



**CONCILIATION MEDIATION AND
ARBITRATION COMMISSION**

**HELD AT MBABANE
164/18**

REF NO: SWMB

In the matter between:

SIPHILANGAYE MATSENJWA

APPLICANT

AND

CENTRAL BANK OF ESWATINI

RESPONDENT

Coram

ARBITRATOR : MR BONGANI S. DLAMINI

FOR APPLICANT : MR. M. HLOPHE

FOR RESPONDENT : MR.M. SIBANDZE

**RULING ON APPLICATION FOR ABSOLUTION FROM THE
INSTANCE-27/08/2019**

1. **DETAILS OF HEARING AND PARTIES**

- 1.1 Before the Conciliation Mediation and Arbitration Commission (“CMAC”) is an *application for absolution from the instance* instituted on behalf of the Respondent. The application was made by the Respondent after the Applicant closed his case and after cross examination of the Applicant by the Respondent’s Attorney was concluded.
- 1.2 The Applicant in the matter is Siphalangaye Matsenjwa, an adult Liswati male and former employee of the Respondent. During the hearing of the present issue, the Applicant was represented by Mr. Mduduzi Hlophe, an Attorney based in Mbabane, District of Hhohho.
- 1.3 The Respondent, Central Bank of Eswatini, is a financial institution with capacity to sue and to be sued in its own name, based in Mbabane in the District of Hhohho. During the hearing, the Respondent was represented by Mr Musa M.

Sibandze, an Attorney based in Mbabane, District of Hhohho.

2. ISSUES TO BE DECIDED

The issue for determination at the present stage is whether CMAC has the power to entertain an application of absolution from the instance, and, if the answer is in the affirmative, whether a case of absolution from the instance has been made out by the Respondent.

3. BACKGROUND FACTS

3.1 The Respondent employed the Applicant on the 1st November 2005 as an Assistant Security Superintendent. The Applicant was in continuous employment with the Respondent until his resignation during or around the 20th December 2016. At the time of resignation, the Applicant was earning the sum of E 40,295.80 per month.

3.2 The Applicant reported a dispute of Constructive Dismissal to CMAC on the 8th May 2018. After conciliation, the dispute was certified as unresolved

and a Certificate of Unresolved Dispute issued by CMAC on the 28th June 2018.

3.3 I was appointed as an Arbitrator on the 31st July 2018 to hear and determine the dispute between the parties in accordance with the law.

3.4 The Applicant seeks the following relief: Additional Notice Pay (E 102,571.28), Severance Allowance (E 256,428.20) and Maximum Compensation for Constructive Dismissal (E483,549.60). The Respondent is opposing the relief claimed by the Applicant.

4. NATURE OF LEGAL PROCESS

4.1 As already indicated herein above, the present application has been made at the instance of the Respondent and seeks to dispose of the matter without the need to have the Respondent present its case on the basis that the Applicant's testimony was too weak or was unsubstantiated to such a degree so as to waive the need to have the Respondent call its own witnesses to dispute the Applicant's version. This

process, in legal terms, is called an absolution from the instance.

4.2 The first question that I requested the parties to address me on is whether or not CMAC, not being a court of law, has the power to entertain such an application. If it were to be found that CMAC does have jurisdiction to entertain such an application, the next question for determination is whether or not a case of absolution from the instance has been made out by the Respondent, being the party moving such an application.

4.3 **RESPONDENT'S VERSION**

4.3.1 The Respondent's version is that CMAC does have the necessary jurisdiction to entertain an application for absolution from the instance.

4.3.2 The Respondent, through its erstwhile Attorney, submitted that not only is CMAC seized with jurisdiction to entertain an application for absolution from the instance, but that it has also made out a case of absolution from the instance.

4.3.3 On the issue of jurisdiction, it was the Respondent's submission that CMAC has jurisdiction to entertain an application for absolution from the instance. In its supplementary heads of argument, the Respondent states;

“Both the cases cited and the reasoning of the courts [South African Courts] and of the authors Smit and Madikizela are distinguishable not only from the facts of the current case but from the prevailing law in Swaziland and the status of the Conciliation Mediation and Arbitration Commission, in arbitration in Swaziland and the status of the CCMA in South Africa.”

4.3.4 The Respondent further states in its submissions that;

“6. It must be noted that the CCMA in South Africa does not stand at the same status as the CMAC in Swaziland in arbitration.

7. In terms of Section 17 (2) of the Industrial Relations Act;

“An arbitration award made under this act shall be enforceable as if it were an order of the court.”

8. Accordingly an arbitration ruling granting absolution from the instance in Swaziland has the same finality as an order of absolution from the instance by the Industrial Court of Swaziland, by way of appeal to the Industrial Court of Appeal in terms of Section 19 (1) or by way of review under Section 19 (5).

10. The reasoning in Madisha according to Madikizela and Smit in their article revolves around Section 138 (1) of the South African Labour Relations Act, which reads as follows;

“The Commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal

with the substantial merits of the dispute with the minimum of legal formalities.”

11. Our Act does not have a similar provision obliging the Arbitrator to deal fully with the merits.

12. What our Act provides is that;

“the arbitrator shall conduct the arbitration in a manner that the arbitrator considers appropriate to determine the dispute fairly and quickly”

See Section 17 (3).”

- 4.3.6 The Respondent goes on to cite the South African case of **Mohale and South African Reserve Bank (2006) 27 ILJ 1563 (CCMA) 2006 ILJ 1563** where the CMMA deemed it fit to grant an order of absolution from the instance.

4.4 APPLICANT’S VERSION

- 4.4.1 The Applicant, through his Attorney vehemently opposed the application for absolution from the instance. It was contended on behalf of the

Applicant that CMAC lacks the jurisdiction or power to entertain an application of absolution from the instance.

4.4.2 The Applicant submitted as follows;

“3. Absolution from the instance is not a competent order at arbitration and CMAC lacks the jurisdiction to make such an order. In terms of section 85 (4) The [sic] Industrial Relations Act No.1 of 2000 (as amended), an Arbitrator is required to determine the dispute within 21 days of the end of the hearing. The Arbitrator’s determination is final. This presupposes that the arbitrator must hear the merits of the case which includes evidence from both parties...”

4.4.3 The Applicant further submitted that;

“4. In *casu* granting absolution from the instance will not be a final determination of the issue in dispute thus offending against section 85 (4) (a) and (b) of the Industrial Relations Act 2000. Being a creature of

statute, CMAC does not have jurisdiction to grant absolution from the instance.”

5. **ANALYSIS OF EVIDENCE AND SUBMISSIONS**

5.1.1 The Respondent is relying mainly on two grounds in seeking to substantiate its arguments to the effect that the remedy of absolution from the instance is available and should be applied in arbitration proceedings under the auspices of CMAC. These two grounds are;

(a) Section 138 (1) of the Labour Relations Act of South Africa makes it obligatory for the arbitrator under the CCMA to deal with the merits of the dispute to finality, whereas in the context of Eswatini, the arbitrator under CMAC is given a discretion to deal with the matter in any manner he or she may deem fit to finality of the dispute. Accordingly, in the context of an arbitrator in Eswatini, there is no legal obligation to deal with the merits of the matter until the dispute is finalized.

(b) In Eswatini, for all intents and purposes, the arbitration process under CMAC ranks in the same level as litigation at the Industrial Court by virtue of Section 17 (2) of the Industrial Relations Act, 2000 (as amended). In South Africa, the same cannot be true as there is no provision equating the arbitration process under the CCMA, at the same level as litigation at the Labour Court.

5.1.2 The Respondent therefore argues that because of the differing legislative framework on the status and rank of the arbitration processes in Eswatini and South Africa, the legal authorities cited by the Applicant's Attorney should be distinguished and held not to apply in the case of Eswatini.

5.1.3 It is, with respect, difficult to comprehend the basis of the distinction sought to be introduced by Learned Counsel for the Respondent. An arbitration process is just an arbitration process. The reality on the ground is that there is, for all intents and purposes, no distinction between an arbitration under the CCMA and arbitration under CMAC.

5.1.4 One has to fully agree with the statement of law pronounced by the court in the South African case of **Irish and Company Inc v Kritzas 1992 (2) SA 623 (WLD) at 633 H to 634**, where it was stated that;

“In my view it was not within the contemplation of the parties that there should be an award made which left the dispute unresolved. It was applicant’s duty therefore not to have treated the matter as one appropriate for a default award but to have proceeded with its evidence and to have invited the arbitrator to make a positive ruling for or against applicant on the evidence presented. It was also the arbitrator’s duty to give effect to the agreement between the parties so that his award should be final and decisive between them and that the party in whose favour the award was given would be entitled to proceed upon the basis of the award as being res judicata...Thus a judgement of

absolution from the instance cannot be a final adjudication between the parties since it does not debar the party against whom the award is given from instituting proceedings in the appropriate court. The award therefore cannot have achieved the finality it was intended to achieve. It was the duty of the arbitrator to see that his award was a final decision on all matters requiring his determination...It seems to me therefore that the award of the arbitrator of absolution from the instance is not a proper award to be made an order of this court.”

5.1.5 In the case of **Minister of Safety and Security v Madisha and Others (JR 161-07) 2009 ILJ 591 (LC)** (“Madisha Judgement”) the court stated that;

“It is not consistent with the purpose of the LRA, which is to provide for the speedy and final resolution of labour disputes to grant absolution from the instance. In this regard I am in full agreement with the sentiments expressed by the court in Irish

& Co Inc (now Irish & Menell Rosenberg Inc) v Kritzas 1992 (2) SA 623 (W) where the court held (in the context of an arbitration in terms of the Arbitration Act 42 of 1965) that it is not within the contemplation of the parties that there should be an award made which left the dispute unresolved and that it is not appropriate for an award of absolution to be rendered against a party to the dispute. It was further pointed out by the court that it is incumbent to have proceeded with the evidence and to have invited the arbitrator to make a positive ruling for or against the applicant on the evidence presented. I am also in agreement with the express statement that a judgement of absolution from the instance cannot be a final adjudication between the parties since it does not debar the party against whom the award is given from instituting proceedings in the appropriate court and that it was the duty of the arbitrator to see that his award was a final decision on all matters requiring his determination.”

5.1.6 The Applicant's Counsel also referred to paragraph 29 of the *Madisha Judgement* where it was held that;

“In the light of the foregoing, I am of the view that an arbitrator and commissioner at arbitration do not have the power to grant absolution from the instance. Where an arbitrator does so, as in this instance, the commissioner committed a gross irregularity in the conduct of the arbitration proceedings and exceeded his or her powers as a commissioner which in turn renders the arbitration award reviewable.”

5.1.7 The Applicant's Attorney also referred to the case of **Minister of Police and Another v Kgopa and Another Case No JR 76/13 (LC)** where it was held by the Labour Court that;

“Absolution from the instance is simply not appropriate in the context of disciplinary enquiries, just as it is not appropriate in arbitration processes.”

5.1.8 All of the above quoted legal authorities stand for the proposition that absolution from the instance is not proper in arbitration proceedings. On the other hand, the legal authority cited on behalf of the Respondent, namely **Mohale and SA Reserve Bank (2006) 27 ILJ 1563 (CCMA)** is distinguishable because the parties in that matter consented that the remedy of absolution from the instance can be considered and determined by the arbitrator. At paragraph 24 of the ruling, the commissioner presiding over the matter had this to say;

“I asked the parties if I could hear that application, on the basis that the CCMA is not a court of law but a quasi-judicial body (See Ngcobo & Others v Blyvooruitzicht Gold Mining Co Ltd (1999) 20 ILJ 1896 (LC) per De Villiers AJ and see also Chemical Workers Industrial Union obo Mthombeni v Amcos Cosmetics (1999) 20 ILJ 2739 (CCMA) per Moletsane C). The parties were at consensus that I can I can entertain the application on the basis of s 138 (1) of the LRA, which states that the arbitrator has a

discretion to determine disputes fairly and quickly with minimum legal formality. I agree. See also NUMSA obo Khumalo and Spangle Galvanisers (2005) 26 ILJ 813 (BCA). In any case I am of the view that the legal jurisprudence should not be allowed to be static but be able to move with the modern times that require new ideas so that the jurisprudence fits in with the modern ideals.”

- 5.1.9 The fact of the matter is therefore that the parties in the *Mohale* case cited above consented and allowed the arbitrator to determine the application for absolution from the instance. The Applicant’s interests in the *Mohale matter* were clearly not well looked after and this resulted in the matter being concluded without hearing the employer’s side on the issues.
- 5.1.10 The mere fact that our Industrial Relations Act 2000 (as amended) does not contain a provision which requires the arbitrator to deal “with the merits of the matter to finality” does not detract

from the firm principle that in a normal arbitration, the arbitrator must deal with the merits of the matter to finality and thereby disposing of the dispute between the parties.

5.1.11 In the “**Request For Arbitration Form**” (which constitutes an agreement between the parties to refer the matter to arbitration and also to highlight the issues for determination in the arbitration), under Item 2 of the said form, the following information is required of the parties; **“What decision would you like [the] commissioner to make?** In furnishing its response to the above requested information, the Respondent stated as follows;

“That Arbitrator finds that the Applicant voluntarily resigned his employ and that circumstances leading to his resignation do not warrant or qualify a claim for constructive dismissal.”

5.1.13 Accordingly, to determine an application for absolution from the instance not only offends against the firm principles laid out by the courts

as demonstrated herein above but it would also offend against the very agreement that the two parties endorsed when agreeing to refer the matter to arbitration.

5.1.14 In conclusion, it is my finding that the application for absolution from the instance moved on behalf of the Respondent ought to fail as CMAC does not have the power to entertain such an application and also on the ground that the parties themselves specifically agreed to have the dispute between them determined on the merits to finality.

6. WHETHER APPLICATION FOR ABSOLUTION FROM THE INSTANCE VALID

6.1 Ordinarily, the finding that CMAC is not seized with jurisdiction to entertain an application for absolution from the instance should dispose of the issue without the need to go into the merits of the application itself. However, for completeness sake, I have deemed it proper to also consider whether the application itself would have succeeded on the merits, that is, were it

to be found that CMAC is seized with jurisdiction to hear or entertain such an application.

- 6.3 The Applicant gave his testimony under oath and stated that he was employed by the Respondent on the 1st November 2005 as an Assistant Security Superintendent earning the sum of E 40, 295.80 per month prior to his resignation.
- 6.4 The Applicant stated in or around September 2015, his services were suspended by the Respondent pending certain investigation relating to an incident that took place at the Matsapha Cash Centre. The Matsapha Cash Centre is a facility owned by the Respondent and it is where all the currency in notes and coins are kept in the country.
- 6.5 The Applicant's testimony was that around that time in 2015, they as the security department of the bank had received information to the effect that one Mfan'fikile Dlamini, who is an executive and top official of the bank had entered the security area and went to the vaults where the bulk money (referred to as "bullion") is kept and there proceeded to unlawfully and without following the stipulated

procedure retrieved a sum of E 65,000.00 (Sixty Five Thousand Emalangeneni).

- 6.6 The information which the security personnel had was that the money (E 65,000.00) had been retrieved by the said Mfan'fikile Dlamini because it was to be used to purchase gifts for the leadership of the country and which gifts were to be presented on a soon to be convened national function. According to the Applicant, it was illegal and unprocedural for the said Mfan'fikile Dlamini to retrieve the said sum of money in the manner in which he did because the money retrieved was not yet in legal circulation and because as security, they had not been made aware of such a withdrawal.
- 6.7 On getting information about the illegal withdrawal of the money or the theft of the money as stated by the Applicant in his evidence, the Applicant had then instructed one Mandla Lushaba to go to the Matsapha Cash Centre to retrieve the electronic footages kept in the bank's system so as to verify if indeed money was unlawfully taken from the vaults and if so, by who.

6.8 The Respondent subsequently called upon the Applicant to provide a detailed explanation in writing on why he had sent the said Mandla Lushaba to retrieve information from the bank's security system as it was felt that this conduct compromised the security of the bank. The Applicant's testimony was that he gave a detailed explanation on why he had sent Mandla Lushaba to retrieve the information from the bank's security system. The Applicant explained that as security, they needed to analyze the video footage so that they could prepare their report on the incident.

6.9 The Applicant's testimony was that in the heat of the moment, they were called to the office by the said Mfan'fikile Dlamini who was the Deputy Governor at the Central Bank and he was extremely furious to learn that the Applicant had sent Mandla Lushaba to retrieve video footages of the incident. The Applicant testified that he explained to Mfan'fikile Dlamini that they were only doing their job as security and that such was within their authorized scope of work.

6.10 Further testimony by the Applicant was that his supervisor, one Christopher Magagula enquired if

Mandla Lushaba had been sent by him (Applicant) to retrieve video footages and the Applicant's response was in the affirmative. The Applicant stated that his supervisor found nothing wrong with what he had done and that as a matter of fact, even the Assistant Governor of the bank, one Muhlubuhlangene Dlamini approved his actions and actually allowed him to proceed with the process of investigating the matter.

6.11 The Applicant was later charged on two counts namely;

6.11.1 "Section 5.2.1.1 (b) Ordering the unauthorized removal of material from premises where such material is kept in that you issued an instruction for the removal of footage from the Matsapha Cash Centre exposing the Bank to security risks.

6.11.2 Section 5.2.1.1 (b) Act of dishonesty in that upon being questioned about the removal of footage at Matsapha Cash Centre, you vehemently denied yet there is evidence to the contrary."

6.12 The Applicant's testimony was that during the disciplinary hearing, the parties in good spirit agreed to engage in negotiations to try and resolve their dispute amicably. The Applicant estimated that it took a period of about three (3) months after the adjournment of the disciplinary hearing. In the interim, the Applicant was called by the Assistant Governor of the bank, Muhlabungene Dlamini where they had lengthy discussions on how to approach the matter. According to the Applicant, the Assistant Governor of the bank advised him to be apologetic for his conduct so that the matter can be resolved quickly.

6.13 In line with the advice given by the Assistant Governor, the Applicant proceeded to write an affidavit and expressed his remorse and further apologized to the bank officials who were offended by his conduct. The Applicant in writing the affidavit and attesting it before a commissioner of oaths believed that this was a way of resolving issues amicably with his employer and that everything would go back to normal.

6.14 However to his shock and surprise, the Applicant was called back to the disciplinary hearing and he was chastised for time wasting and seeking to delay the finalization of the disciplinary hearing. According to the Applicant, this approach by the bank was extremely disappointing and had drained all the energy left in him.

6.15 It was the Applicant's contention that at the disciplinary hearing, he raised a point that the hearing was time barred in that Article 1.9 of the Disciplinary Code and Procedure applicable at the Respondent's undertaking provides that disciplinary action against an employee ought to be taken within 30 days of the employer becoming aware of the alleged misconduct. The said article provides that;

“All disciplinary action should be taken as soon as possible after the misconduct has been brought to the attention of management, in any case not later than 30 working days. However, the thirty-working days period refers to matters dealt with by management up to head office level. Matters such as those involving

police investigations and/or litigation may take longer periods as circumstances demand.”

6.16 The Applicant stated that his preliminary point was dismissed by the chairperson of the hearing and, on appeal to the Governor of the bank, a similar outcome was returned by the head of the institution. This, according to the Applicant frustrated him so much such that he soon realized that his fate was already sealed and therefore that he should resign and claim constructive dismissal.

6.17 The Applicant's testimony was that there were other conditions that gave him a clear picture that he was no longer needed in the organization and that he could no longer continue to serve and be accepted by the institution. These include the non-payment of his long service bonus which is payable after 5 years as well as the failure by the organization to furnish him with uniform which had been given to all other staff members.

6.18 In cross-examination and in its written submissions, the Respondent's Counsel pressed hard in order to demonstrate that none of the issues relied upon by

the Applicant constitute proper grounds for claiming constructive dismissal. On the issue of the disciplinary hearing being time barred for instance, it was argued and put to the Applicant that he should wait till finalization of the disciplinary hearing but instead of doing just that he opted to resign.

6.19 The Respondent's Attorney also argued that the Applicant failed to show in what way or manner he was prejudiced by the affidavits he was made to write by the Respondent. It was also the Respondent's contention that the Applicant failed to utilize the grievance procedures available to him which avenues could have assisted him in resolving whatever grievance he had with his employer.

7. CONCLUSION

7.1 The test to be applied in a case of absolution from the instance was pronounced by the court in **Pinky Toi Mngadi v Conco (Pty) Ltd t/a Coca cola Swaziland (Pty) Ltd SZIC 17 (16 April 2015)** in which it was held that;

“In an application for an absolution from the instance, the paramount question to be exclusively considered by the court at the close of the case for the Applicant is; *is there evidence upon which a reasonable man might find for the Applicant...*”

7.2 As it stands, the Applicant’s unopposed evidence leans towards the granting of the claim of constructive dismissal made by the Applicant. In **Grogan J, Workplace Law (9th Ed), at pp 115-116**, it is stated by the learned author that;

“It is not possible to draw up a closed list of examples of employer conduct that render the situation intolerable for employees. Actions which have been accepted by the courts and arbitrators are an offer of inferior employment coupled with a threat of dismissal if the employee did not accept the offer; unlawful deductions from an employee’s salary; the offer of an alternative position at greatly reduced salary; insistence by the employer that the employee accepts an inferior post, albeit without change of salary or benefits; sexual and other forms of harassment; failing to

prevent employees from smoking in the presence of an asthmatic employee; unjustified disciplinary action; the denial of company transport; or exerting undue pressure on the employee to resign.”[My emphasis]

7.3 Whilst it is true that the Applicant relies on several issues to justify his claim for constructive dismissal, which frankly speaking, would qualify in one or more of the categories listed above, the most important issue is to get to know from the Respondent what the basis of the charges against the Applicant were and whether such charges were valid. In a claim for constructive dismissal, the employer has the opportunity to justify the charges and prove them in a neutral and independent forum.

7.4 The Applicant’s testimony was that a senior manager flouted procedure and illegally took money from the bank’s vaults, money which was not yet authorized to flood the financial market in the country. This testimony by the Applicant has not yet been disputed which means for now it

remains true and correct. In a normal setting, the senior manager who flouted procedure should have been the one to have been shown the exit door but instead, the person who tried to do the right thing and protect the interests of the bank is the one who was charged and made to go through an emotionally draining disciplinary hearing. This cannot be acceptable by any stretch of imagination.

7.5 The Respondent has to come and defend its decision to charge the Applicant and must demonstrate how the Applicant is liable on those charges. This is because the charges preferred against the Applicant are the cause for the chain of events which led to a strain on the employment relationship between the parties. I may add that if the Respondent is able to prove the charges against the Applicant on the required standard, then the Applicant's claim of constructive dismissal is unlikely to succeed.

7.6 I would therefore hold that even if I had jurisdiction to hear an application for absolution

from the instance, that this is not a proper case in which the Respondent would have succeeded.

7.7 In the final result, the application for absolution from the instance made on behalf of the Respondent is hereby dismissed. The parties are invited to a pre-hearing for purposes of setting a date for continuation of the matter on Friday the 30th August 2019 at 1400 hrs. CMAC is to issue invitation to all the parties accordingly.

**DATED AT MBABANETHIS _____ DAY OF AUGUST,
2019**

**BONGANI S. DLAMINI
CMAC ARBITRATOR**