



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

HELD AT MANZINI

SWMZ 478/13

In the matter between:-

GUGU SHONGWE

APPLICANT

And

WORLD VISION SWAZILAND

RESPONDENT

CORAM:

Arbitrator : Fanile Ginindza
For Applicant : Mr. Zwelakhe Nhleko
For Respondent : Mr. Banele Gamedze

Nature of Dispute : Unlawful termination (Breach
of contract)

Date of Hearing : 13/10/14, 25/11/14, 4/12/14,
14/01/15, 26/02/15, 2/04/15,
22/04/15.

ARBITRATION AWARD

1. DETAILS OF HEARING AND REPRESENTATION

- 1.1 The Applicant is Gugu Shongwe an adult female Swazi of Mliba in the Manzini region and was duly represented during these proceedings by Mr. Zwelakhe Nhleko, a labor Consultant.
- 1.2 The Respondent is World Vision Swaziland a None Governmental Organization and was duly represented during these proceedings by Mr Banele Gamedze, an Attorney from Musa Sibandze Attorneys.
- 1.3 The arbitration hearing was held at CMAC-Manzini Office situate at KaLankhosi Building, on the above mentioned dates.

2. ISSUE TO BE DECIDED

- 2.1 The issue for determination is whether there was a breach of contract by the Respondent.

3. BACKGROUND TO THE ISSUE

- 3.1 The Applicant is an ex-employee of the Respondent, having been employed as a Health, HIV/AIDS and Nutrition Communities Representative on the 1st December, 2010 and she was terminated on the 31st March, 2013. Her monthly wage according was E4, 249-

73. She is claiming compensation for unfair termination of employment contract.

3.2 The Respondent admits the former employment relationship between the parties as well as its material terms. It, however, denies the alleged breach of her contract and contends that her position became redundant after a restructuring exercise and that she was paid her terminal benefits which she accepted.

4. SUMMARY OF THE EVIDENCE AND ARGUMENTS

The Applicant's Version;

4.1 The only witness paraded by the Applicant was the Applicant herself and I shall refer to her as such herein.

4.2 The Applicant testified that she was employed on a three year fixed contract which began on the 7th June 2010. On the 29th November 2012 which was the second year of her contract she received a letter advising her that the Respondent was in the process of restructuring and have since discovered her position would be redundant.

4.3 It was the Applicant's testimony that she was told that the Respondent would try to create new posts to which

she could be fitted. She testified that she was told that by the 1st January 2013 she would know if she has been given a new post or not, and that if she did not get a post by this date she would get a termination letter.

4.4 The Applicant testified that the said letter further advised her to contact Human Resources Department if they had any queries but she did not get any help when she went to enquire because her contract had not expired. She then decided to write a letter to the Respondent.

4.5 It was the Applicant's testimony that before the termination letter the employees (Manzini branch) were called to a meeting wherein they were advised as to what would happen if a post became redundant. The Applicant testified that officers from the Labour Department were present. It was her testimony that the Labour Department advised them that where an existing contract was breached by the employer, the employee concerned must be paid.

4.6 The Applicant testified however that when they were given termination letters nothing was said about the payment for the remainder of their contracts and nothing was communicated to them.

- 4.7 Under cross examination the Applicant confirmed that before the termination of her services she was told about the restructuring of the Respondent. The Applicant however testified that she did not know that the Respondent was restructuring as a result of financial constraints.
- 4.8 The Applicant also confirmed that as a means to salvage the situation the Respondent was going to open posts for those who qualified. She testified however that she did not apply for any post in the new structure because there were no advertisements made.
- 4.9 It was put to the Applicant that there were internal advertisements made and that evidence shall be adduced to that effect. The Applicant testified that she cannot deny that because she was at ADP (Area of Development Program) level. She testified that maybe it was advertised at National level. Her testimony was that she depended on her line Manager for communication and that maybe the latter was told about the posts.
- 4.10 The Applicant confirmed that the Labour Department advised them that the employer would be liable for

breach of contract. It was then put to the Applicant that her contract was not breached because her contract was to endure from the 1st December 2010 to the 30th September 2013, and it was terminated on the 31st Mach 2013.

4.11 The Applicant confirmed that she was made aware that some posts would be redundant but not hers. It was put to the Applicant that she was aware and that evidence would be led to that effect. The Applicant disputed this and testified that she did not know since her position concerned the HIV/AIDS pandemic.

4.12 The Applicant maintained that she was not engaged pertaining to the issue of her position being redundant. It was put to the Applicant that she was engaged and that evidence would be led to that effect.

4.13 It was further put to the witness that in terms of the Employment Act 1980 (as amended) all the necessary steps were taken when she was terminated and that there was no breach of contract. The Applicant disputed this.

4.14 There were no further questions

4.15 Mr. Nhleko for the Applicant applied to hand in the Applicant's contract as part of the Applicant's evidence and there was no objection. The contract was then submitted as part of her evidence.

The Respondent's Version;

4.16 The Respondent paraded a total of two (2) witnesses. The first witness was Ms. Sakhile Dlamini whom I shall refer to as the witness or "RW 1" herein.

4.17 The witness testified that she was employed by the Respondent as the Governance and legal advisor and that prior to that she was the Child Protection Specialist.

4.18 It was the witness's testimony that she knows the Applicant from the records as she was employed at the Mandlangempisi office as a HIV facilitator and that she is no longer the Respondent's employee.

4.19 The witness testified that the Respondent went through an internal restructuring process which is referred to as an organizational development which was to align available resources and to position the Respondent to better respond to the community needs. It was the

witness's testimony that as a result of that process some employees (about 300) were affected and their positions became redundant.

4.20 It was the witness's testimony that a letter was then written to the Labour Commissioner notifying her office of the process and the reasons thereof and the effect and in particular the redundancy of staff. A copy of the letter was submitted as part of the evidence and was marked exhibit "WV 1".

4.21 The witness testified that a Change Management Committee was set up and comprised of different categories of staff from Managers to Community staff. This Committee supported the Senior leadership in effecting the change as a result of the Operational Development. Her testimony was that presentations for staff to provide update were then co-ordinated by the Change Management Committee to ensure that staff had all the necessary information and the necessary consultations were made.

4.22 "RW 1" testified that the staff was then engaged on how their positions were affected through individual consultations by their respective Supervisors. Her testimony was that staff meetings were held where the

staff was informed and internal statements were published through the Pulse (internal magazine). The witness testified that statement was issued by the Managing Director (MD) explaining the entire process. A copy of the statement was submitted as part of the evidence and was marked exhibit “WV 2”.

4.23 The witness testified that the final list of affected staff came out after the consultations and they were notified through correspondence and they were paid their terminal benefits. A letter signed by the Applicant was submitted as part of the evidence and was marked exhibit “WV 3”.

4.24 It was the witness’s evidence that initially advertisements were made after the restructuring exercise for staff wherein they were invited to make applications for posts to which they were suitable. “RW 1” testified that some employees applied and were re-engaged and those who were not successful were not re-engaged.

4.25 The witness testified that the Applicant according to her records did not apply and was paid her severance benefits.

- 4.26 Prior to being terminated the witness testified that the consultation process lasted for about three (3) months, and that the Applicant formed part of the consultative process which was conducted by Supervisors.
- 4.27 Under cross examination the witness confirmed that the Applicant was notified of her redundant position generally by the national office with all other employees and individually by her Supervisor
- 4.28 The witness confirmed that the Applicant was notified of available posts aimed at minimizing redundancies.
- 4.29 When pressed if she could not deny that the Applicant received such notification, the witness testified that staff do not communicate through their Supervisors as alleged by the Applicant. Her testimony was that staff could go to the National office and there is also the internal magazine. Further, her testimony was that others in the Applicant's position did apply. It was the witness's testimony that she thinks the Applicant chose not to apply but was notified.
- 4.30 All the questions that followed during the cross examination dealt with the procedure adopted in notifying the Applicant about the new posts after the

restructuring process and none dealt with alleged the breach of contract. The witness stuck to her guns and testified that if Applicant's colleagues got to know of the available posts chances are that the information reached the Applicant. The witness also testified that information about the vacant posts came from the Head Office where she was based and sent to the Supervisors who in turn send back reports of what is happening on the ground, and therefore she was in a position to say that the notification about vacant positions did reach the Applicant.

- 4.31 The second witness paraded by the Respondent was Babazile Bhembe-Shabangu who testified that she was employed as the Area Development Program Manager by the Respondent. She is currently employed by the Palsm for Life Fund. I will refer to her as the witness or "RW 2" herein.
- 4.32 The witness testified to the Commission that the Applicant was one of the staff with which she worked at Mandlangamphisi and that she was known to her.
- 4.33 It was the witness's testimony that the Respondent embarked on a restructuring exercise which was referred to as the Operations Development exercise.

She testified that the purpose of the exercise was for the Respondent to be more efficient and to put more focus of the available resources to community work. She testified that as a result of this exercise the Applicant's position was no longer in the respondent's organogram and her post became redundant.

4.34 After the exercise, the new structure was released and the Applicant was informed of the new developments through correspondence. "RW 2" testified that she personally engaged the Applicant and told her about the new posts and advised her to apply. The letter to the Applicant was submitted as evidence and marked exhibit "MV 4". She testified that internal memoranda were also issued to all staff and immediate Supervisors also engaged with staff and that she personally did presentations to employees.

4.35 It was the witness's testimony that she personally talked to the Applicant when she delivered to her exhibit "MV 4" and she had in her possession a copy of the Respondent's news letter and the new structure of the Respondent.

4.36 It was the witness's testimony that the purpose of the meeting was to make the Applicant appreciate the

change and to help her understand how her post had been classified as redundant.

4.37 The witness testified that she then advised the Applicant that the Respondent would advertise new posts and encouraged the Applicant to apply should a suitable post be advertised. It was the Applicant's testimony that the Human Resource Department then communicated with the employees at certain times on ways which they could take to go look for alternative employment.

4.38 The witness reiterated that the Applicant was given an opportunity to apply and the available positions were made known to her. It was her testimony that the job advertisements were printed and pinned on the notice board for all to see. Further it was her testimony that the Applicant's colleague who was employed as a Food Security Community Worker also based in Mandlangempisi applied.

4.39 A copy of the news letter was submitted as evidence and marked exhibit "MV 5".

4.40 Under cross examination the witness explained that in terms of the hierarchy, there was one employee

between her and the employees and this was the Health and HIV Facilitator who reported to her. The employees reported to him.

4.41 It was the witness's testimony that employees were notified through the news letter about the available posts, and that she would only engage with the employees when their Supervisor needed her to clarify something.

4.42 The witness testified that the availability of posts had been an item of a series of meetings held with the employees, and denied that the Applicant was not notified of vacant posts.

4.43 The witness conceded that the Applicant was employed on a fixed term contract and testified that in her knowledge the contract had not expired and that is why the Applicant was paid her severance allowance.

5 ANALYSIS OF THE EVIDENCE AND ARGUMENTS

5.1 The Applicant herein is claiming payment of six (6) months' salary which is the remaining period in his contract when his services were terminated on the ground of redundancy by the Respondent. The Applicant was paid her retrenchment package as

follows, Severance allowance **(E1, 961.11)**, 2 months additional Notice pay **(E8, 499-46)**, Annual leave due **(E2, 745-56)** and WVS Provident Fund Credit **(E12, 164-47)**.

5.2 It is worth noting that throughout her evidence in chief the Applicant did not challenge the substantive fairness of the termination of her services. She testified that on the 29th November 2012 she received a correspondence which advised her that the Respondent was restructuring and that her position would be redundant. Under cross examination however, the Applicant changed tunes and testified that she was not notified that her post would be redundant since it dealt with the HIV/AIDS pandemic. Part of the letter which was received by the Applicant reads thus; **“As a result of this processes, we hereby advise that your role as HIV & AIDS Representative has changed by more than 30% and no longer fits within the new structure thereby rendering it (the role and not you) redundant.”**

5.3 Even before this correspondence, the Applicant testified in chief that employees were called to a meeting in Manzini in which officers from the Labour Department were in attendance. She testified that they were

advised as to what would happen should a post be declared redundant. It was also the testimony of “RW 1” that employees were consulted through their respective Supervisors. “RW 2” corroborated this testimony when she testified that she personally engaged the Applicant, and the purpose of the engagement was to make the Applicant appreciate the change and to help her understand how her post became redundant. It was “RW1”s uncontroverted evidence that a notice in terms of Section 40 (1) of the Employment Act 1980 (as amended) was issued to the Labour Commissioner advising her of the retrenchments. It is the view of the Commission therefore that the retrenchment exercise was based on a sound business reason and was carried out in accordance with the law.

- 5.4 The next issue is the claim for payment of the six (6) months remaining in the Applicant’s contract. The Applicant herein is actually saying that, even though she was dismissed as a result of being redundant she was supposed to be paid her salary for the duration of her fixed term contract.
- 5.5 In *casu* the Applicant’s contract provides in **Clause 12** that the Parties can terminate this contract without

cause at any time upon 30 days advance written notice, and further states that the Respondent has the option to terminate this agreement for cause, which shall result in immediate discharge.

- 5.6 In the Industrial Court case of **Sipho Shongwe v Swaziland Meat Industries case no. 66/02** the Court was confronted with a similar argument wherein it was argued on behalf of the Applicant that the termination on grounds of redundancy was unlawful as a fixed term contract cannot be terminated on operational grounds. The Court found that the termination was lawful because it was permitted by a clause in the fixed term contract, and that the Respondent had complied with the said clause by giving notice as stated therein.
- 5.7 Even if the Commission were to find that there was a breach of contract, the Applicant's claim would not succeed in light of the decision of **Roma Investments (Pty) Ltd v Edward Gamedze Industrial Court of Appeal case no. 04/2004, Ebersohn AJA** had this to say at page 5 paragraph 10: **"As a general rule where an offer compromise (tender) is concerned the sending of a cheque in full and final settlement of a debt amounts to an offer of**

compromise. It carries with it the implied condition that if the cheque is accepted (that it is banked or cashed) the claim is settled. (See) Odendaal v Du Plessis 1918 AD 470; Burt NO V National Bank of SA Ltd 1921 AD 59). The effect thereof is that the debtor may raise the compromise as a complete answer to a claim against him later. (See Stieler v Krock-Bou Aannemers Bpk [1997] 2 All SA 526 (W)). The principle that a party may not reprobate and approbate at the same time is clearly applicable.

5.8 At page 6 paragraph 12, the Judge went on and stated that: **“If the creditor accepts payment, where a tender to settle is made, he thereby accepts the offer of compromise. A creditor who does not wish to compromise must return the payment tendered and sue for the full amount (See Van Breukelen v Van Breukelen) or take such other steps as he may be advised to take. He may not retain payment “without prejudice” to his right. (See Andy’s Electrical v LaurieSykes (Pty) Ltd 1979 (3) SA 341 (N).**

5.9 The above statement was echoed by Nkonyane J in the case of; **Swaziland Union of Financial Institutions**

and Allied Workers Union (SUFIAW) v Swaziland National Provident Fund (SNPF) Industrial Court Case no. 211/2012 at page 9 paragraph 22, where he said; “The Applicant’s members having failed to return the amounts to the Respondent in order for them to claim any balance owed, they have accepted an offer of compromise. A creditor who does not wish to compromise must return the payment tendered and sue for full amount. The Applicant’s members cannot retain the payments without prejudice to their rights. They cannot approbate and reprobate at the same time...The retention of the amounts paid to the Applicant’s members is sufficient to bind them.

- 5.10 On the failure of the Respondent to mitigate the effects of the redundancy by failing to notify the Applicant of any available posts after the restructuring, it was testified both “RW 1” and “RW 2” that posts were advertised. It was the testimony of “RW 1” that posts were advertised and some of the affected employees were engaged, and further that the Applicant did not apply for any post. This testimony was corroborated by the testimony of “RW 2” who testified that she personally communicated with the Applicant and advised her that new post would be advertised and that

she should apply for any suitable position. She testified that the advertisements were pinned on the notice board and one of the Applicant's colleague applied. It was her further testimony that when she consulted with the Applicant she had the Respondent's newsletter and the new proposed structure of the respondent. I therefore find that adequate means were made by the Respondent to mitigate the effects of the redundancy by notifying its employees of the new structure and further advertising new posts to which the affected employees could apply.

5.11 It is therefore the Commission's finding that the Applicant's contract was not breached.

6 AWARD

6.1 The Applicant's claim is hereby dismissed;

6.2 There is no Order as to costs.

DATED AT MANZINI ON THE 15th DAY OF JANUARY, 2016.

FANILE GININDZA
CMAC COMMISSIONER