



**CONCILIATION                      MEDIATION                      AND  
ARBITRATION                      COMMISSION**

**HELD AT SITEKI**

**REF NO: SWMZ 173/17**

In the matter between:

**AYANDA MATSEBULA**

**APPLICANT**

**AND**

**DWALENI CLUB (PTY) LTD**

**RESPONDENT**

**Coram**

**ARBITRATOR                      :**                      **NONSIKELELO. DLAMINI**

**FOR APPLICANT                      :**                      **IN PERSON**

**FOR RESPONDENT                      :**                      **MNDENI SIMELANE**

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**ARBITRATION AWARD**

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## **1. DETAILS OF HEARING AND PARTIES**

- 1.1 The arbitration hearing was held on the following dates; 15<sup>th</sup> June, 2017 Pre-arbitration; 7<sup>th</sup> July,2017; 20<sup>th</sup> July, 2017 and the 3<sup>rd</sup> August,2017; at the offices of the Conciliation, Mediation and Arbitration Commission (CMAC) at KaLankhosi Building in Manzini.
- 1.2 The Applicant is Ayanda Matsebula, an adult Swazi male of Manzini. The Applicant conducted his own case despite being advised of his rights to legal representation.
- 1.3 The Respondent is Dwaleni Club (Proprietary) Limited, a company incorporated in terms of the Company laws of Swaziland and is based at Dwaleni in the Manzini region. The Respondent was represented by Mr. Mndeni Simelane (Director).

## **2. ISSUE BE DECIDED**

The issue for determination is whether the Respondent constructively dismissed the Applicant.

The Second issue for determination is whether the Applicant is entitled to payment of overtime for Sundays worked amounting to E4, 432.00

## **3. BACKGROUND FACTS**

- 3.1 The Respondent is in the business of furnishing or selling food and liquor beverages and soft drinks to the public and is based at Dwaleni in the Manzini region.

- 3.1 The Applicant alleges that he was employed as a Bar Manager on the 6<sup>th</sup> June, 2015 and earned the sum of E1200. 00. On or about the 7<sup>th</sup> March, 2017 the Applicant resigned from his job through a letter dated 6<sup>th</sup> March,2017 after the counting of stock and a discovery that there was missing stock, therefore alleging that he had been constructively dismissed by the Respondent.
- 3.2 The Applicant reported a dispute for constructive dismissal to the Commission, however the dispute remained unresolved after conciliation, and a Certificate of Unresolved Dispute No. 238/17 was issued by CMAC. The parties requested that the dispute be determined by arbitration and I was appointed to decide same, in terms of section 85(2) of the Industrial Relation Act 2000(as amended)
- 3.3 The Applicant seeks the following relief: Notice pay (E1 200.00), overtime (Sundays) pay (E4, 432.00) and compensation for constructive dismissal (E14 400.00). The Respondent opposes the Applicant's claims in their entirety.

#### **4. SURVEY OF EVIDENCE AND ARGUMENTS**

- 4.1 The Applicant paraded two witnesses; Dudu Zwane and himself, who gave evidence in support of his case. Mndeni Simelane gave evidence in aid of the Respondent's case.
- 4.2 The following facts are common cause:
  - 4.2.1 While on duty on the 3<sup>rd</sup> March 2017 the company Director Mndeni Simelane gave out an instruction that the Applicant with one

Sthembiso Simelane do a stock taking. It was discovered that some stock was missing and the Respondent directed that the Applicant signs an acknowledgement for the stock shortage.

- 4.2.2 As a result of this the Applicant left his employment and did not return the next day of the 4<sup>th</sup> March 2017.
  - 4.2.3 On the 7<sup>th</sup> March 2017, the Applicant tendered his resignation letter dated 6<sup>th</sup> March,2017.On the 7<sup>th</sup> March, 2017 the Respondent wrote a letter and delivered it at the Applicant's home advising him that he was to report for duty to be tried for the offence which occurred on the 3<sup>rd</sup> March,2017.
  - 4.2.4 The Applicant was earning a salary of E1, 200.00 per month.
- 4.3 The following facts are in dispute:
- 4.3.1 The Applicant testified that he was employed as a Bar Manager and performed both duties for the bar and the Respondents' shop. However, the Respondent's witness disputed these allegations and stated that the Applicant was employed at the shop as a Shop assistant.
  - 4.3.2 The Respondent's witnesses testified that the Applicant's was not in anytime given or appointed to the position of Bar Manager. When it enquired from the Applicant during cross examination as to when he was appointed as a Bar Manager by the Respondent, his response was that he performed all the duties at the bar an shop, which included purchasing stock,

collecting cash from the tills for safekeeping at the safe and banking all monies.

- 4.3.3 The Applicant's evidence was that on the 3<sup>rd</sup> March, 2017 after he and another employee Sthembiso Simelane counted stock, it was discovered that a certain amount of stock was missing. Mr. Simelane the company director accused the Applicant of stock theft and threatened that he would not be paid his salary for a period seven (7) months until the lost stock is fully paid up.
- 4.3.4 The Respondent's witnesses on the negative stated that when the stock was discovered to be missing, the Applicant signed and acknowledged that stock was missing. The Applicant according to the Respondents' witness then requested to be granted permission to pay for the lost stock in monthly installments of five hundred Emalangeni (E500.00). The Applicant would obtain the money from his grandfather in Nhlangano to secure the debt. It is the Respondents submission that he explained to the Applicant that he would think about the issue of repayment and give a response the next day since it was already late after working hours.
- 4.3.5 The Applicant further testified that he then reported to the Mr. Simelane that he would not report to work the next day because he was not in a position to work without remuneration. The Applicant further stated that he requested to be paid his salary for February, but was told he will not be paid unless he tendered a resignation letter. The Applicant further submitted evidence that he did not return to work the

next day, 4<sup>th</sup> March, 2017 until he resigned on the 7<sup>th</sup> March 2017.

4.3.6 The Respondent on the other denied all these as unfounded evidence. He further stated that the Applicant disappeared from work without permission or notice since he last reported for work on the 3<sup>rd</sup> March, 2017 after it was discovered that there was missing stock. He absented himself for a period of more than three days without permission and only tendered his resignation letter on the 7<sup>th</sup> March, 2017. The Respondent further enquired from the Applicant during cross examination why he did not make a claim of unpaid wages with the Commission if he was not paid his salary for the month of February 2017. The Applicant's response was that there was no fixed date for payment of his salary he was paid whenever it suited the Respondent. It was the Respondent submission that he would pay the Applicant's salary on the 9<sup>th</sup> of every consecutive month.

4.3.7 The Respondent during cross examination further requested that the Applicant clarifies as to why he did not raise a grievance which would support his allegations that he is working under intolerable working conditions, prior to tendering his resignation letter. The Applicant stated that he did raise a grievance with one Zwane and Hlatjwayo whom both work for Swaziland Electricity Company.

4.3.8 The Respondent submitted evidence that he personally went to Applicants homestead and requested him to return back to work but the Applicant refused. The Applicant during cross examination did not deny that he refused to

return to work and further added that he would not return to work because he would not be paid.

4.3.9 The Respondent further argued that the Applicant terminated himself since he worked without any supervision and all powers and authority to conduct the work were completely vested on the Applicant, hence it was impossible for the Respondent to terminate the Applicants services constructively. The Respondent further submitted evidence that the only reason the Applicant left his employment was due to his negligence in the loss of stock.

4.3.10 The Respondent's evidence during cross examination was that stock was the Applicant's responsibility and in his custody since he bore the responsibility to purchase same, he also would do a stock taking before and after purchasing stock for the Respondent Company.

4.3.11 It was the testimony of Duduzile Zwane under oath in support of the Applicant's case that she was a former employee of the Respondent and worked as Shop Assistant and Bar Attendant. She submitted evidence that the Applicant worked at the Respondent's shop from 7am and when the Shop closed for the day he would resume his duties at the bar until it closed at 11pm on daily basis. It was her submission further that the Respondent would frequently accuse all staff of stock theft.

4.3.12 The witness gave evidence that on the 2<sup>nd</sup> December, 2016 she was dismissed with other employees on allegations of stock theft, and the Applicant was left to continue working. During

cross examination she submitted that she is not sure why the Applicant left employment as she was no longer working for the Respondent. It was further her testimony that the Applicant's responsibilities included monitoring all staff, both at the shop and bar, collecting cash money from the tills and placing it for safe keeping and purchase stock.

4.3.13 It was further the testimony of the witness during cross examination that the Applicant worked until late even on weekends and was not given off days. It was also her testimony that the Applicant would always count the quantity of stock before he went to purchase stock and after same was purchased.

## **5. ANALYSIS OF EVIDENCE AND ARGUMENTS**

5.1 **Section 37** of the Employment Act 1980 provides as follows:

***“When the conduct of an employer towards an employee is proved by that employee to have been such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves his employment, whether with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by his employer”.***

5.2 The Learned Nkonyane J made the following observation in the case of **Timothy Mfanimpela Vilakazi v Anti-Corruption Commission and others (IC case no. 232/02)** at 5:



***“The burden of proof in constructive dismissal cases is therefore on the employee to show that the conduct of the employer was such that the employee could no longer reasonably be expected to continue in his employment. It is an objective test”.***

- 5.3 The Learned Dunseith JP in the case of **Nana Mdluli v Conco Swaziland Limited (IC case no.12/04)** at paragraph 4 quoted the dicta from the South African case of **Pretoria South Society for the Care of the Retarded v Loots (1997) 181 LJ 981 (LAC)**, which pronounced as follows:

***“When an employee resigns or terminates the contract as a result of constructive dismissal, such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfill what is the employee’s most important function, namely to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so, on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned”.***

- 5.4 The Industrial Court has also held that, the conduct that the employee complains about must be unlawful

and unfair before the employee can invoke the provisions of **Section 37** of the Employment Act.

See **Nana Mdluli v Conco Swaziland Limited (Supra). Samuel S. Dlamini v Fairdeal Furnishers (IC case no.145/00).**

- 5.5 Moreover, the Industrial Court has held that before an employee invokes the provisions of **Section 37** of the Employment Act, the employee must have exhausted internal remedies unless he or she can prove that it was not a reasonable option in the circumstances.

See: **Jameson Thwala v Neopac (Swaziland)Limited (IC case no. 18/1998). Nana Mdluli v Conco Swaziland Limited (Supra).**

- 5.6 The Applicant alleged that the Respondent advised him that he would not be paid his salary until the amount for the lost stock is recovered. The Applicant further stated that he reported to the Respondent that he would not continue working without remuneration; hence he stopped working and resigned after a period of four days. The Respondent refuted all these allegations and stated that the Applicant made a request to pay for the lost stock, and that the response from the Respondent was that he was to think about the Applicant's request.
- 5.7 I hold that it is not necessary to make a finding whether or not the Applicant reported a grievance since there were no other structures which the Applicant could have used to report his grievance. The Applicant reported directly to the Company Director during his course of employment and all the other employees were junior to him.

5.1 There was no evidence submitted by the Applicant that the he was never paid any salary neither were deductions effected to his salary for the lost stock without his permission or consent. The only argument the Applicant presents is that he was informed by the Respondent that he would not be paid his salary until the amount for the lost stock is recovered.

5.2 **Section 64** of the Employment Act 1980 provides as follows: An employer who-

**(a) “fails to pay wages to an employee when those wages are due or payable,  
(c ) makes any deduction from the wages of an employee or receives any payment from an employee contrary to the to the provisions of this Part,**

**Shall be guilty of an offence and shall be liable**

to

**On conviction to a fine of not exceeding two Thousand five hundred Emalangeneni or an imprisonment not exceeding three years or**

**both..”**

5.3 The Applicant testified that there was no specific date when his salary was paid by the Respondent but only when the Respondent saw it fit to pay. The Respondent denied all these allegations by submitting that the Applicant was always paid his salary on the 9<sup>th</sup> of every consecutive month.

5.4 **Section 47(1)(b)** of the Employment Act 198 provides as follows:

**“The times when wages shall be deemed to be due from an employer to an employee shall be as follows:- in the case of an**

***employee employed for a period in excess of one month, at intervals not exceeding one month''***

- 5.5 The Applicant has not raised any evidence that the resigned from the company due to indefinite dates for payment of his salary. It is also my observation that the Applicant stopped working after the discovery that there was missing stock on the 3<sup>rd</sup> March, 2017, he acted in the heat of the moment, and he has also not been able to produce evidence that proves that he worked in an unbearable working condition which resulted in his resignation.
- 5.6 When the Respondent took it upon himself to request the Applicant to return the work or answer for his actions of negligence, the Applicant failed to do so alleging that he could not continue working without being remunerated. It is my further view that the Applicant was running away from his own problems because there are no proven facts that he continued to perform his duties for a month and was not paid his wages before he decided to quit.
- 5.7 Based on the objective test pronounced by the above authorities and the above reasons, I find that the Applicant was not constructively dismissed by the Respondent, but voluntarily resigned. His claims ought to be dismissed in their entirety.
- 5.8 The Applicant is also claiming overtime for Sundays worked. The Respondent did not deny that the Applicant performed duties even on Sunday but only raised evidence that he would give time off during the

week to the Applicant as rest days. The Applicant denied these allegations as untrue and unfounded.

- 5.9 In terms of **Section 22 of the Employment Act**, “every employer shall within two calendar months of the appointment of an employee, give him a completed copy of a form wherein is recorded amongst other things; date of employment, wages, hours of work, probation and short description of the duties of the employee”. It is common cause that the Applicant was employed for more than a year at the Club.
- 5.10 It became necessary therefore that the Respondent produces in evidence either the signed statutory employment form prescribed by **Section 22 of the Employment Act** or the some evidence proving that the Applicant was employed as a Shopkeeper and took rest days during the week.
- 5.11 In the case of **Patrick Masondo v Emalangeni Foods (IC Case no: 45/04)** para 23-4, the learned President made the following remarks;

**“The Respondent also failed to produce in evidence the statutory employment form prescribed by Section 22 of the Employment Act. This form should by law have been completed and signed by the parties within two calendar months of the engagement of the Applicant. The employer is required to record the employee’s normal working hours on the form. The purpose of the Section 22 form is to record the essential terms of employment and**

**thereby avoid subsequent disputes such as that which has arisen in this case. The form constitutes *prima facie* evidence of the matters contained therein. The primary obligation to ensure compliance with Section 22 rests on the employer, to the extent that non-compliance constitutes a criminal offence on that part of the employer.”**

5.12 It is my findings that the Respondent failed to act in line with the above provisions; this could have eased the burden from him to prove whether they had actually made an agreement with the Applicant to exchange payment of overtime with rest days. It became necessary therefore that the Respondent produce evidence either the signed statutory employment form prescribed by **Section 22 of the Employment Act**, or the some evidence proving that the Applicant did actually agreed and took the rest days in lieu of overtime for the days worked on Sundays.

5.13 With regard to the above and the fact that the Respondent did not deny that the Applicant worked on Sundays, it is my findings that the Applicant is entitled to be paid overtime for Sundays worked. However it is also my findings the Applicant has failed to adduce evidence to prove his claim for ninety two (92) Sundays totaling to four thousand four hundred and thirty two Emalangenani only (E4, 432.00). He has failed to specify the exact number of hours and the specified dates, which include the months and years for which he is basing his claim. It is worth mentioning that if the

Applicant was making a claim under the statutory period of 18months where his entitlement falls, he would make a claim for seventy eight (78) Sundays.

5.14 I make the following order.

## **6. AWARD**

6.1 I find that the Applicant was not constructively dismissed by the Respondent, but resigned voluntarily.

6.2 The Applicant's claims are dismissed in the entirety.

6.3 I make no order for costs.

DATED AT SITEKI ON THIS \_\_\_ DAY OF JANUARY 2018

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NONSIKELELO DLAMINI  
CMAC ARBITRATOR