



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

HELD AT MANZINI

STK 016/14

In the matter between:-

MFANUKHONA MANGWE

Applicant

And

**SWAZILAND NATIONAL TRUST
COMMISSION**

Respondent

Coram:

Arbitrator	:	Nonhlanhla Shongwe
For Applicant	:	Siphiwo Vilakati
For Respondent	:	Sabelo Gule & Maria Masuku

ARBITRATION AWARD

DATES OF ARBITRATION : 4th & 17th September 2014,
8th & 28th October 2014,
13th November 2014,
3rd December 2014, 13th &
14th January 2015, 29th June
and 2nd July 2015.

VENUE : CMAC Offices, LaNkhosi
Building, Manzini

DETAILS OF HEARING AND REPRESENTATION

1. The Applicant herein is Mfanukhona Mangwe an adult Swazi male of Ezulwini in the District of Hhohho. He was initially represented by Kwanele Magagula who handed over to Buhle Dlamini and the last appearance was by Siphiso Vilakati, from the offices of Sithole and Magagula Attorneys.
2. The Respondent is the Swaziland National Trust Commission, a statutory body having its principal place of business at Lobamba in the Hhohho Region. The Respondent was represented by Sabelo Gule the Operations Officer and Maria Masuku the Human Resources Officer.

ISSUES TO BE DECIDED

3. I am required to determine whether:
 - 3.1 the Applicant was an employee to whom Section of the **Employment Act 1980** 35 applied;
 - 3.2 there was a dismissal and if the answer is to the affirmative;
 - 3.3 the procedural and substantive fairness of the Applicant's dismissal.

BACKGROUND TO THE ISSUE

4. The Applicant was employed on the 1st November 2012 on a written fixed term contract, the duration of which is in issue. The Applicant's version is that it was for a period of 12 months ending 1st November 2013, whereas the Respondent's position is that it was for a period of 16 months to lapse on the 28th February 2014.

5. It is common cause that the Applicant was employed as a Junior Sous Chef earning the sum of E4, 200.00 per month. The employment relationship came to an end on the 1st March 2013 under circumstances which are in dispute.
6. A dispute concerning the termination of the employment relationship arose and the Applicant reported a dispute with the Commission. Unfortunately the parties failed to resolve the dispute and a certificate of unresolved dispute was issued.
7. The parties, by agreement requested that the matter be referred to arbitration wherein I was appointed to arbitrate.
8. The Applicant's case is that he was dismissed unfairly and therefore is seeking payment of Notice pay and Maximum Compensation for the unfair dismissal. The Respondent on the other hand, is disputing the Applicant's case, contending that there was no dismissal as the employment contract was terminated by the effluxion of time.

SURVEY OF EVIDENCE AND ARGUMENTS

APPLICANT'S CASE

9. Two witnesses testified for and on behalf of the Applicant namely; the Applicant (AW1) and Mthokozisi Ndwandwe (AW2). The salient aspects of their testimony is set out hereunder:

TESTIMONY OF MFANUKHONA MANGWE

10. He testified that he was employed on the 1st November 2012 on a fixed term contract which was to lapse on

the 1st November 2013. He worked beyond the termination period until the 1st March 2014 wherein he was handed a letter dated the 20th February 2014 informing him that his employment was being terminated with effect from the 28th February 2014.

11. On or about the 1st March 2014 at around 8.00 am Mr. Philemon Dlamini his Supervisor introduced him to a new member of staff and asked him to orient the new employee on the nature of his work. About 35 minutes later, he received a call summoning him into the office. When he got to the office he was handed the termination letter.
12. The Applicant testified that he was taken aback by the letter of termination as according to his knowledge his contract of employment had lapsed in November 2013 but was allowed to work beyond the expiration date to the 1st March 2014 thus converting his employment into a permanent status.
13. The Applicant stated that he never received a copy of the contract he signed. Despite numerous requests for a copy of the contract from Maria Masuku the Human Resources Officer and Philemon Dlamini his Supervisor he was not given. The copy of the contract he discovered marked "**MM2**" is the copy he received from the Respondent at Conciliation whose contents are in issue. He conceded that though the contract bears his signature he denied that the contents thereof were a true reflection of what he signed for. The contract he signed was also initialed on every page by him and his Supervisor yet the one he received did not have those initials, which validates his suspicion that the copy he received was a forgery.

14. Subsequent to his dismissal, he enquired from his Supervisor through a WhatsApp message about the duration of his contract. To that his Supervisor responded that to his recollection the HR had informed him that it was to expire on the 30th November 2013. In support of this allegation the Applicant produced exhibits “**MM3**” and “**MM4**” being an affidavit by one Ian Simelane a Computer technician and the transcribed communication thread between the Applicant and his Supervisor respectively.
15. Accordingly the Applicant deems his dismissal as being unfair in that as a permanent employee the employer was obliged to follow due process before terminating his services. Therefore, he prayed for maximum compensation for the unfair termination and notice pay as he was not given sufficient notice prior to his termination.
16. When cross examined he admitted that the initials appearing in particular on page 2 of exhibit “**SNTC-D**” (copy of contract of employment), and the signature at the back are his. The said page contains the duration of the employment as being for sixteen (16) months spanning from the 1st November 2012 to 28th November 2014. He testified however that his initials seem to have been forged.
17. When asked why he continued to work if he was of the view that his contract of employment had expired, he stated that he was of the view that the Respondent would give him notice of the expiration and when the employer did not he felt like his services were needed and continued performing his duties.
18. He testified under cross-examination that he was never given a copy of the contract after signing it instead he

was promised to be given one at a later date. He even approached the Human Resources Officer several times only to be given empty promises.

19. He denied that the purpose of his visit to the Human Resources Office on the 19th February 2014 was to request an extension of his employment contract. He clarified that he went there for a loan and the Human Resources Officer enquired about his employment status.
20. He further testified that he signed his contract in the presence of his Supervisor who also signed on behalf of the employer.

MTHOKOZISI NDWANDWE (AW2)

21. I have intentionally omitted the evidence of the witness as I felt it does not assist nor advance the Applicant's case in any way. There is no correlation between his evidence and that of the Applicant. His testimony is basically his own personal experience with the Respondent which I view as a dispute on its own.

RESPONDENT'S CASE

22. The Respondent called two witnesses namely; Nomsa Vilane the Human Resources Officer (RW1), and Philemon Dlamini the Applicant's Supervisor (RW2). The salient aspects of their testimony is set out hereunder:

TESTIMONY OF NOMSA VILANE (RW1)

23. Her testimony was that she was tasked by her Supervisor the Human Resources Manager to circulate contracts of employment to all employees.
24. On the 6th January 2013 she personally gave Philemon the Applicant's contract of employment which was for 16 months spanning from the 1st November 2012 to 28th February 2013. Her duty is to compile the necessary documents for payroll purposes.
25. During cross-examination she testified that she was not present when the Applicant signed the contract. The only way she knew that Applicant had signed his contract was because the company procedure is that an employee's pay can only be processed once a signed contract has been filed with the office of the Human Resources.
26. She was asked if the Applicant was paid his salary for November to December 2012. Her response was in the affirmative. She was then asked as to how the Applicant was paid his salary for that period since there was no formal documentation confirming his employment. She stated that it was by verbal agreement.

TESTIMONY OF PHILEMON DLAMINI (RW2)

27. He testified that he was employed by the Respondent as Lodge Supervisor since May 2012 on a contractual basis.
28. He stated that the Applicant was transferred to Magadzavane around November 2012. At the time he was not given a contract of employment to sign but was made aware that his contract will be brought at a later date for him to sign. The delay in issuing the

contracts was caused by the absence of the Human Resources Manager.

29. On or about the 7th January 2013 the Human Resources Officer brought employment contracts for all employees at the lodge to sign. The Applicant signed his on the very same day and was given a copy of same with all the other employees. The contract was for the period commencing on the 1st November 2012 to February 2014. He identified exhibit **"SNTC-A"** as a copy of the contract duly signed by him on behalf of the Respondent.
30. According to Philemon he never at any point conversed with the Applicant through texting confirming the duration of the Applicant's contract of employment.
31. When confronted with the transcribed text messages (exhibit **"MM4"**) exchanged between him and the Applicant he denied being part of the conversation. Despite being confronted with the phone from which the messages were sourced and was shown the messages, he denied that he sent the messages. He only confirmed that the profile picture on the number was his. A message was sent to test the veracity of his testimony from the Applicant to the number he was disputing and the message went through to his phone. Even when faced with glaring proof he maintained his stance.
32. During cross-examination he testified that he signed the Applicant's contract as a witness as he was present during the signing. The Applicant further put his initials on every page of the contract. When confronted with the two copies of the contracts discovered on record by both parties being exhibit **"SNTC-A"** and exhibit **"MM2"** he identified exhibit **"SNTC-A"** as being the

one they both signed as it had initials. He could not however give a plausible explanation of how the Applicant got hold of a copy without initials.

33. After the Respondent had concluded its case, both parties decided to hand in their closing arguments in writing.

ANALYSIS OF EVIDENCE AND ARGUMENTS

34. The issues for determination are inter alia: whether the Applicant was an employee to whom Section 35 of **The Employment Act 1980** applied when his services were terminated; whether there was a dismissal and if the answer is in the affirmative, to determine whether the termination of the employment relationship was reasonable and fair in the circumstances.

35. I have to state from the onset that the Applicant's case presented one insurmountable difficulty. During the initial proceedings the Applicant's representative at the time, presented a different case than the one presented during the last session when the Applicant was represented by a different representative. Initially the case of the Applicant was that after the expiry of the fixed term contract on the 30th November 2013, and in the absence of any extension or renewal of that contract or in the absence of any agreement as to the renewal period his employment was indefinite and he became a permanent employee. The version that he was permanent is irreconcilable with his version of tacit renewal.

36. However, during closing submissions counsel for the Applicant pursued a different line of argument, being that the Respondent's failure to terminate the employment relationship at the end of the contract

period gave rise to a tacit renewal of the contract of employment on the same terms and conditions.

37. To support this proposition the Applicant made reference to the case of **Londiwe Sithole v National Public Services & Allied Workers Union Group Funeral Scheme and Another SZIC 186 / 2013**, wherein the Judge President made reference to **John Grogan: workplace Discipline 8th Edition @ p. 110** to say;

[10] Employees on fixed-term contracts may claim that they have been dismissed, and challenge the fairness of the dismissal only if they can prove that they had some reasonable ground for expecting renewal. The onus of proving a reasonable expectation rests on the employee.

It was further stated in the same case that;

*[11] In the present application if the court finds that the fixed term contract that expired on the 30th April 2003 was tacitly renewed, the Applicant would have to resume her duties as normal for the next six months. If the court finds that it was not, **cadit quaestio**, and the application would be dismissed.*

38. In deed this case is authority in support of this position of the law which is now trite. However, this proposition does not apply to the Applicant's initial stance that he was converted into a permanent status, but rather on the contention that his contract of employment was tacitly renewed for another year. If say the Applicant were to succeed on the latter he would still be entitled to the remaining period of the tacitly renewed contract of employment but not to the relief of maximum compensation which supports his initial stance.

WAS THE APPLICANT AN EMPLOYEE TO WHOM SECTION 35 APPLIED?

39. Section 42 (1) of the **Employment Act 1980** provides that in the presentation of any complaint regarding the termination of his or her services, an employee is required to prove that at the time his or her services were terminated he or she was an employee to whom section 35 applied.

40. The Section 35 cited therein provides as follows;

“Employee’s services not to be unfairly terminated.

(1) This section shall not apply to -

(a) an employee who has not completed the period or 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.
[my emphasis]*

41. The Applicant in trying to discharge his onus testified that he was in continuous service for sixteen (16) months. This was not disputed by the Respondent. However the latter’s reason for contesting that the Applicant enjoyed the protection of S.35 was premised on the fact that the Applicant was engaged on a fixed term period of sixteen (16) months which period expired by effluxion of time.

42. The Applicant contends that after the expiry of the fixed term contract on the 30th November 2013, and in the absence of any extension or renewal of that contract or the conclusion of any new contract, his contract of employment was tacitly renewed on the same terms and conditions.
43. It is apparent that this point cannot be dealt with without determining the duration of the contract of employment. Here I am faced with mutually destructive versions, the Applicant arguing that the contract was for 12 months and the Respondent insisting that it was for 16 months.
44. The Applicant in his evidence in chief testified that he was never given a copy of the contract upon signature thereof. He only got a copy from RW1 during conciliation which has been filed marked "**MM2**". The Respondent also filed its copy of the contract marked "**SNTC-A**". Both copies are for a period of 16 months and are similar in all aspects and bear the Applicant's signature on the last page. Except that the Respondent's copy has initials yet the Applicant's copy which he got from the Respondent during conciliation, is not initialed. Though the Applicant confirmed the signature and initials on the Respondent's copy as his, he disputed the contents with regards to the duration. The Applicant implied that the contract of employment had been fabricated by the Respondent to justify the termination of his services.
45. I am now faced with two copies of the contract of employment. One with initials and the other is not initialed. Both these copies have been sourced from the Respondent yet the mutual position is that the Applicant's contract had initials. This begs the question, where did the other copy come from.

46. Compounding the issue was that the copies of the contract discovered on record are in dispute and accordingly the Respondent had to lead evidence thereon. Two rules generally apply to the admissibility of documentary evidence, namely; the document must be an original and there must be proof that the document is authentic. A witness must testify to the authenticity and the accuracy of that document that it is what it purports to be. The Respondent's failure to lead such evidence means that the said documents cannot be admitted into evidence as they are unreliable. (See, in this regard, **NUM obo Mbalane v Bank Colliery [2000] 3 BALR 358.**
47. The Respondent did not call the Human Resources Manager who drew up the contract nor did they produce the original copy of the contract. Consequently, an adverse inference will be drawn by the Respondent's failure to do so, but the obvious consequence is that the Respondent can only rely on the evidence given by RW1 and RW2 and the Applicant, to discharge its onus.
48. RW1 testified that she was not present when the Applicant signed the contract and there is no indication from her testimony if at all she saw or read the Applicant's contract. Instead her testimony was that she was asked to circulate contracts for all employees by the Human Resources Manager.
49. RW2 damaged his credibility by persisting in his version that he did not converse with the Applicant through whatsapp about the duration of the contract, even after it became apparent that he was not telling the truth. This has the effect of discrediting his testimony entirely. It is apposite to reproduce the relevant portion of the

conversation of the Applicant and RW2 marked “**MM8**” which records thus;

*“14:05, 2014/5/5 – you (Applicant) Yayiphela nini
12:00, 2014/5/5 – Dlamini F: ngeva nga hr kutsi
beyiphela 30 november 2013*

50. In this thread the Applicant asked the recipient about the duration of his employment contract and the response was that, ‘according to the HR (Human Resource) it was to expire on the 30th November 2013. This gives credence to Applicant’s case that the copy presented to the Commission may have been fabricated to suit the Respondent’s case. The most probable inference to be drawn is that the Respondent manipulated the contract as a pretext for dismissing the Applicant.
51. The Respondent has not advanced any satisfactory proof to gainsay the Applicant’s denial that the contract has been fabricated. On a preponderance of probabilities and the proven facts, I find that the Applicant’s contract of employment was for a period of 12 months and was allowed to work beyond the termination date of the contract of employment.
52. The learned author **John Grogan** in his book **Workplace law, 8th Edition**, at page 45 stated that;

“if after the agreed date for termination of the contract the employee remains in service and the employer continues to pay the agreed remuneration, the contract is deemed to have been tacitly renewed, provided that an intention to review is consistent with the parties conduct. The relocated contract will continue on exactly the same terms and conditions as the previous fixed term contract,....”

See: **Mokgokong and another v. Swaziland Nazarene Health Institutions (SNHI) Case no. 401/2015 (IC)**

53. Therefore since his contract had been tacitly renewed, the Applicant does enjoy the protection of Section 35 of the **Employment Act 1980**.

WAS THERE A TERMINATION OF THE EMPLOYMENT CONTRACT?

54. As I have found that the Applicant was an employee to whom Section 35 applied, it follows therefore that a determination be made on whether there was a dismissal or not.

55. The Respondent has not advanced any other reason for the termination of the Applicant's services other than to say the contract had run its course. The termination of the Applicant's services was by letter dated 20th February 2014 which the Applicant received on the 1st March 2014. The letter marked "**MM1**" informed the Applicant that his contract of employment had not been renewed hence it was being terminated with effect from the 28th February 2014.

WAS THE TERMINATION FAIR?

56. I have had occasion to peruse both copies of the contract on record on the issue of termination. Clause 9 of exhibits "**MM2**" and "**SNTC-A**", titled 'termination of the contract of employment' records thus;

"Termination by Notice

After the employee has been appointed to the permanent [my emphasis] staff of the employer, each

of the parties may terminate this contract on the following basis: ...

57. The contract goes on to state the statutory notice as provided for in Section 33 of the **Employment Act 1980**. There is no provision on both contracts for premature termination for fixed term contract employees other than dismissal for misconduct.
58. Having found that the Applicant's contract was tacitly renewed for another period to expire on the 30th October 2014, the termination of his contract of employment was accordingly pre-mature.
59. In the South African case of **Buthelezi v Municipal Demarcation Board [2005] 2 BLLR 115 LAC** it was pointed out as follows;

“At common law a party to a fixed – term contract has no right to terminate such contract in the absence of a repudiation or a material breach of the contract by the other party. In other words there is no right to terminate such contract even on notice unless its terms provide for such termination. The rationale for this is clear. When parties agree that their contract will endure for a certain period as opposed to a contract for an indefinite period, they bind themselves to honour and perform their respective obligations in terms of that contract for the duration of the contract and they plan, as they are entitled to in the light of their agreement, their lives on the basis that the obligations of the contract will be performed for the duration of that contract in the absence of a material breach of the contract. Each party is entitled to expect that the other has carefully looked into the future and has satisfied itself that it can meet its obligations for the entire term in the absence of any material breach. Accordingly, no

party is entitled to later seek to escape its obligations in terms of the contract on the basis that its assessment of the future had been erroneous or had overlooked certain things. Under the common law there is no right to terminate of a fixed - term contract of employment prematurely in the absence of a material breach of such contract by the other party."

60. I conclude that the Respondent repudiated the employment contract prematurely. Accordingly, the termination of such contract before the end of its term was unfair and constituted an unfair dismissal.

61. I therefore find that the appropriate compensation to redress the unfairness is an amount equivalent to the remuneration the Applicant would have been paid for the balance of the contract period. Such amount is equivalent to eight months' pay based on the fact that the contract was to lapse at the end of October 2014.

62. This proposition is consistent with the approach adopted in **Meyers v Abrahamsom 1952(3) SA 121(C)**. In that case **Van Winsen J** laid down the correct approach for computing damages for a premature dismissal in the following terms at 127E:

"The measure of damages accorded such employee is, both in our law and in the English law, the actual loss suffered by him represented by the sum due to him of the unexpired period of the contract less any sum he earned or could reasonably have earned during such latter period in similar employment."

63. The following order is made;

AWARD

64. The Applicant's dismissal was unfair.

65. The Respondent is hereby directed to pay compensation to the Applicant an amount equal to eight (8) month's remuneration equivalent to the sum of **E33, 600.00**.

66. The Respondent is further directed to pay the Applicant the said sum of **E33, 600.00** not later than the 30th November 2015.

THUS DONE AND SIGNED AT MANZINI ON THIS 30th DAY OF OCTOBER, 2015.

.....
NONHLANHLA SHONGWE
CMAC COMMISSIONER