



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

HELD AT MBABANE

SWMB 208/14

In the matter between:-

SIMANGELE NTJALINTJALI

APPLICANT

And

TEMSEBE BEAUTY SALON

RESPONDENT

CORAM:

Arbitrator : Lobenguni Manyatsi

For Applicant : Mr. Mbhekwa Mthethwa

For Respondent : Ms. Bonisile Shabalala

ARBITRATION AWARD

Venue : Asakhe House, 1st Floor Mbabane

Date of Arbitration : 14th August 2014

Nature of Dispute : Unfair Dismissal

1. Details of Parties and Hearing:

1.1 The Applicant is Simangele Ntjalintjali, an adult female Swazi national from Mbabane, a former employee of the Respondent. Applicant was represented by Ms. Bonisile Shabalala, a lawyer from Bongani G. Mdluli and Associates during the arbitration hearing.

1.2 The Respondent is Temsebe Beauty Salon, an establishment duly operating along Dzeliwe Street in Mbabane. The Respondent was represented by Mr. Mbhekwa Mthethwa, an attorney from CJ Littler Attorneys during the arbitration hearing.

1.3 The arbitration hearing was held at CMAC Mbabane Asakhe House Building on the 14th August 2014 and closing submissions were made on the 28th August 2014

2. Issue for determination:

2.1 The issue for determination pertains to whether or not the dismissal of the Applicant was procedurally and substantively fair.

3. Background to the dispute:

3.1 The Applicant is an adult female Swazi national, a former employee of the Respondent who was employed as a Nail Technician.

3.2 Applicant alleges to have been dismissed by the Respondent and now therefore challenges the fairness of the dismissal.

- 3.3** The dispute was reported by the Applicant to the Commission, conciliated upon and subsequently certified as unresolved. A certificate of unresolved dispute was issued at the conclusion of the conciliation proceedings.
- 3.4** The certified issues in dispute which appear ex facie the certificate of unresolved dispute are; notice pay E 2, 400.00.00, additional notice E 1, 107.00, severance pay E 2, 769.30 and maximum compensation for unfair dismissal E 28,800.00.
- 3.5** The dispute was referred to arbitration by the consent of both parties who signed the CMAC FORM 8 Request for arbitration and I was appointed to arbitrate over the dispute.

SUMMARY OF PARTIES' EVIDENCE AND ARGUMENTS

4. APPLICANT'S CASE:

- 4.1** In support of Applicant's case, Applicant and two other witnesses came to give evidence. A summary of the most important aspects of the evidence influencing the matter are detailed herein below;

Simangele Ntjalintjali (AW1):

- 4.2** The Applicant testified that she was employed by the Respondent on or about the 1st August 2009 and stopped working for the Respondent in November 2013
- 4.3** Applicant stated that Grace, her employer, sent her a mobile text message (sms) dismissing her from work. This followed an episode where she was asked by Grace

to come to work on a Sunday but she could not make it because she woke up ill on that fateful day.

4.4 Applicant further testified that Grace called her on the Sunday and she told her that she was ill but if she was able to come to work she would come. After the phone call from Grace, she misplaced her phone and so when Grace called again she could not take that call.

4.5 Applicant stated that she tried calling Grace on the following Monday but she did not pick up. She then sent her an sms to tell her that she was still not feeling well, thus would not be able to come to work even on that day.

4.6 Applicant further testified that after she had sent the sms to Grace, she did not get a response until later in the evening where Grace sent an sms saying “you can continue staying at home, I have found a replacement sisi, ngiyabonga”.

4.7 On the Tuesday, Applicant testified that she did try to go and talk to Grace. She went with her mother who would act as a mediator between them. On the very morning they were going to see Grace, a lady friend of the employer called and told her that she should not bother going to the Labour department because the employer had a lawyer who was working on the issue, she should just come and apologize.

4.8 It was Applicant’s testimony that she did go to Respondent’s premises together with her mother to try and straighten out the issues they had with her employer. Grace told them that she sent the sms out of

anger but refused to apologise for it because she believed she had done nothing wrong.

- 4.9** Under cross-examination the Applicant was asked how much she earns as a basic salary and she responded that she was paid a basic salary of E1, 000.00 (one thousand emalangeni) and earned a commission on top of that. She admitted that the amount of E2, 400.00 that she had put as her salary in the report of dispute was the last salary she had earned and it included commission.
- 4.10** The Applicant was further asked what their agreement with her employer had been on the Saturday about coming to work on the Sunday. She stated that her employer had made appointments for her, hence the expectation of her to come to work.
- 4.11** Upon further cross-examination, Applicant stated that she told her employer that she was ill while on her way to work because she had vomited and had to go back to the house and change and she was also feeling dizzy.
- 4.12** Applicant further stated under cross-examination that after Grace sent her the sms, Grace tried calling her and she did not pick up because she was angry and did not want to say something that she would regret.
- 4.13** Still under cross examination, Applicant stated that she told Grace that they should continue with the sms Grace had sent earlier, nothing should change. This was after Applicant's mother had tried to intervene. Grace had refused to apologise for the sms.

4.14 The Applicant stated that she did bring a sick sheet to prove that she had been ill. The authenticity of the sick sheet was disputed by the Respondent's representative, to which Applicant responded that the doctor must have made a mistake when writing the date of her visit.

Queen Mavimbela (AW2)

4.15 The next witness to be called in support of Applicant's case was her mother, Queen Mavimbela, who testified that Simangele was indeed working for Grace at the salon and that she earned a basic salary plus a commission

4.16 Queen went on to testify that Simangele did not just stop working; she fell ill on the day in question. Simangele went to see a doctor and when she came back from the doctor she dropped off the sick sheet at Respondent's premises.

4.17 When Queen came back from work on the day Simangele had been to see the doctor, Simangele showed her an sms that had been sent by Grace. Queen further stated that she then told Simangele that they would have to go and see Grace so as to get to the bottom of the matter.

4.18 When they got to salon to speak to Grace, Grace just told them that the sms is what it is and would not change .They then left her like that.

4.19 On Cross-examination, Queen confirmed that Simangele, earned the sum of E1, 000.00 as her basic salary plus Commission. Simangele fell ill on the

Saturday evening and tried calling Grace on the Sunday to report.

- 4.20** She further stated that she never spoke to Grace on the Monday but only went with Simangele to see Grace the following day to try and talk to both parties and try and resolve the issue they might be having. When they got to the salon, they found that Grace was difficult and did not want to talk to them. They left before they could finish what they had come for.
- 4.21** Queen further stated that Simangele and Grace did not say anything to each other during the meeting and that the Respondent had not called them but she had initiated the meeting.

Kevin Fluhmann - AW3

- 4.22** The final witness to be called by the Applicant was Kevin Fluhmann who confirmed that he was in a relationship with the Applicant. He stated that on the day that Simangele fell ill he was with her.
- 4.23** Simangele sent an sms to Grace to tell her that she was feeling sick. Sometime after that Grace replied with an SMS that Simangele must just stay where she is, she has found someone to replace her at the salon. Simangele then went to show her mum the sms from Grace. After seeing the sms, Simangele's mother then called Grace to talk about it.
- 4.24** Kevin testified that he accompanied Simangele to see a Doctor. They then went to see Grace the following day

but he was not privy to what happened inside as he was not inside the meeting.

4.25 On cross - examination, Kevin stated that the Applicant fell ill on the Sunday, on Saturday she was fine. He also testified that Applicant never left the house on the Sunday; she just sent a sms to Grace to tell her she was ill.

4.26 Further on cross-examination Kevin stated that Simangele showed her mother the sms from Grace on the very same day that she had received the sms.

4.27 Legal submissions made on behalf of the Applicant were to the effect that the main relief sought by the Applicant was compensation for unfair dismissal. It was submitted that the Applicant was dismissed using an sms by the owner of Respondent on the 25th November 2013. The dismissal was done arbitrarily without regard to proper procedures and without any substance.

4.28 The case of *Ex Parte- Phindile Motsa v Siyabonga Wine and Malt CMAC Case SWMZ 138/08* was cited to give guidance to the Arbitrator on the widely accepted elements of fair procedure and that the Respondent did not follow these laid down procedures when dismissing Applicant.

5. RESPONDENT'S CASE

5.1 In support of Respondent's case, Respondent's owner came to give evidence. A summary of the most important aspects of evidence influencing the matter are detailed herein below;

GRACE DLAMINI (RW1)

5.2 Grace testified that Simangele was indeed employed by her as a Nail Technician and she earned a basic salary of E1600 plus commission. She started earning that money in 2013.

5.3 Grace further testified that on the Sunday, Simangele was supposed to come to work; her appointment was for 1 pm. At 12 noon she called Simangele and she said that she was coming to work. At 13:30 pm, Simangele called Grace and said that she had vomited in the taxi and was going back home to change.

5.4 Grace stated that when she spoke to Simangele on the phone the second time, she (Simangele) stated that she went to a party the previous day as it was her birthday and she drank Jack Daniels, yet she was not used to it. Grace told Simangele to go back home and change and come back to work because the client was waiting for her. Simangele did not come to work on that day and she was not picking up Grace's phone call when she called. Grace had to cancel all the appointments that she had and work on Simangele's client.

- 5.5** On the following day (Monday), Simangele was booked and Grace herself was booked. Grace started at the bank and while she was at the bank she was called by a client who said that she was standing at the door and there was no one. Grace had expected that Simangele would be at work by that time. Soon thereafter, Grace received an SMS from Simangele that she was unable to come to work even on that day.
- 5.6** Grace stated that what had angered her most was that Simangele had not cancelled her appointments for that day and that she had confessed that she had drunk liquor that is why she was ill. When she got home she sent Simangele an sms and told her to stay at home, she cannot continue to work the way they were working. Immediately after sending the sms she realized that what she had just done was wrong and tried to call Simangele to apologize but Simangele did not pick up the phone. Grace stated that she then called Simangele's mother and told her about the sms and that she was sorry. Grace stated that she also sent Simangele an sms apologizing for what she had written in the first sms.
- 5.7** Grace stated that when she spoke to Simangele's mother, she asked them to come into the salon first thing in the morning to talk. On the day they came to the salon, Simangele related the whole story of what had happened to Grace and her mother, including the part about her drinking alcohol and falling sick. Grace stated that she said in front of Simangele and her mother that she has no problem, Simangele should come back to work. Simangele stood up after hearing Grace say that and collected her belongings that were on Respondent's premises and then said they should continue with the sms Grace had sent the previous day.
- 5.8** After the meeting and Simangele leaving work, Grace states that she went to the labour department to try and have them mediate in the matter but even then Simangele refused to come back to work.
- 5.9** On cross-examination Grace stated that Simangele made her own appointments for her clients. She further

stated that Simangele did not report in the morning of the Sunday that she was ill; Grace only got to know that Simangele was ill when she called her at 12 noon to tell her that her client was already waiting for her.

5.10 Grace further stated that she only received an sms from Simangele on the Monday and that is when she then sent her an sms telling her to remain at home.

5.11 Grace further stated that on the day of the meeting with Simangele and her mother, they spoke at length and each aired their grievances but she promised that she would do right by Simangele, she would go to labour Department and they would advise her on how to pay Simangele what is due to her in terms of leave and overtime. She stated that she said Simangele should come back to work but Simangele who had been quiet all along said that they should continue with the sms Grace had sent and she left them talking with her mother.

5.12 Grace also stated that she had warned Simangele several times about her conduct at work. These warnings were done verbally. She reiterated that she did not dismiss the employee because she had reversed that sms.

6. Analysis of the evidence and arguments:

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

6.2 It was agreed between the parties that Applicant was indeed an employee of Respondent. That not being in dispute, the first port of call was therefore to establish

whether Applicant was in fact dismissed by her employer on the 24th November 2013

6.3 At the beginning of the arbitration it was agreed that in light of the Respondent's defence that Applicant was never dismissed but that she voluntarily left the employ of the Respondent, the duty to start would be upon the Applicant who would also bear the onus of proving whether there was a dismissal in law and in fact. This is because onus to prove that there was a dismissal rests on the employee and once the onus is discharged, the onus then shifts to the employer to prove that the dismissal was for a fair reason (substantively fair) and that it was in accordance with a fair procedure (procedural fairness). See **John Grogan "Dismissal" (2010) Juta & Co. Ltd at page 68.**

6.4 The enquiry into whether or not Applicant was dismissed by her employer is of paramount importance. This is because if it is found that the Applicant was in fact dismissed by Grace through an sms, then the next enquiry would turn onto the substantive and procedural fairness of the dismissal

6.5 It should be ascertained whether employee's attempt to withdraw the sms had any substance and whether Applicant's statement that they should continue with the sms was material. Did it amount to a resignation on her own free will, was it acceptance of the dismissal or was she forced to resign thus rendering the termination a constructive dismissal? To be determined also is whether it was reasonable in the circumstances and in

the context of subsequent events to continue with the termination of the employment relationship.

6.6 Applicant admitted that after her employer had sent the sms, Grace tried calling her soon afterwards but she did not pick up her phone because she was upset and was afraid she would say something she would regret at a later stage. Grace did not call once but tried several times and ended up calling Applicant's mother when Applicant did not pick up her phone. Grace told Applicant's mother about the sms she had sent and that she regretted saying what she had said in the sms. If Grace was not remorseful about the sms she had sent, would she have gone to such great lengths to try and speak to the Applicant and reverse it, it is doubtful.

6.7 During the arbitration hearing, the Applicant and her witnesses were quite economical with the truth when it came to events leading up to the Applicant not being able to go to work and events after receipt of the sms by Applicant. They all seemed to forget when exactly Applicant fell ill, if she did wake up to go to work or just did not even make an attempt to go to work. They seemed not to be sure whether or not Grace tried calling Simangele after sending the sms and if she did call Simangele's mother or if Simangele's mother was the one that insisted that they go and see Grace and try and straighten out the whole issue surrounding Applicant not going to work and Grace subsequently sending an sms.

6.8 It is common cause that Grace did send an sms to Applicant, telling her to remain at home, but soon after sending the sms she had an epiphany and came to realise that what she did was wrong and tried to make

amends by calling the Applicant, who did not pick up her phone.

- 6.9** The culpability of the actions (sending an sms to Applicant) of the employer were mitigated by the timeous and bona fide action of the same employer who made an attempt to withdraw the sms and get the Applicant and her mother to come to a meeting where they could talk things through.
- 6.10** Our Industrial Court appears to have taken cognizance of the “employers’ right to right a wrong.” In **Simon Dlodlu v Emalangen Foods, Industrial Court Case No. 47 of 2004, on paragraph 12.2**, Dunseith JP held that ***“where the employer acknowledges the error of its conduct and promptly withdraws its illegitimate demands, an employee who thereafter chooses to resign will not be regarded as constructively dismissed”***.
- 6.11** In **Kemp t/a Centralmed v Rawlings (2009) 30 ILJ 2677 (LAC)**, Zondo JP on behalf of the majority enunciated the principle that an employer has a “right to right a wrong”. This is a principle which cannot be denied acceptance in our local jurisprudence if we are to give precedence to the hallmarks of fairness and equity upon which our industrial relations are founded.
- 6.12** In the case of **Rawlings v Dr Kemp t/a Centralmed (2010) 31 ILJ 2325 (SCA)**, the Supreme Court of Appeal confirmed the principle that had been laid by the Labour Appeal Court in the above-cited case that, if an employer acts timeously and in good faith, to rectify the

wrong of a dismissal made, but the employee insists on the dismissal, the employer should not be held liable to pay compensation, even where the employee successfully challenges the fairness of the dismissal.

6.13 Consequent to these aforementioned authorities, it is objectively apparent that the Applicant's decision to refuse her employer's attempt to withdraw the sms and insisting that they should stick with the sms was unreasonable and premature under the circumstances.

6.14 The Applicant's decision that she wants her and Grace to stick by the sms Grace had sent was not made in the heat of the moment but it was duly considered by Applicant, who made the pronouncement a day after the sms had been sent. The Applicant herself acknowledged during cross-examination that she told the employer that they should stick to the sms that was sent by the employer.

6.15 In the case of ***Semenya & others v CCMA & others (2006) 27 ILJ 1520 (LAC)***, the court observed that ***"Where the opportunity to be heard is given after the decision has been taken, and it is one of those situations where it is acceptable and the person concerned spurns that offer or does not make use of it, it cannot lie in such a person's mouth to say that he was not given an opportunity to be heard. In such a case an opportunity to be heard has been given and rejected."***

6.16 Simangele refused to talk to her employer after the said sms. Grace tried to talk to the Applicant first through the phone and secondly face to face but Applicant blatantly

refused to talk and insisted that they should stick to the sms. The Applicant cannot then turn around and claim that she was not given an opportunity to be heard.

6.17 In light of the foregoing, I find that Applicant failed to discharge the onus resting upon her to prove that she was dismissed by the Respondent

7. Award:

7.1 The Applicant's claim for unfair dismissal is hereby dismissed

DATED AT MBABANE ON THE __ DAY OF OCTOBER 2014

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LOBENGUNI Y. MANYATSI

CMAC ARBITRATOR