



**CONCILIATION MEDIATION AND
ARBITRATION COMMISSION**

HELD AT NHLANGANO

REF NO: NHO 028/17

In the matter between:

THANDI MARIA DLAMINI

APPLICANT

AND

MY CHIOCE HARDWARE (PTY) LTD

RESPONDENT

Coram

**ARBITRATOR
DLAMINI**

:

NONSIKELELO

FOR APPLICANT

:

BASIL TFWALA

FOR RESPONDENT

:

NO APPEARANCE

**ARBITRATION AWARD
EX PARTE**

1. DETAILS OF HEARING AND PARTIES

- 1.1 The arbitration hearing was held on the 29th August, 2017 at the offices of the Conciliation, Mediation and Arbitration Commission (CMAC) at the first floor Swaziland Water Service Building, Nhlanguano Swaziland.
- 1.2 The Applicant is Thandi M. Dlamini, an adult Swazi female of Khubuta in the Shiselweni region. The Applicant was represented by Basil Tfwala a Labour Consultant based in Manzini.
- 1.3 The Respondent is My Choice Hardware (Proprietary) Limited, a company duly incorporated in terms of the company laws of Swaziland with its principal place of business at Khubuta in the Shiselweni Region. During pre-arbitration stage the Respondent was represented by lawyer Mr. Patel and Mr. Wudiwulu Azaz from Respondent Company, however they did not show an appearance twice for the arbitration proceedings after the pre-arbitration meeting.

2. Preliminary issue to be decided

- 2.1 The preliminary point for determination is whether or not it was proper for the matter to be heard in the absence of the Respondent.
- 2.2 The matter was scheduled for pre-arbitration on the 11th July, 2017 and both parties were present. The

matter was by the consent of both parties postponed to the 1st August, 2017 for determination through arbitration proceedings. On this date the Respondent was not in attendance and the matter was rescheduled to the 22nd August, 2017 and invitations were issued and served to Patel. Arif who's designation was the company owner on behalf the Respondent. The Respondent again made no appearance for the proceedings; subsequently the matter was rescheduled to the 29th August, 2017. Despite being served again with the invitation the Respondent did not make an appearance. It appeared from the proof of service (CMAC Form 20) served on the 15th August 2017, that the same Patel. Arif received the invitation that was served on the Respondent.

- 2.3 Following that the Respondent was properly notified and was aware of the ongoing arbitrations proceedings, as the Commission re-invited the Respondent several times but the Respondent still did not show any appearance. In such event it waived its right to appear, the Commission will invoke **CMAC Rule 27 (b)** will apply,

“If a party against whom relief is sought fails to attend the hearing or is not represented, the arbitrator may proceed to arbitrate the dispute in the absence of the party”.

2.4 It is my finding that the Respondent deliberately shunned the matter by its failure to attend; this happened in spite of the fact that the Respondent had knowledge of the said matter as they had attended the Pre-arbitration meeting and consented to having the matter postponed to the 1st August, 2017. The Respondent was further aware that it was pending whether before the commission. The matter had to be postponed several times just to make sure that the Respondent was properly served before it can proceed. The Commission went all out and exhausted all means of notifying the Respondent. In light of the afore going, the matter proceeded in the absence of the Respondent.

3. ISSUES TO BE DECIDED

- 3.1 The first issue for determination is whether or not the Applicant was dismissed by the Respondent.
- 3.2 In the event it is found that she was dismissed, a finding has to be made whether or not the termination of her services was substantively and procedurally fair.

3.3 Thirdly, a finding has to be made whether or not the Applicant is entitled to leave pay.

3.4 The last issue for determination is whether the Applicant is entitled to her salary for April, 2017

4. BACKGROUND FACTS

4.1 The Applicant was employed by the Respondent on the 25th August May, 1999 as a Shop Attendant. She was in continuous service with the Respondent until the 30th April, 2017 when she stopped rendering services to the company allegedly after Patel Azaz told that there was no more employment for her .When she left employment he was earning the sum of E1 400.00 per month.

4.2 The Applicant reported a dispute for unfair dismissal which was conciliated, however it remained unresolved, hence a Certificate of Unresolved Dispute no. 259/17 was issued by the Commission. The dispute was referred to arbitration by an order of the Industrial Court in terms of Section 85 (2) of the Industrial Relations Act 2000 (as amended). I was then appointed to decide same.

4.3 The Applicant claims the following: Notice pay - E1, 400.00; Additional Notice Pay- E3, 672.00; Severance Pay - E9, 180.00 leave pay - E974.00; Salary April, 2017 E1, 400.00 and compensation for unfair dismissal - E16, 800.00.

5. SURVEY OF EVIDENCE AND ARGUMENTS

5.1 Two witnesses including the Applicant gave evidence to substantiate her case. The Respondent was not represented during arbitration; consequently no evidence was led in support of its case.

- 5.2 It was the Applicant's evidence that she was employed by one Abdul as a Shop Attendant at Mphopotha Shop (Pty) Ltd on the 25th August; 1999. It was further her submissions that in October, 2016 the company changed its Directors and name to My Choice Hardware (Pty) Ltd. She also gave evidence that she was introduced to her new Directors who welcomed her on board and she continued working for My Choice Hardware (Pty) Ltd, until the 30th April, 2017 when she was dismissed. It was the Applicants evidence that prior to her dismissal, she was given new uniform written My Choice Hardware in December, 2016
- 5.3 According to the Applicant she continued working as Shop Attendant until she was dismissed by the one Azaz who was her previous employer and Director of Mpompotha Shop (Pty) Ltd. It was her submissions that on the day of her dismissal she was not paid her salary for the month of April 2017, but was given only E40.00 and a note book to apprehend her signature, to which refused to sign nor take the E40.00
- 5.4 The Applicant testified that on the day of her dismissal she requested for an explanation and the grounds for her dismissal and all she was told was that she was dismissed for always being in the favor of the shop's customers.
- 5.5 The Applicant's evidence during cross-examination was that she was not paid terminal benefits when the new company took over from Mpompotha Shop (Pty) Ltd to My Choice Hardware Pty Ltd. She further testified that she was also not given notice prior her dismissal and that during the course of her employment she was neither given off-days nor leave as she worked from Monday to Sunday. It was further the Applicant's testimony during cross examination she would be permitted to take one day per month as an off-day and

would again be granted only when she asked permission to be excused then she would be excused from her duties and be off-duty.

- 5.6 According to the Applicant, because the Respondent did not have a valid reason for dismissing her and no disciplinary hearing was held, she viewed the termination of her services as substantively and procedurally unfair.
- 5.7 The second witness to testify for the Applicant's case was Samuel Mshengu Dlamini who testified under oath, that the Applicant was employed at Mpompotha Shop (Pty) Ltd, for a long period and she is the oldest employees and continued working even when the company changed its name to My Choice Hardware (Pty) Ltd.
- 5.8 It was further his testimony during cross examination that he bought maize meal from the Respondent's Shop and discovered that it was not in a good condition as it had changed its from the usual white colour to green. He then returned the maize meal, and during that time an argument erupted between himself and the Directors of the shop. It was further his evidence that due to the seriousness of the misunderstanding between himself and the shop owners he decided to approach the Applicant as she was Swazi assuming she would bring an understanding between himself and the shop owners.
- 5.9 Unfortunately this did not go well with the Company Directors as they accused the Applicant of colluding with me and started shouting at her. It was the testimony of the witness that when he went to the shop the next day he was informed by the company's petrol attendant one Mziyako that the Applicant was summarily dismissed.

6. ANALYSIS OF EVIDENCE AND ARGUMENTS

6.1 The Arbitration was conducted in line with the Commission's **Rule 271(1) (CMAC)**.

6.2 The Rule reads as follows:

“If a party to a dispute fails to attend an arbitration hearing or is not represented at an arbitration, and the commissioner is satisfied that the party not in attendance or not represented was properly notified of the arbitration hearing and that there is no just and reasonable explanation for that party’s failure to attend or non-representation, the commissioner may-

(a) dismiss the matter, if the party who referred the dispute to the Commission fails to attend the hearing or is not represented.

(b) proceed to arbitrate the dispute in the absence of that party, if the party against whom relief is sought fails to attend the hearing or is not represented”.

6.3 There was no explanation given by the Respondent for its failure to attend the arbitration hearing. It is worth emphasizing that even on the 1st August, 2017 the Respondent failed to attend or was not represented, yet

there was proof that the company was aware of the ongoing proceeding. It is worth mentioning that two Directors from the Respondent's company, Patel Arif and Wudiwula Azaz attended the pre-arbitration meeting on the 11th July, 2017 and consented to the postponement of the proceedings to the 1st August, 2017.

- 6.4 Despite their failure to attend on this date the matter was rescheduled twice to the 22nd and the 29th August 2017 and still the Respondents did not attend. It would be unfair to keep on postponing the arbitration in the absence of a reasonable explaining from the company for its default of appearance. I then ordered the matter to proceed in the absence of the Respondent.
- 6.5 **Section 42(1) of the Employment Act, 1980** states that where an employee claims that his or her dismissal was unfair and sues the employer as a consequence thereof, he or she should first prove that, he or she was an employee to whom **Section 35 of the Employment Act** applied.
- 6.6 **Section 35(1) and (2)** of the Employment Act states thus:

“This section shall not apply to -

- (a) an employee who has not completed the period of probationary employment provided for in Section 32;***
- (b) an employee whose contract of employment requires him to work less than twenty-one hours each week;***
- (c) an employee who is a member of the immediate family of the employer;***
- (d) an employee engaged for a fixed term and whose term of engagement has expired.***

(2) No employer shall terminate the services of an employee unfairly”.

- 6.7 Essentially, the Applicant had to prove that: she had completed probation; she was not a casual employee; she was not a member of the immediate family of the employer; and lastly; that she was not engaged for a fixed term whose term of engagement had expired.
- 6.8 The Applicant stated under oath that she had worked continuously for the Respondent for eight (17) years. **Section 32 of the Employment Act** provides that the probationary period of an employee who is not engaged on supervisory, confidential and technical work, shall be three (3) months.
- 6.9 Although the Respondent, by default of appearance, failed to challenge the Applicant’s evidence, both parties agreed at Pre-arbitration that the matter be determined in arbitration proceedings. The Respondent did not dispute that the Applicant was their employee and that she was dismissed on the 30th April, 2017. It is worth mentioning that the both parties agreed that there was no written contract signed by the parties when they engaged the Applicant. The Applicant’s date of employment was in dispute so was her employment capacity as the Respondent alleged that the Applicant was a Packer and had been employed for only six months at My Choice Hardware.
- 6.10 During Pre-arbitration meeting the Respondent did not dispute the fact that the Applicant was an employee to whom **Section 35 of the Employment Act** applied. I find that the Applicant has discharged her onus and as such is entitled to sue the Respondent for the alleged termination of his services.

6.11 The Applicant having discharged his onus, the burden then shifted to the Respondent to prove that the termination of the Applicant's services was one permitted by **Section 36 of the Employment Act**, and that taking into account all the circumstances, it was reasonable to dismiss her.

6.12 I have alluded to the fact that despite its failure to attend the arbitration, the Respondent's did not deny at pre-arbitration that the Applicant was dismissed further that she was dismissed on the 30th April, 2017. Then the next issue to address is was the reason to dismiss the Applicant justified in terms of the law. See **Section 42(2) of the Employment Act 1980** which provides as follows:

“The services of an employee shall not be considered as having been fairly terminated unless the employer proves-
(a) that the reason for the termination was one permitted by Section 36; and
(b) that, taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee”.

6.13 In making a determination whether or not the dismissal of an employee was one permitted by **Section 36 of the Employment Act** and reasonable in all the circumstances of the case, I have a duty to consider the evidence placed before me. It was the Applicants' testimony that she was dismissed on the evening of the day she was told that she was always in favor of customers. The reason advanced to the Applicant by the Respondent for her dismissal, was

that she always colluded with customers. This is not a valid reason for dismissal permitted by section **36 of the Employment Act.**

6.14 It is inevitable that the Applicant was not called to a disciplinary hearing where she would present her case and adduce evidence to substantiate same. Despite the fact that the Applicant was not called to a disciplinary hearing, the reason to terminate her services is also not valid, to warrant a sanction of a dismissal in the current circumstances.

6.15 The Respondent having failed to attend the arbitration hearing in order to lead evidence proving that the Applicant's dismissal was substantively fair, the Applicant's version remained uncontroverted. I find that the Applicant's dismissal was not permitted by **Section 36 of the Employment Act**, thus substantively unfair.

7. PROCEDURE

7.1 The Applicant testified that her dismissal was procedurally unfair because she was denied her right to be charged and called to a disciplinary hearing. Through the testimony of the Applicant's witness Mshengu Dlamini, evidence was adduced that when he went to My Choice Hardware the next day after the misunderstanding he encountered with the Respondents, he was informed by the Petrol Attendant that the Applicant had been dismissed instantly.

- 7.2 Before an employee can be terminated for commission or omission of the company rules and procedure it is fundamental that a disciplinary hearing is conducted. In the **S.U.B. vs Armstrong Dlamini** case the learned Judge decided that, “there may be some instances where the failure to hold the disciplinary hearing might be decisive against the employer but this is not the case” The current case is distinguishable from the case of **S.U.B vs Armstrong Dlamini** (supra) as the Applicant was not dismissed for any criminal offence, where it would be mentioned that taking into all circumstances of the case, it was reasonable to terminate her services.
- 7.3 The Respondent having failed to conduct a disciplinary hearing against the Applicant, nor to consider the two crucial factors as provided by **Section 42(2) of the Employment Act**, which places the burden of proof upon the Respondent to prove that; a) that the reason to terminate was one permitted by **section 36** and, b) that taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee. I find that the Applicant’s dismissal procedural unfair.
- 7.4 It is also worth mentioning that the Respondent did not follow the provisions of section **33 bis (1) of the Employment Act 1980** which provides as follows that; An employer shall not -
- (a) Sell his business to another person to another person; or

- (b) Allow a takeover of the business by another person,
Unless he first pays all the benefits accruing and due for payment to the employee at the time of such sale or take over.
- (2) Notwithstanding subsection (1) if the person who is who is buying the business or taking it over, makes a written guarantee which is understood and acceptable to each employee that all benefits accruing at the termination of his previous employment shall be paid by him within 30 days and by mutual agreement agreed in writing and approved by the Commissioner of Labour, Section (1) shall not apply.

7.5 The was no evidence led by the Applicant that she was paid her terminal benefits when the business changed its trading name and Directors from Mpompotha Shop (Pty) Ltd to My Choice Hardware (Pty) Ltd . It is therefore my further finding that the Applicant is entitled to a payment of terminal benefits.

8. SALARY APRIL 2017

- 8.1 The Applicant has claimed the sum of E1, 400.00 as a claim for wages in lieu of days worked in the month of April, 2017
- 8.2 According to the Applicant she was dismissed on the 30th April, 2017 and was given E400.00 which she refused to take, hence she is still owed her wages for

the month of April; 2017. It was further the Evidence of the Applicant that she was earning a salary of E1,400.00 per month.

9. LEAVE PAY

9.1 **Section 123 of the Employment Act 1980** provides that where an employee's services are terminated after he has served more than three months but less than twelve (12) months the employer shall, on or before such termination pay to the employee a sum equal to not less than one day's wages for each completed month of service. **The Regulation of Wages (Retail, Hairdressing Wholesale and Distributive Trade Industry Order, 2016** at (3) provides as follows; on completion of eight years continuous service with an employer, an employee shall be entitled to eighteen working days leave on full pay.

9.2 The Applicant is therefore entitled to E6.33 x 8.5hrs x 18 months which equal E 969.23

9.3 In awarding compensation for unfair dismissal to the Applicant, I have considered the following factors:

9.3.1 She worked for a relatively long period she worked for seventeen years eighteen months (17 years 18 months)

7.3.2 She is towards retiring age hence possibilities that she secures another employment opportunity are very slim.

9.4 I find that an award of 8 months compensation to the Applicant would be fair and equitable in all the circumstances.

9.5 I make the following order.

10. AWARD

10.1 I find that the Applicant's dismissal was substantively and procedurally unfair.

10.2 The Respondent is directed to pay the Applicant the following monies:

8.3.1	Notice pay	=	E1, 400.00
8.3.2	Additional Notice	=	E3, 445.76
8.3.3	Salary April (2017)	=	E1, 400.00
8.3.4	Leave Pay	=	E969.23
8.3.5	Severance Pay	=	E8, 614.40
8.3.6	Compensation for unfair dismissal (8 x E1400.00)	=	E11, 200.00
	TOTAL		<u>E27, 029.39</u>

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10.3 The Respondent is ordered to pay the Applicant the sum of **E27, 029.39** at the CMAC offices at Nhlangano, Swaziland Water Services Building not later than the 30th March, 2018

DATED AT NHLANGANO THIS ___ DAY OF FEBRUARY, 2018

NONSIKELELO DLAMINI

CMAC ARBITRATOR