



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

**HELD AT MBABANE**

**SWMB**

**231/13**

In the matter between:-

**LUNGILE MNISI**

**APPLICANT**

**And**

**MANTENGA LODGE**

**RESPONDENT**

CORAM:

**Arbitrator** : Mr Bongani.S Dlamini

**For Applicant** : Mr S. Dlamini

**For Respondent** : Mr S. Simelane

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**ARBITRATION AWARD**

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1. **PARTIES AND REPRESENTATION**

- 1.1. The Applicant is Lungile Mnisi an adult Swazi female and former employee of the Respondent. During the arbitration hearing, the Applicant was represented by Mr S. Dlamini, an attorney from Mkhwanazi Attorneys in Mbabane.
- 1.2. The Respondent is Mantenga Lodge (Pty) Limited, a company registered and incorporated in terms of the Company laws of the Kingdom of Swaziland. The Respondent company is in the Hotel and Tourism Industry and is based at Ezulwini area. The Respondent was represented by Mr S. Simelane, an Attorney based in Mbabane.

## 2. **ISSUE IN DISPUTE**

- 2.2. This is a case of alleged unfair dismissal. The Applicant's case is that she was unlawfully dismissed from her employment after being accused of imposing a mandatory gratuity of 10% on the total bill of two guests of the Respondent company.
- 2.3. The Respondent on the other hand argued that the termination of Applicant's services was fair and reasonable in all the circumstances of the matter as the Applicant had acted against the policies of the Respondent by imposing a mandatory gratuity or tip of 10% against the will of the Respondent's guests.
- 2.4. The matter was first reported to the Conciliation, Mediation and Arbitration Commission (CMAC) on or around the 2<sup>nd</sup> July 2013. In the Certificate of Unresolved Dispute and during the hearing of the matter, the following forms of relief are requested by the Applicant;

- i) Notice pay (E 1 425.00)
  - ii) Additional Notice Pay (E3 380.00)
  - iii) Severance pay (E 8 450.00)
  - iv) Maximum compensation for unfair dismissal (E 17 100.00)
- 2.5. After the matter had gone through conciliation, a Certificate of Unresolved Dispute was issued by the Commission on the 9<sup>th</sup> June 2014. Through a Court Order dated 8<sup>th</sup> October 2014, the matter was referred back to the Conciliation Mediation and Arbitration Commission by the President of the Industrial Court for determination of the issues accordingly. This Court Order was received by CMAC on the 22<sup>nd</sup> October 2014.
- 2.6. I was appointed as Arbitrator in the matter on the 22<sup>nd</sup> October 2014 and I concluded the matter on the 24<sup>th</sup> November 2014 after which I reserved my ruling on the issues till further notice.

### **3. NATURE OF EVIDENCE PRESENTED DURING HEARING**

- 3.1. The Applicant was the only witness to give testimony in her case, suffice it to say that the Applicant supplemented her case by adducing a number of documents in support of her verbal testimony.
- 3.2 The Respondent also relied on the evidence of its Director, Robert Jupp and further submitted a number of documents in support of its case.

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

The Applicant gave her testimony under oath and stated that she was employed by the Respondent initially as a House- Keeper during the year 1998. In July 2012, the Applicant was promoted to assume the position of Waitress where she worked under the supervision of Robert Jupp and one Paloma.

The Applicant's services were terminated by the Respondent on the 18<sup>th</sup> June 2014 after certain allegations of misconduct were leveled against her by the Respondent. At the time of the Applicant's termination, she was earning the sum of E 1 425.00 (One Thousand Four Hundred and Twenty Five Emalangeni) per month.

Giving an account of the events leading to her dismissal, the Applicant's testimony was that sometime in June 2013, she was called upon to serve as a Waitress, certain two customers of the Respondent who were apparently husband and wife.

The Applicant then outlined the procedure for providing service to a customer of the Respondent as she had been taught by her senior colleagues from receiving the client up to the stage of processing a bill for a client. This procedure was applied by the Applicant when serving the two guests of the Respondent. The Applicant's testimony was that she welcomed the two guests and proceeded to show them a table where they could sit for their meals.

Once the guests were seated, the Applicant requested to take their order for beverages and at the same time handed them the Respondent's menu book. After some time, the Applicant came back to the guests to take an order of their meals. It was the

Applicant's testimony that the guests were friendly and that they had talked about a number of issues including how tips or gratuity are paid as a token of appreciation by guests of the Respondent.

The Applicant stated that she explained to the guests in question (upon being asked on this issue by the male guest) that the issue of tips is not mandatory but lies solely at the discretion of the guest. It was stated by the Applicant that there were three different methods of paying tips if the guest wished to do so, namely that it could be 10% of the bill, or less than 10% or even more than 10%.

The Applicant's testimony was further that after the two guests had finished their meal, they asked for their bill and she proceeded to process it. Upon presenting the food bill to the couple, the man enquired on why Applicant had not included the 10% gratuity on the bill. The Applicant proceeded to include the 10% gratuity item on the bill in the presence of the two guests and on their table.

Since the couple was to use electronic payment for their bill, they then proceeded to the front desk to make their payment. Whilst the payment was being processed, the Applicant noticed that the woman was complaining about the 10% gratuity. The husband however dismissed the woman's complaint and stated that the 10% gratuity was fine. At this stage the Applicant could not stop the gratuity payment since the husband had consistently indicated that he was fine with the tip and in fact was the one who had volunteered to offer it at the table whilst the couple was still seated.

The Applicant's testimony was that the couple came back the following morning for breakfast and she was the one to serve them again. This time around the couple tipped her with E 10.00 after they had finished their meal. The Applicant stated that after about two days of serving the two guests, one afternoon while she was preparing to leave work, she was informed to remain behind. One Bongiwe then informed the Applicant to go to the Respondent's office where the Applicant was queried by Paloma on why she had charged the two guests a 10% mandatory fee on the bill. The Applicant denied charging the guests the 10% fee against their will but explained that the guests had voluntarily paid her the 10% gratuity.

The Applicant was then given a letter suspending her for two weeks without pay whilst the company was to conduct an investigation into Applicant's conduct. Later the Applicant was charged for the offence and was called to attend a disciplinary hearing. The hearing was chaired by a Mr Bloom, who after hearing the Applicant's representations and after examining some electronic mail communication between the female customer and one Paloma, concluded that the Applicant was guilty of the offence of wrongfully charging a customer of the guest house a 10% gratuity. The Chairman of the hearing recommended a sanction of dismissal of the Applicant which recommendation was implemented by Mr Robert Jupp.

On learning that her services were to be terminated, the Applicant pleaded with Robert Jupp to be taken back to her previous position of House-Keeping but this request was turned down by Robert Jupp who indicated that he did not want

anything to do with the Applicant. The Applicant then proceeded to report a dispute with CMAC.

In cross-examination, the Respondent, through its attorney, Mr Sikhumbuzo Simelane, sought to establish that the Applicant had forced the two guests to pay the 10% gratuity against their will otherwise they would not have complained. The Applicant however denied these allegations and maintained that the husband gave her the tip of 10% voluntarily.

The Applicant stated that her dismissal by the Respondent was unfair and she asked to be compensated in respect of notice pay, additional notice pay, severance allowance, outstanding leave pay and maximum compensation for unfair dismissal. The Applicant stated that she is presently unemployed and has two children with one child still attending school.

## **5. THE RESPONDENT'S CASE**

The Respondent's defence to Applicant's claims was heard through its Director, Mr Robert Jupp. The evidence by Robert Jupp was that the Respondent's business is in the tourism and hotel industry. Jupp's testimony was that as management, they are very particular that their guests are given the best treatment and that their stay in the country is comfortable with minimal disturbances.

According to the testimony by this witness, one way of ensuring that the Respondent improves its hospitality and care to its customers is to ask the guests to complete a "*Guest Questionnaire*" on a range of issues and service provided by the guest house. It was through this *questionnaire* that one Paloma had noticed that one of their guests had registered a complaint to the effect that he or she had been charged a

10% service fee without being advised prior. This questionnaire had been completed in Room 10 which made it possible to trace the identity and information of the guest in question.

The guest was requested to provide more information about her dissatisfaction and she proceeded to detail on what happened in two electronic mail messages sent to Paloma. It was on the basis of this communication that the Applicant was charged, called to a disciplinary hearing and subsequently dismissed. Mr Jupp stated that in terminating the Applicant's services it was not true that the company had a personal vendetta against her but that the process was fair, open and just in that company policy had been breached by the Applicant and that if such conduct is not controlled, could have far reaching consequences not only for the Respondent but for the country as well.

In conclusion, Mr Jupp prayed that the Applicant's claims to be compensated for unfair dismissal ought to be rejected as there was no merit on any of the claims and that the Respondent was well within its rights to take the action it took against the Applicant. The Respondent, through its Director Mr Jupp stated that as a company, they conceded that the following payments are due to the Applicant:

- Leave pay ( E 1325.00)
- Outstanding tips ( E 335.00)
- Outstanding June salary (E 249.00)

## 6. **ANALYSIS OF EVIDENCE AND ARGUMENT**

The Respondent's case or defence is based on the *questionnaire* completed by the guest as well as the electronic communication exchanged between the guest and Paloma. It has been stated in a



number of cases that disciplinary hearings are not formal court proceedings such that the normal rules of evidence and the strict approach to the standard of proof on certain issues ought to be relaxed.

The above stated principle does not in any way mean that we should totally ignore the rules of natural justice thereby bringing doubt to our justice system in the labour law context. Every evidential issue must be treated in the context in which it has arisen. In the present matter, there is the testimony of the Applicant who was cross-examined at length by the Respondent's attorney regarding the truthfulness of her testimony in particular on the aspect that the husband consented to the payment of the 10% gratuity and did so without being forced. On the other hand, there is a *questionnaire* completed by the guest and the communication exchanged between the Respondent's management and the guest.

The Applicant could not be afforded the opportunity to scrutinize and question the validity of the contents of these documents because their authors were not present during the hearing. That being the case, it cannot be said that the disciplinary hearing or the arbitration process was fair in its admission or consideration of the evidence presented to it. The Applicant was denied the fundamental right to put to test or scrutiny the contents of the documents presented at the hearing.

The above state of affairs is firmly dealt with by **John Grogan, Workplace Law (9<sup>th</sup> Ed)** at p.196 wherein the author states the position of the law as follows;

***"In principle, it is unfair to rely on claims by a person who does not testify at the disciplinary proceedings. So, for example, an***

***employer's reliance on a letter of complaint from an irate customer about an employee's alleged disrespectful manner was ruled unfair because the customer had not been called to testify."***

***See also : MAGIC COMPANY v CCMA & OTHERS (2005) 26 ILJ 271 (LC)***

The Respondent's case is therefore largely based on hearsay evidence and, that being the case, the Applicant's testimony is to be preferred as against the untested evidence contained in the papers submitted on behalf of the Respondent. Having considered the facts and the evidence presented during the hearing of the matter, the conclusion I make is that the dismissal of the Applicant by the Respondent was unfair and unreasonable in the circumstances of the case.

## **6. AWARD**

Having considered the evidence presented during the hearing of the matter and, taking into account the Applicant's length of service with the Respondent; the Applicant's hardships following the dismissal; the Applicant's age and her likelihood to find alternative employment, I award the Applicant the following sums of money;

- (a) Notice pay in the sum of E 1 425.00**
- (b) Additional notice pay in the sum of E3 380.00**
- (c) Severance pay in the sum of E 8 450.00**

- (d) Leave pay in the sum of E 1352.25**
  
- (e) Outstanding tips in the sum of E 335.00**
  
- (f) Outstanding June 2013 salary (as offered by the Respondent) E 249.03**
  
  
- (g) 8 months compensation in the sum of E 11 400.00**

The Respondent is to pay the total sum of **E26 591.28** to the Applicant through CMAC in Mbabane on or before the 15<sup>th</sup> January 2015.

**THUS DONE AND SIGNED ON THIS .....DAY OF DECEMBER, 2014.**

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**BONGANI S DLAMINI**  
**CMAC ARBITRATOR**