uyeba”, which means go away you thief.

The Applicant maintained even under cross-examination that these words, in as far as she was concerned amounted to a dismissal.

The testimony of Mrs. Thwala on the other hand were to the effect that she had never dismissed the Applicant. She stated that she had told the Applicant to go home and fetch the money that she had allegedly stolen. The testimony of Mrs. Thwala was to the effect that she had never shouted at the Applicant across the crowded restaurant. She stated that

she would not do such a thing as she would loathe to cause a scene in front of paying customers. She stated that even on the occasion that she found the Applicant embroiled in a shouting match with a customer, she had preferred to go to her office and to call the Applicant to the office so that they could speak privately, and away from the customers. She stated that according to the rules of the hospitality business, customers were to be accorded utmost respect; hence she would not have done this.

She stated that she had expected the Applicant to leave and to come back eventually with or without the money, so that she could be disciplined and put back to work. She stated that in her opinion she had not dismissed her, as she still expected her to bring the money back. The Applicant did not allude to any other proof that she had been dismissed, hence it was only on the strength of the alleged utterances that were shouted by Mrs. Thwala that she alleged that she was dismissed.

In light of the foregoing it is clear that on a balance of probabilities that the Applicant has not been able to prove that she was dismissed. It is not necessary to make a determination on the question of whether or not she stole the money in question, more so as there were many inconsistencies in her story regarding the amount of money that she found, and whether or not Bongani and Mthupha

had ever helped her to shift her employer's desk. It is also clear that she had a number of money-related problems at work, seeing two witness testified that she had been caught pushing a customer's E20.00 into the toilet with a mop. What is indeed key in this matter is whether or not she was dismissed by the employer.

It would seem clear that there is no conclusive proof that can be said to have been led by the Applicant as Mrs. Thwala's explanation contradicts what the Applicant had relied upon as being an alleged dismissal. The burden of proof then shifted back to the Applicant to competently gainsay what Mrs. Thwala was saying.

Furthermore, Mrs. Thwala stated that the Applicant had once before disappeared from work, and had returned several days later, only to say that she needed more time to go back and sort out her issues with a customer who had insulted her.

Mrs. Thwala also testified that to prove that further that she had not dismissed the Applicant, she had not asked the Applicant to return her company uniform. There was no effort on the part of the Applicant's representative to challenge this evidence in any way whatsoever.

It seems therefore clear that the Applicant was never dismissed, but simply deserted work. The totality of the evidence led herein, and the surrounding circumstances of

the case having been taken into consideration, point to a scenario where the Applicant simply failed to return to work after she had been told to go and fetch the missing money. This may or may not have been caused by the fact that she had indeed stolen the money, and was afraid of the consequences that may have followed this act. It could also have been because she was completely innocent of the said theft, but the long and short of all of this is that she does not appear to have been dismissed.

John Grogan, in his work titled, "Dismissal", (2000) Juta & Co Ltd at page 35 states that;-

*"Employees who permanently abandon their employment are in much the same position as those who resign - by deserting, they repudiate their contracts and bring them to an end. But there are significant differences between desertion and resignation. Repudiation by an employee occurs only when the employee form the intention of abandoning his or her work permanently; before that, the employee is simply absent from work, and the employer must treat the unauthorized absence as a form of misconduct".*

The said learned author states further that:-

*"The initial issue is whether the employee has formed the intention not to resume work, where that intention has been*



*formed; the courts recognize that a dismissal will not have occurred”.*

In the case of ***Alpheous Thobela Dlamini vs Dalcrue Holdings (Pty) Ltd, I.C. Case No. 382/04 at paragraph 27 of the court per P.R. Dunseith stated that:***

*“Where the employee’s conduct exhibits a deliberate and unequivocal intention never to return to work, there is no need for the employer to hold an enquiry. It may simply accept the employee’s desertion as repudiation of the employment contract, and thereby terminates the contract.*

In casu, it is my overall conclusion that the Applicant deserted her job, just as she had done before when she walked off to go and sort out her issues with the customer she had quarrelled with. The only difference is that this time she did not return to her job as she had done previously. This in my view, conveyed a clear intention that she was repudiating the employment contract, and thereby bringing it to an end.

By implication, the Respondent accepted the Applicant’s repudiation of the contract, and thus the contract between the parties herein, was terminated at the Applicant’s instance.

## **CONCLUSION**

The Applicant in her Report of Dispute claimed that she had been underpaid in an amount of E400.00 which is the difference between what she was allegedly paid as her first salary of E800.00, and her second salary of E1, 200.00.

During cross-examination, it came to light that she had signed for the receipt of E1,100.00 as her second salary, E1,150.00 as her third salary, and E1,200.00 as her fourth salary. She could not reconcile these figures with her initial testimony that she had been paid E1,200.00 as from her second salary, up to her very last one (this was when she was asked questions of clarity by the Arbitrator).

It was also clear that she could not refute that in accordance with the Regulation of Wages Order, 2012 (Hotel, Accommodation, Catering and Fast Foods Trades) the minimum salary for waitress in a restaurant is actually E770.00 per month. So the Applicant was not in actual fact underpaid when she received an amount of E800.00 as her first salary.

The Applicant could not even refute that she was paid this amount because she had started work, not at the beginning of the month, but when it had already begun.

In light of the foregoing, it is my finding that the Applicant has not been able to make out a case of underpayment.

**5. AWARD**

Having heard the evidence of both parties, I hereby find that the Applicant has failed to make out a case of unfair dismissal. The Applicant's claims are hereby dismissed in their entirety.\_

**THUS DONE AND SIGNED AT MANZINI ON THIS .....  
DAY OF APRIL, 2014.**

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**KHONTAPHI MANZINI  
CMAC ARBITRATOR**