



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

HELD AT MBABANE
77/17

SWMB

In the matter between:-

JABULANE SIBANDZE

APPLICANT

And

WILLIAM STUART

RESPONDENT

CORAM:

Arbitrator : Lobenguni Manyatsi

For Applicant : In person

For Respondent : In person

ARBITRATION AWARD

{19/07/2017}

Venue : Mbabane Inner City Offices

Nature of Dispute : Unfair Dismissal

1. Details of Parties and Hearing:

1.1 The Applicant is Jabulani Mphikeleli Sibandze, an adult male Swazi national from kaPhunga, in the Shiselweni Region and an alleged former employee of the Respondent. During the arbitration hearing, Applicant represented himself.

1.2 The Respondent is William Stuart, an adult male who had engaged the Applicant to perform certain work for him. During the hearing, the Respondent represented himself.

1.3 The arbitration hearing was held at CMAC Operations offices, Mbabane on the 2nd and 30th May 2017.

2. Issue for determination:

2.1 The issue for determination pertains to whether or not the Applicant was an employee of the Respondent and if he was, whether he was dismissed from work and whether his dismissal was fair or not.

3. Background to the dispute:

3.1 Applicant alleges that he was unfairly dismissed by the Respondent and that he is entitled to be compensated for the unfair dismissal.

- 3.2 Respondent on the other hand denies Applicant's claims and states that the Applicant was not unfairly terminated from work as he was not his employee in the first place but an independent contractor.
- 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 relief sought by the Applicant which appears ex facie the Certificate of Unresolved Dispute is:
- | | |
|---|-------------|
| 3.4.1 Notice Pay | E1, 500.00 |
| 3.4.2 Leave Pay | E750.00 |
| 3.4.3 Maximum compensation for unfair dismissal = | |
| | E46, 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 his witness, one Themba Lukhele gave evidence. Applicant was the first one to testify herein. A summary of the most important aspects of the

evidence influencing my decision are detailed herein below;

4.2 Applicant testified that in September 2016 he was called by Mr. Stuart to go and renovate toilets at his school, Magwanyana Primary School. He did that work and was paid E7, 000.00 (seven thousand emalangen) for the work done. On the day of the payment, Mr. Stuart sat him down and told him that he had plans for building more of the school. Mr. Stuart told him that he could do the work as an independent contractor or be employed permanently by the school.

4.3 Mr. Stuart advised the Applicant that it would be wise for him to take up permanent employment. Applicant liked the idea and agreed that he be employed permanently. Mr. Stuart mentioned to the Applicant that he would work for three months then be employed permanently. The Applicant and his fellow employees did various construction projects around the school. Within a month of the employment the Applicant's fellow employees complained that the wages they were getting were too low, they wanted an increment. Mr. Stuart did not accede to their demands, they were paid their wages due and let go. Applicant worked alone after that for two days.

4.4 After two days, the Applicant was called by the head teacher of the school, who happens to be Mr.

Stuart's brother and told that he should go and look for men that he was going to work with, the wages to be given to the employees had been increased, including the rate of the Applicant himself.

4.5 Applicant went and looked for the men and when he came back with them he introduced them to the head teacher because his boss was not there. The men worked from October 2016 to around the 21st or 22nd of January 2017. The people stopped working because Inspectors from the Town Board came and stopped the construction because there were certain documents they wanted before the construction could continue. The Applicant stated that the Respondent said the men should stop working save for himself (Applicant) and another man, one Bongiswa Mbingo, who continued to make bricks in readiness for when the project continued.

4.6 Applicant stated that besides the construction work, he did all the work of a grounds man of the school, including changing door locks, cleaning the yard of the school and any other duties that were assigned by the Respondent. He further stated that they had a fixed time of getting to work and a knock off time, they could not take on other projects while working for the Respondent.

4.7 Applicant stated that on the 6th February 2017, he went to the head teacher and reminded him that when he was employed he was told that he would

be on probation and after completion of 3 months he would be made permanent. The head teacher promised to go and speak to his brother about the issue. On the 13th February 2017, the Respondent came to the school and called Applicant into the office. That is where Applicant was told that he should also stop working and was told that the head teacher would give them money for the days worked. He wrote a letter to the Respondent registering his dissatisfaction about the manner in which he was dismissed and asked for payment of compensation for the unfair dismissal. The Respondent responded verbally and told him that he was not his employer and that he should proceed with the CMAC route.

- 4.8 Applicant stated during cross-examination that he never got an appointment letter from Magwanyane Primary School. He also stated that he was stopped by the Respondent from working, who in turn had been stopped by the Town Board.

THEMBA LUKHELE (AW2)

- 4.9 The Applicant called one Themba Lukhele to testify on his behalf. Mr. Lukhele testified that he knows that the Applicant worked at Magwanyane Primary School as a foreman when they were building classrooms. He further testified that the Applicant not only concentrated on the building of classrooms but he also performed other duties around the

school. They had a fixed time for knocking on and knocking off work and they could not take other jobs other than the project they were working on.

5. RESPONDENT'S CASE

- 5.1 In support of Respondent's case, the Respondent himself gave evidence. A summary of the most important aspects of the evidence influencing my decision are detailed herein below;
- 5.2 The Respondent stated that he had a very good relationship with the Applicant over the last few years. When he needed a job done, he would sit down with the Applicant and discuss the job he wanted done and the Applicant would then charge for his services.
- 5.3 He stated that a project came up at the school and he called the Applicant to discuss the project. He made an offer to the Applicant, to choose whether he wanted to tender for the job and name his price or have the Respondent employ him for the duration of the job they were to do. This offer was made based on the fact that the Applicant had been asking for a long time that the Respondent employ him full time instead of him naming a price and moving on after that project was complete.
- 5.4 Respondent explained to the Applicant that there was a lot more construction work that was to be done at the school, not just the construction of classrooms. An offer was made to the Applicant to

be a supervisor of the project and he would be paid E120.00 (one hundred and twenty emalangeni) per day. The Applicant accepted the offer to work on contract.

5.5 After some time the Applicant expressed his unhappiness at the rate that was offered and demanded an increment to E175.00 (one hundred and seventy five emalangeni) per day and because the Respondent was under a lot of pressure to finish the work he succumbed to the demand of an increment and offered the Applicant E150.00 (one hundred and fifty emalangeni) per day, which the Applicant accepted.

5.6 The Respondent testified that whilst the project was ongoing, the head teacher of the school told him that he would need a caretaker for the school and asked him to help him find one. The head teacher informed him that the budget for the position was E120.00 per day. Because the Applicant had always been asking for employment, Respondent told him that at the end of the project he might get a permanent job but the problem was that the salary was only E120.00 (one hundred and twenty emalangeni) per day. If Applicant accepted the job he would be put on probation and be employed permanently thereafter. He stated that he was not offering the Applicant a job but merely informing him of the prospects of a permanent job. The

Applicant was given a chance to go and think about the offer.

5.7 Respondent stated that when they were almost finished with the 1st phase of the classroom project they got a visit from an Inspector of the Town Board and the Applicant attended to him because he (Respondent) was not there. When Respondent called the Inspector later in the day, the Inspector informed him that they should immediately stop working on the project until they complied with the requirements from the Town Board. The Respondent told the Applicant and other workers that they needed to stop before they got into trouble. He had been informed that the approval process might take anything between three and four months.

5.8 The Respondent informed the Applicant that they could not carry on with the workers, they would pay them off and let them go, and they would call them back once they got approval. He asked the Applicant and one other employee to remain with him. He told the Applicant that he would continue paying them in the meanwhile trying to convince the Inspector to let them complete the project. As the Applicant was living on the premises and earning money while doing nothing, the Respondent found him minor things to do around the school and also told the head teacher to give him work if there was anything to be done. Most of the time they

were doing nothing. In the end the Respondent called in the Applicant and told him that this arrangement could not go on, the approval seemed to be taking longer than he had anticipated. Respondent paid Applicant his dues and let him go.

- 5.9 In cross-examination, the witness stated that the fact that the Applicant accepted the daily rate meant that he accepted the contract. He stated that they had nothing written down since they started their working arrangement; the only thing that was written down was proof of payment. He stated that he was paying the Applicant and maybe once or twice he asked the head teacher to pay the workers. The school was just the location of that particular project; it had nothing to do with the Applicant's employment.

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 During pre-arbitration, the process of arbitration was explained to the parties that were in attendance, including how arbitration is conducted and the right to bring witnesses and legal

representation. The parties stated they would each represent themselves. At the end of the Arbitration, both parties opted not to file closing submissions.

6.3 The Respondent averred during pre-arbitration that the Applicant was not his employee but an independent contractor. The first port of call will be for me to decide whether or not the Applicant was indeed an employee of the Respondent and if he was an employee, was he an employee to which **Section 35 of the Employment Act, 1980 (as amended)** applied.

6.4 When giving his evidence, the Respondent testified that he had a long relationship with the Applicant, he would engage him on projects and the Applicant would name his fee for doing same. This time around it changed; he offered the Applicant the option to either name his fee or join him for a fixed period and be paid a daily wage, paid out at the end of the month. The Applicant chose the latter.

6.5 The courts have developed tests to determine whether a person is an employee i.e. engaged in a contract of employment, or an independent contractor engaged on a contract of service. The case of **Smit vs Workmen's Compensation Commissioner 1979 (1) SA 51 (A)** laid down criteria for distinguishing features of a contract of employment. This case was cited with approval in the case of **William Zwane vs Swazi Elba (Pty)**

Ltd IC Case no. 320/2002 which discussed the principles laid in the **Smit** case.

6.6 The following can be termed distinguishing features of a contract of employment as laid down in the abovementioned decided cases:

- (a) The extent of supervision of the worker, - employee is subordinate to the will of the employer and is obliged to obey the lawful commands, orders, or instructions of his employer, who is entitled to supervise and control him by prescribing to him what work he has to do and the manner in which he has to do it. In a contract of service, the independent contractor is bound by his contract of work, not by the orders of the job owner
- (b) The nature of payment (salary or fee),
- (c) Where work is conducted - an employee renders his services to the employer alone and is not allowed to take up employment with another employer
- (d) Whether the employee is required to perform the work personally - an employee renders personal service to the employer whereas an independent contractor performs specified work, or produces a specified result.
- (e) Whether the worker can be instructed by the employer on how, where and when to perform tasks.

6.7 Both Applicant and Respondent seem to agree that the Applicant was under the control of the Respondent during this time and he directed Applicant on what to do from time to time.

Applicant's job was not only concentrated on the classroom project but he was directed to do other things around the school by the Respondent and the head teacher of the school who was the authority always on site.

- 6.8 From the evidence of the Applicant and his witness, it is clear that the Applicant and the other employees worked exclusively for the Respondent, they could not take up any other work during that period. The Applicant and his co-workers also had a fixed time for getting to working and knocking off; they did not fix their own hours. This was not denied by the Respondent.
- 6.9 The Applicant did not stipulate a fee for this project, instead it was agreed between the parties that the Applicant would earn a wage (salary) for this project. This also resulted in the Applicant being there personally to do the work because if a person is paid a daily rate, if he is absent from the job he does not earn that day's wage.
- 6.10 It is my finding that the Applicant was an employee of the Respondent and employed on a fixed term contract, which was to expire on completion of the project he was employed for. He was indeed an employee to whom **Section 35 of the Employment Act** applied because his fixed term contract had not expired at the time he was terminated.

- 6.11 The next step is to establish whether or not Applicant was in fact dismissed for a reason permitted by **Section 36 of the Employment Act, 1980** and whether taking into account the circumstances of the case, it was reasonable to terminate the services of the employee. **(See Section 42(2) of the Employment Act, 1980).**
- 6.12 Section 36 (i) of the Employment Act states that *“It shall be fair for an employer to terminate the services of an employee ... because the employer is unable to continue in employment without contravening this Act or any other law”*.
- 6.13 The Applicant testified that an Inspector from the Town Board came to inspect the building that they were building and instructed that they stop construction until such time that they satisfy certain requirements. The Inspector found him on site when he came. The Respondent corroborated that evidence and stated that the Inspector then spoke to him to tell him that the construction must be stopped. The Respondent further testified that he tried and failed to convince the Inspector to allow them to proceed with the construction.
- 6.14 If the Respondent had allowed the Applicant to proceed with the work that he had been employed for, he would have contravened the law that had

given the Inspector to stop the construction of the building pending fulfilment of certain requirements.

6.15 The Respondent also testified that keeping the Applicant for an extended period whereas they were failing to meet the requirements of the Town Board meant paying him for sitting and doing nothing because even that work he had asked that he be assigned at the school was very minimal.

6.16 By having the Applicant assigned various things to do around the school did not mean that the employee was now an employee of the school or even employed permanently by the school but it was a humanitarian effort by the Respondent to keep the Applicant employed until the project he was working on resumed. The project took longer than anticipated to resume and the Respondent could not have been expected to keep the Applicant for a prolonged period and exhaust his resources whereas he did not even know when they would be given permission to resume the building project.

6.17 In terms of ordinary contractual principles, when a contract has become permanently and objectively impossible to perform due to no fault of either party, the contract automatically terminates. In the context of the employment relationship and unfair dismissal law, where the impossibility to perform is on the side of the employer, the employment contract remains in force until it is terminated by

notice or some other means. See **Grogan J - Dismissal, Discrimination and Unfair Labour Practices 2nd Edition at page 164**

- 6.18 The Respondent did not immediately dismiss the Applicant but he kept him on with the hope that they would continue with the construction but this was not to be. In the end he called the Applicant and sat him down to apprise him about the situation, which was beyond both their controls. This to me shows that the Respondent did all he could to save the Applicant's job before dismissing him.
- 6.19 The Applicant stated that he was asking for his leave pay for the time that he worked as each completed month attracts one day of leave and he had completed five months working for the Respondent. The Respondent did not dispute the leave due to the Applicant. Therefore the Applicant's claim for leave pay will succeed.
- 6.20 Consequent to these aforementioned authorities and analysis, I am inclined on a balance of probabilities to find that the termination of services of the employee was for a reason permitted by Section 36 (i) of the Employment Act and that taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee.

7. Award:

- 7.1 The Applicant's claim for unfair dismissal is hereby dismissed
- 7.2 The Respondent is ordered to pay the Applicant leave pay equivalent to five days = E750.00
- 7.3 There is no order as to costs.
- 7.4 The amount of E750.00 (seven hundred and fifty emalangeni) should be paid at CMAC Mbabane Operations offices on or before the 31st August 2017.

DATED AT MBABANE ON THE __ DAY OF JULY 2017

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LOBENGUNI Y. MANYATSI

CMAC ARBITRATOR