



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

HELD AT MBABANE

SWMZ 466/2013

In the matter between:-

Sikelela Dlamini

Applicant

And

Falicious Hair Care

Respondent

CORAM:

Arbitrator : Commissioner Sipho Nyoni

For Applicant : In person

For Respondent : Irene Mthembu

ARBITRATION AWARD

Venue : Asakhe House Mbabane

Dates of Arbitration : 11th February 2014, 24th
February 2014 & 6th March 2014

Nature of Dispute : Unfair Dismissal

1. Details of Parties:

- 1.1 The Applicant is Sikelela Dlamini an adult Swazi male of P.O Box 37 Lavumisa. The Applicant represented himself during the arbitration proceedings.
- 1.2 The Respondent is Irene Mthembu trading as Falicious Hair Care being a sole proprietorship operating in Mbabane within the district of Hhohho.
- 1.3 The arbitration hearing was held at CMAC Offices - Mbabane Asakhe House.

2. ISSUE TO BE DECIDED:

- 2.1 The issue for determination is whether the dismissal of the Applicant was procedurally and substantively fair.

3. BACKGROUND TO THE ISSUE:

- 3.1 Applicant is an ex-employee of the Respondent having been employed in September 2013 in the capacity of a 'barber person'.
- 3.2 The Applicant alleges that he was unfairly dismissed by the Respondent on the 1st of December, 2013. The Applicant challenges the fairness of the dismissal. He alleges that the dismissal was procedurally and substantively unfair.
- 3.3 The dispute having been conciliated upon was certified as an unresolved dispute and a certificate of unresolved dispute issued.

3.4 The certified issues in dispute as appear from the certificate of unresolved dispute are a) notice pay E1,100.00, b) Leave pay E180.00, c) Salary for November 2013 E120.00, d) Compensation for unfair dismissal E3,300.00.

3.5 The Respondent disputes the alleged unfair dismissal and argues that the Applicant was never dismissed but rather that the Applicant absconded from work.

4. Issues not in dispute:

4.1 A pre-arbitration hearing was held for the purpose of narrowing down the issues in dispute. The parties agreed as follows, that the Applicant earned a monthly wage of E1, 100.00 (One thousand one hundred Emalangeni), that the Applicant was employed on the 5th of September,2013, and that the Applicant worked six days a week.

5. SUMMARY OF THE EVIDENCE:

The Applicant's version:

5.1 Two witnesses inclusive of the Applicant testified in support of his case. A summary of the most important aspects of each of the witnesses evidence influencing the outcome of this matter is as follows;

SIKELELA DLAMINI (AW1):

5.2 He gave evidence under oath and testified that he was employed by the Respondent as a barber person on the 5th of September 2013. He stated that he earned a monthly salary of E1, 100.00 (one thousand one hundred Emalangeni).

- 5.3 The Applicant gave evidence to the effect that on the 25th of November 2013 he got involved in an accident and sustained some burn wounds in the incident. The Applicant stated that the accident happened away from the workplace.
- 5.4 As a result of the injuries he sustained the Applicant states that he was given three days off work by his doctor. He testified that after the three days which he had been given by the doctor lapsed that he was still unable to return back to work and consequently did not report back for duty.
- 5.5 The Applicant stated that he sent someone to go to his workplace and inform his employer about his absence from work and further submit the doctor's note. After the lapse of the three days given by the doctor he again sent the same person back to report that he still was not able to report for work. The Applicant however conceded in his evidence that he subsequently discovered that the person he had sent had not been able to report him the second time.
- 5.6 The Applicant stated that he eventually returned to work on the 1st of December 2013 which was a Sunday.
- 5.7 It was the Applicant's evidence that when he returned on the 1st of December he found that the Respondent had already hired someone to replace him. He stated that he was informed by one Isaldo Desousa who was his supervisor that someone had been hired to replace him as the owner of the salon had thought that he was no longer returning to work.
- 5.8 Applicant stated that he was then advised to return on the following day to collect his salary for the month of November

2013. He stated that when he returned on the following day he still found the person that had replaced him at work.

- 5.9 The Applicant stated that an amount of E120.00 (one hundred and twenty Emalangeneni) was deducted from his salary by the Respondent. The amount deducted according to the applicant was to pay the person who had replaced him for the period of his absence.
- 5.10 It was the Applicant's testimony that after receiving his salary he enquired about his employment and that he was informed that someone else had been employed in his place. Applicant stated that after he had been notified that someone else had been employed he then left the premises of the Respondent as he considered himself to have been dismissed.
- 5.11 With regards his leave claim, the Applicant stated that during the period of his employment he never went on leave and that he was entitled to one leave day per month.
- 5.12 Under cross-examination it was put to the Applicant that he had only been employed for two and a half months and not three months. The Applicant maintained that he had been under the employ of the Respondent for three months.
- 5.13 It was further put to the Applicant that his last day at work had been the 24th of November 2013. The Applicant stated that the 25th of November 2013 was his off day and that therefore the three days which the doctor had given him only started to count on the 26th of November 2013.

5.14 It was further put to the Applicant that he was supposed to return to work on the 28th of November 2013 yet he had only returned to work on the 1st of December 2013. The Applicant responded by admitting that he had returned to work on the 1st of December 2013 but denied that he was supposed to return on the 28th of November. The Applicant stated that since the 25th was his off day, the doctor's days only began counting on the 26th of November and ran up to and including the 28th of November. The Applicant therefore stated that he was only due to return to work on the 29th of November, 2013.

5.15 It was further put to the Applicant that he was never dismissed from work. The Applicant maintained that he was dismissed and that he was told that there was no space for him to work since someone else had been employed in his place.

6. NHLANGANISO DLAMINI 'AW2'

6.1 This witness testified that he was sent by the Applicant to submit a sick sheet on his behalf at his workplace. He testified that when he submitted the sick sheet he found the director of the Respondent, Irene Mthembu and that he was told to submit the sick sheet at the other salon where the Applicant was employed since the Respondent operated two salons.

6.2 Under cross examination the witness was only asked if he had been told that the Applicant was not employed by the Respondent or just that he should submit the sick sheet with other salon so that the Applicant's supervisor could be made aware of the Applicant's absence. The witness stated that he

was told that the Applicant was not employed by the salon where he had submitted the sick sheet but by the other salon where he was directed to submit the sick sheet.

7. RESPONDENT'S CASE/ VERSION:

7.1 The Respondent led two witnesses in evidence to support its version of events. The most important aspects of the witnesses' evidence influencing the outcome of these proceedings are detailed herein below.

CELUMUSA DLAMINI 'RW1'

7.2 This witness testified to the effect that he is employed by the Respondent as a hair stylist. He confirmed that he knew the Applicant as a fellow employee of the Respondent. The witness stated that some man had arrived at the salon to deliver a sick sheet on behalf of the Applicant. He stated that they advised this person to wait for the owner of the salon Irene Mthembu to arrive so that he could hand the sick sheet directly to her. The witness confirmed that Irene Mthembu subsequently arrived at the salon and the man duly handed the sick sheet to her and that Irene requested that the man submit the sick sheet with the other salon where the Applicant was stationed so that the Applicant's supervisor could be made aware of the sick note.

7.3 The evidence of this witness was not challenged under cross-examination.

8. ISALDO DESOUSA 'RW2'

8.1 This witness testified that he was the Applicant's supervisor. He confirmed that the Applicant was employed by the Respondent on the 5th of September 2013. The witness stated

that the Applicant had only worked for the Respondent for a period of two and a half months.

- 8.2 The witness stated that during the short period within which the Applicant had been employed, that the Applicant on one occasion other than the one giving rise to this case disappeared from work for a period of two days without permission. The witness stated that the Applicant never submitted any doctors note for such absence.
- 8.3 The witness testified that three weeks after the Applicant's first disappearance from work that a man had arrived at the salon to submit a sick sheet on behalf of the Applicant. The witness stated that he enquired from this person if he knew what was wrong with the Applicant and that this person advised him that the Applicant had been involved in an accident and got burnt. The witness as part of his evidence submitted the sick sheet which had been submitted on behalf of the Applicant.
- 8.4 The witness testified that the Applicant returned to work on the 1st of December 2013 and that when he arrived he found someone else at the salon working. He stated that he advised the Applicant to go to the other salon to discuss the issue with Director of the salon Irene Mthembu since he had no work to give the Applicant on that day.
- 8.5 The witness testified that the Applicant was advised by the director to come on the following day so that he could get his salary for the month of November 2013. The witness stated that the issue of the employment status of the Applicant was never discussed.

- 8.6 The witness further confirmed that a certain amount was deducted from the salary of the Applicant in respect of the days that he had not reported to work on. The witness stated that the Applicant did not take kindly to the deduction and complained bitterly about it and consequently left the salon.
- 8.7 The witness stated that a week after he had left the salon the Applicant then submitted a letter complaining about his unfair dismissal and gave them seven days to respond to the letter. He stated that he handed over the letter to the Director of the Salon Irene Mthembu.

9. ANALYSIS OF THE EVIDENCE:

- 9.1 From the outcome of these proceedings the Applicant seeks payment of notice pay in the amount of E1,100.00 (one thousand one hundred Emalangeni), leave pay in the amount of E180.00 (one hundred and eighty Emalangeni), salary for the month of November, 2013 in the amount of E 120.00 (one hundred and twenty Emalangeni) and Compensation for unfair dismissal in the amount of E3,000.00(three thousand Emalangeni)
- 9.2 In view of the fact that the Respondent denies that it dismissed the Applicant, the Applicant therefore bears the onus of proving that a dismissal occurred. **See John Grogan; Dismissal, Discrimination and Unfair Practices second edition at page 168**
- 9.3 The onus will shift to the Respondent to prove that the dismissal was both fair and reasonable once the Applicant has

discharged the onus as stated above this being in compliance with the provisions of **section 42 (2) of The Employment Act 1980**, which reads as follows; 'The services of an employee shall not be considered as having been fairly terminated unless the employer proves-a) that the reason for the termination was one permitted by section 36; and b) that taking into account all the circumstances of the case it was reasonable to terminate the services of the employee'.

9.4 In his evidence the Applicant testified that he returned to work on the 1st of December 2013 and upon his return he found that the Respondent had already hired / employed someone else. He testified that he was told to go and speak to the director of the salon at the other salon which was also operated by the Respondent. 'RW2' who also testified in support of the Respondent stated in his evidence that when the Applicant returned to work after his absence he informed the Applicant that he did not have any work for the Applicant to do because he had already employed someone else . The Applicant testified that even when he returned on the following day to collect his salary he found the person who had replaced him still at work working in his place. The Applicant further testified that he had written a letter to the Respondent challenging his unfair dismissal by the Respondent. 'RW2' also confirmed in his evidence that he had received a letter from the Applicant about a week after he had left the salon and that the letter was a claim against an unfair dismissal. The Respondent upon receipt of the letter did not respond to same and in fact the Applicant was not even called to answer for his alleged desertion.

9.5 In view of the above, I find that the Respondent's assertion that the Applicant had deserted work cannot be sustained. It

is my finding that the Applicant has discharged the onus of proving that he was dismissed.

- 9.6 The Respondent however also raised the argument that the Applicant had only been employed for two and a half months and was therefore still on probation. **Section 42 (1) of the Employment Act of 1980** places a further hurdle to the Applicant's claim for unfair dismissal. The provisions of section 42 (1) reads as follows; In the presentation of any compliant under this part the employee shall be required to prove that at the time his services were terminated that he was an employee to whom section 35 applied.
- 9.7 **Section 35 of the Employment Act** provides as follows: Employees services not to be unfairly terminated.
- 1) This section shall not apply to;
- a) An employee who has not completed the period of probationary employment provided for in section 32.
- 9.8 The essence of the Respondent's argument therefore is that since the Applicant was under probation he cannot complain or argue that he has been unfairly dismissed.
- 9.9 The Industrial Court in the case of **Thulisile Mngomezulu vs. Swaziland Fruit Cannery (Pty) Ltd case No. 496/09** had to decide a similar argument as the one advanced by the Respondent. The Judge in the Thulisile Mngomezulu case (supra) held "that all employees at the workplace should enjoy equal protection of the law against un-procedural dismissals" _____ In arriving at the above conclusion the court was guided by **section 20 of The Constitution Act of Swaziland** which reads thus, "all persons are equal before and under the law in all spheres of political, economic, social and cultural life and

every other respect and shall enjoy equal protection of the law”

9.10 Being guided by the Thulisile Mngomezulu case I therefore find that the Applicant was entitled to a pre-dismissal procedure. The Applicant is therefore entitled to both substantive and procedural fairness. The Applicant was not afforded a hearing prior to being dismissed, I therefore find that the Applicant’s dismissal was procedurally unfair.

9.11 Turning to the reason for the dismissal, the evidence placed before me is that the Applicant sustained a burn injury when he was involved in an accident away from the workplace. The Applicant was given three days off work by a medical practitioner. A sick note was submitted as part of the evidence and the note is not in dispute. The issue however arises from the fact that the Applicant failed to return to work after the lapse of the three days that he had been given by the medical practitioner. The Applicant absented himself for a further two days and only returned to work on the 1st of December 2013 yet he was due to return on the 29th of November 2013.

The Applicant had therefore taken the two days without the permission or authority of the Respondent and further did not have a medical practitioner’s certificate certifying that he was unfit to return to work.

9.12 Further evidence placed before me and which evidence was not challenged by the Applicant was that of RW2 who testified that three weeks prior to the incident giving rise to this case, the Applicant had also disappeared for two days without the Respondent’s authority or permission and had further failed to produce a sick note justifying his absence from work.

9.13 Effectively the Applicant had absented himself from work for a total of four days within a period of thirty days without the permission of his employer.

9.14 **Section 36 (f) of the Employment Act, 1980** provides that it shall be fair for an employer to terminate the services of an employee because the employee has absented himself from work for more than a total of three working days in any period of thirty days without either the permission of the employer or a certificate signed by a medical practitioner certifying that he was unfit for work on those occasions.

9.15 I therefore find that the dismissal of the Applicant was substantively fair. I have already found that the dismissal was procedurally unfair because the Applicant was not afforded a pre- dismissal hearing. The Applicant's services were terminated without a hearing having only worked for the Respondent for a period five days short of three months. Having taken all the factors surrounding the dismissal I order that the Respondent pays the Applicant compensation equivalent to one month's salary calculated at the rate of his remuneration at the time of his dismissal.

10. LEAVE CLAIM:

10.1 **Section 123 (1) of The Employment Act 1980** provides that where the services of an employee are terminated after a period exceeding three months but not amounting to one year from the date of commencement, or after a period of employment following the completion of a year in respect of which the paid annual holiday has been taken, the employer shall, on or before the date of such termination pay to the

employee a sum equal to not less than one day's wage for each completed month of such period.

10.2 In the present case the Applicant had not been employed for a period exceeding three months and consequently therefore is not entitled to receive compensation equivalent to one days wage for each month completed.

10.3 The claim for leave pay is therefore dismissed.

11. NOTICE PAY CLAIM:

11.1 The dismissal of the Applicant has been held to be substantively fair and consequently the Applicant is not entitled to receive notice. The Applicant committed an offence which entitled the Respondent to summarily dismiss the Applicant. The claim for notice pay is dismissed.

12. SALARY FOR NOVEMBER 2013 CLAIM:

12.1 The Applicant seeks a refund of the amount deducted by the Respondent when paying him his salary for the month of November, 2013. It is not disputed by the Respondent that it deducted the amount of E120.00 (one hundred and twenty Emalangeni) from the salary of the Applicant. The Respondent argued that the deduction was in respect of the two days that the Applicant had not reported to work.

12.2 The Applicant's daily rate was E44.95 (Forty four Emalangeni and ninety five cents) and therefore the Respondent was only entitled to deduct the total amount of E89.90 (eighty nine Emalangeni and ninety cents) for the two days.

12.3 The Applicant is therefore entitled to the refund of E30.10 (thirty Emalangeni and ten cents) which was taken by the Respondent.

13. AWARD/ ORDER

13.1 The award that I make is as follows:

13.2 The Applicant's dismissal is held to be procedurally unfair.

13.3 The Respondent is to pay compensation to the Applicant in the sum of E1,100.00(one thousand one hundred Emalangeni) being in respect of the procedurally unfair dismissal

13.4 The claim for leave pay is hereby dismissed.

13.5 The claim for payment of notice pay is dismissed.

13.6 The Respondent is ordered to pay the amount of E30.10 (thirty Emalangeni and ten cents) in respect of the excess deduction effected on the Applicant's November, 2013 salary.

13.7 No order for costs is made.

13.8 The Respondent shall pay the total amount of E1130.10 (one thousand one hundred and thirty Emalangeni and ten cents) at CMAC Offices- Mbabane on or before the 30th of April 2014.

DATED AT MBABANE ON THE __ DAY OF MARCH 2014

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SIPHO M NYONI

CMAC ARBITRATOR