

IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION

HELD AT MANZINI MNZ 557/07

In the matter between:-

BOYKIE GWEBU APPLICANT

And

NTOMBENKULU DLAMINI T/A

NKOSEPHAYO TRANSPORT RESPONDENT

CORAM:

ARBITRATOR : ROBERT S. MHLANGA
FOR THE APPLICANT : MR SELBY DLAMINI
FOR THE RESPONDENT : MR ZAMOKUHLE LUKHELE

ARBITRATION AWARD

VENUE: CMAC OFFICES, ENGULENI BUILDING, GROUND FLOOR

1

1. DETAILS OF HEARING AND REPRESENTATION

1.1 The applicant is Boykie Gwebu, an adult Swazi male who was duly represented herein by Selby Dlamini.

1.2 The respondent is Ntombenkulu Dlamini trading as Nkosephayo Transport, an adult Swazi business woman or public transport operator, who was duly represented herein by Mr Zamokuhle Lukhele, from the office of Piliso, Simelane & Partners.

2. BAKGROUND OF THE DISPUTE

2.1 In this case, the applicant reported a dispute of unfair dismissal to CMAC. As a result of the alleged unfair dismissal, the applicant initially claimed from the respondent the payment of notice pay, additional notice pay, severance pay, annual leave pay, overtime pay, unpaid wages for June 2007 and wages for days worked in July 2007, and maximum compensation for unfair dismissal.

2.2 The dispute was conciliated upon, and the parties were able to reach a settlement in respect of some of

2

the issues herein, except the issue of overtime. The parties could not agree or resolve the issue of overtime and as a result hereof a Certificate of Unresolved Dispute was issued by the commission.

2.3 The parties could not voluntarily agree to refer the dispute to arbitration, hence the applicant filed an application at the Industrial Court under Case No. 107/08 for an order directing that the matter be referred to arbitration under the auspices of CMAC in terms of Section 85 (2) of the Industrial Relations of 2000 (as amended).

2.4 Eventually on the 24th April 2008, the Industrial Court, under Case No. 107/2008 issued an order that the matter be referred to CMAC for the determination of the unresolved dispute herein.

2.5 Subsequently, I was appointed by the commission to arbitrate in these proceedings.

2.6 The arbitration hearing was preceded by a pre-arbitration conference, which was held on the 26th June 2008. The main purpose of the pre-arbitration meeting was to confirm the parties' representation,

-3-

to establish the number of witnesses each party intended to call (if any); to find out if there was any documents each party intended to use as documentary evidence and the need to exchange the same prior to the date of hearing.

2.7 On the other hand, during the pre-arbitration conference the parties were duly advised to file with the commission their respective opening statements before the commencement of the arbitration hearing. Both parties agreed to do that, but only the respondent was able to file her opening statement before the arbitration proceedings commenced.

3. ISSUE TO BE DECIDED

The issue I am called upon to decide herein is the overtime pay allegedly owed to the applicant by the respondent. In his closing submissions, the applicant prays that an award be granted in his favour for the payment of overtime in the sum of E34, 727.47 (Thirty four thousand seven hundred and twenty seven emalangeni, forty seven cents). Therefore, the question which begs for an answer is whether or not the applicant is entitled to be paid the sum of E34, 727.47 as claimed herein.

-4-

4. SUMMARY OF EVIDENCE 4.1 APPLICANTS CASE

4.1.1 Boykie Gwebu, the applicant herein gave evidence under oath, and he said that he was employed by the respondent as a kombi driver in or about September 2005. The applicant further testified that, at the time of his alleged dismissal he was earning a salary of E1, 400-00 per month.

4.1.2 The applicant stated that he was driving the respondent's kombi or mini bus which was plying or servicing the Manzini-Mbabane public route.

4.1.3 It was the applicant's testimony that, his working schedule was to the effect that he started work at 5:00 am and knocked off at 7:00 pm, from Monday to Friday. He said that he also worked on Saturdays and Sundays. On Saturday he started work from 6:00 am to 7:00 pm. The applicant said that the Sunday takings were mainly used for the kombi's fuel (petrol) for the following Monday.

-5-

4.1.4 Mr Gwebu also testified that his other task or duty was to transport Tisuka TakaNgwane staff from Mbabane at about 7:00 am to work at Lozitha, from Monday to Friday. He said that he transported them back home (Mbabane) at 4:30 pm. In short, the applicant stated that other than his routine work, he also transported the said Tisuka TakaNgwane staff or employees who were residing in Mbabane to and from work from Monday to Friday.

4.1.5 Mr Gwebu testified that everyday after work he gave the respondent the money earned or day's takings. The applicant said that he used to drive to the respondent's home at Mbekelweni to deliver the cash or money earned each day.

4.1.6 The applicant stated that after work he parked the kombi at Bhunu Mall. He said that he was staying at kaKhoza.

4.1.7 It was also the applicant's testimony that he worked overtime in that he was working in excess of the legally stipulated eight (8) hours per day. The applicant alleged that despite working

-6-

overtime, the respondent was not paying him for overtime worked.

4.1.8 In conclusion, the applicant prayed that an award be issued in his favour to the effect that the respondent should pay him for overtime worked while he was still in the respondent's employ. Though the applicant did not state the amount of overtime pay being claimed herein, but his representative stated that the computation of the overtime pay will be set out in the applicant's closing submissions.

CROSS EXAMINATION

4.1.9 During cross-examination the applicant confirmed the fact that he was employed by the respondent in September 2005.

4.1.10 Under cross-examination the applicant maintained that he started work at 5:00 am and knocked off at 7:00 pm, from Monday to Friday; and that on Saturdays he began work at 6:00 am to 6:00 pm, while on Sundays he started work at 7:00 am to 6:00 pm.

-7-

4.1.11 It was put to the applicant that in terms of the contract of employment between the parties, he was supposed to work from Monday to Saturday. It is said that it was never agreed between the parties that the applicant should work on Sunday. In response to this, the applicant disagreed or disputed these allegations, and he insisted that he worked from Monday to Sunday per week.

4.1.12 The applicant also testified during cross-examination that, while he was still in the respondent's employ, he had a good working relationship with his former employer (respondent).

4.1.13 The applicant further stated under cross-examination that while he was still employed by the respondent, he never complained to the respondent about his overtime pay. He said that he only demanded or requested for a wage increment, and that the respondent consequently increased his salary from E1200-00 to E1400-00 per month.

-8-

4.1.14 During cross-examination the applicant insisted that he used to work even on Sundays.

4.1.15 Under cross-examination the applicant testified that after the day's work he parked the kombi at Bhunu Mall underground parking.

4.1.16 The applicant also stated under cross-examination that he used to make about four (4) trips per day during his routine work as a kombi driver.

4.1.17 It was the applicant's testimony that he was once given three (3) weeks' leave by the respondent at his request, to attend to his sickly father. He said that he asked another driver, namely, Dumsani Malaza to work in his stead in the meantime and or for the duration of the said three (3) weeks.

-9-

4-2 RESPONDENT'S CASE NTOMBENKULU DLAMINI'S EVIDENCE (RW1)

4.2.1 Ntombenkulu Dlamini, an adult Swazi businesswoman, who is a public transport operator, trading as Nkosephayo Transport gave her testimony under oath.

4.2.2 The respondent in her testimony confirmed that she was the applicant's former employer. She further confirmed that the applicant was verbally employed by her as a kombi driver and that he (applicant) was employed in or about October 2004.

4.2.3 She said that she initially paid the applicant E1200-00 per month, but that at the time of the termination of his services he was earning a salary of E1400-00 per month.

4.2.4 Ntombenkulu Dlamini further testified that in terms of the verbal contract of employment between the parties, the applicant's working schedule was to the effect that, he started work at

-10-

6:45 am and knocked off at 5:45 pm, from Monday to Saturday. The respondent specifically denied or disputed the fact that the applicant worked on Sundays.

4.2.5 The respondent also said that the parties did not agree that the applicant should work overtime. The respondent stated that, if the applicant was working on Sundays (which fact she disputed), the applicant was expected to give her (respondent) the income earned on Sundays (which thing the applicant did not do). She said that the fact that no income or money was received by her from the applicant as money worked or earned on Sundays, is an indication that he never worked on Sundays.

4.2.6 The respondent stated that she was not even aware that the applicant was working overtime. She said that she heard about this, for the first time during the conciliation of this dispute at CMAC; that the applicant was allegedly working overtime. In a nutshell, the respondent disputed the fact that the applicant used to work overtime (including working on Sundays).

-11-

4.2.7 The respondent alleged that the applicant never at any stage, during the currency of the contract of employment between the parties, complained or informed her (respondent) that he was working overtime nor did he ever demanded the alleged overtime pay from her.

4.2.8 The respondent stated that she instructed the applicant to park the kombi at Bhunu Mall (underground parking) after work. She said that the applicant did not consistently adhere to the said directive in that sometimes he did not park the kombi at Bhunu Mall. She said that at times the applicant would park the kombi at the Liqhaga flats without her consent or authorization.

4.2.9 It was the respondent's further testimony that, in the beginning, the working relationship (employer - employee relationship) between her and the applicant was good. The respondent stated that unfortunately, as time went on, the applicant's work performance declined in such a way that he failed to meet the agreed target in terms of the daily takings. The respondent alleged that of late

-12-

the applicant was making on average, between E350-00 and E450-00 per day.

4.2.10 The respondent also testified that the applicant requested a special leave of three (3) weeks in order to attend to his sick father. The respondent said that she allowed the applicant the requested time to enable him to attend to his sick father. The respondent stated that the applicant was away for about a month. The respondent said that to her surprise, it transpired that it was not true that the applicant needed the 'leave' to attend to his sick father; he was during the period of absence engaged somewhere on a temporary basis as a driver for tourists.

4.2.11 She said that the applicant made an arrangement with another driver namely, Dumsani Malaza whom he asked to stand in for him for the duration of one (1) month. The respondent further stated that the salary for the month while applicant was absent was paid to him (applicant), and as per the arrangement between him and Malaza, he in turn paid Malaza.

-13-

CROSS EXAMINATION

4.2.12 During cross-examination the respondent disputed the fact that the applicant worked overtime in the first place.

4.2.13 Under cross-examination the respondent also denied the applicant's alleged working schedule. The respondent maintained that the applicant's working time was to the effect that, he started work at 6:45 am to 5:45 pm from Monday to Saturday.

4.2.14 The respondent (Ntombenkulu) specifically denied that the applicant was working even on Sunday. She also disputed the applicant's allegation that the money or income earned on Sundays were used for the kombi's fuel. She stated that to her knowledge, the kombi used to be fuelled up (full tank) every Saturdays after work in preparation for Monday (since Sunday was not a working day). The respondent also said that the applicant did not work during public holidays.

-14-

4.2.15 The respondent insisted that the applicant was not working on Sunday and that she never received any income or Sunday takings.

DUMSANI MALAZA'S TESTIMONY (RW2)

4.2.16 In support of her case the respondent led the evidence of Dumsani Malaza, hereinafter referred to as RW2.

4.2.17 After taking an oath, RW2, Dumsani Malaza testified that he is a kombi driver of Nhlambeni area. He said that he knows the applicant, Boykie Gwebu since the time when he (Malaza) was still employed as a driver for Asinamali Transport.

4.2.18 Mr Malaza testified that one day the applicant (Boykie Gwebu) asked him to temporarily relieve him as a stand-in driver for Nkosephayo transport, because he was given a leave of three weeks in order to attend to his sick father.

4.2.19 It was RW2's evidence that he worked as a stand-in driver for one (1) month or four (4) weeks instead of three (3) weeks as per the initial

-15-

agreement between him (Malaza) and the applicant (Boykie).

4.2.20 This witness (RW2) further testified that as a stand-in driver his working schedule was to the effect that, he started work at 6:45 A.M to 7:00 P.M from Monday to Saturday throughout the duration of four (4) weeks (one (1) month). This witness also stated that he was not working on Sundays.

4.2.21 RW2 testified that he used to hand over the daily takings to the respondent (Ntombenkulu Dlamini) after work.

4.2.22 It was Malaza's evidence that after hours he parked the kombi at Bhunu Mall underground parking.

4.2.23 On the other hand, RW2 testified that, while he was working as a stand-in driver, he once met the applicant along the Manzini-Mbabane highway and that the applicant was driving another kombi transporting tourists.

-16-

CROSS EXAMINATION

4.2.24 During cross-examination, Mr Dlamini, the applicant's representative put it to Mr Malaza (RW2) that all his evidence in chief in so far as it relates to the working schedule was fabricated and that it was further from the truth.

4.2.25 Mr Malaza maintained that all what he testified about in his evidence in chief about his working hours was true.

4.2.26 It was further put to RW2 that he was not telling the truth that he was not working on Sundays. It was further put to him that he was "schooled" hence his testimony is false.

4.2.27 RW2 disagreed with what was put to him; he insisted that he was telling the truth. He said that as a stand-in driver, he was told or instructed by the applicant regarding the working hours; he said the applicant informed him as to when to start work and when to knock off.

-17-

5- ANALYSIS OF EVIDENCE AND SUBMISSIONS

5.1 Both parties filed their written closing submissions after the close of their respective cases. However, I wish to remark about the parties' closing submissions. The parties' written closing submissions or arguments are regrettably shallow and incomprehensible. In their respective submissions the parties have failed to adequately address the issue at hand namely, overtime pay, so to enable me to issue a fair and appropriate award.

5.2 I will not traverse all the evidence adduced in this case; but my analysis will mainly focus on the evidence which I deem relevant to my award.

5.3 In the present case the issue in dispute is an accrued overtime pay allegedly owed to the applicant by the respondent covering the period of eighteen (18) months.

5.4 According to the applicant's submission the accrued overtime pay allegedly owed to him by the respondent amounts to E34,727.47 (Thirty four thousand seven hundred and twenty seven

-18-

emalangenji forty seven cents). Therefore, I am called upon to decide, after my careful analysis of the evidence, whether or not the applicant is entitled to the said sum of E34, 727.47.

5.5 Before I decide whether or not the applicant is entitled to the aforementioned sum of money; firstly, I have to determine whether the applicant worked overtime as alleged herein.

5.6 Basically, the applicant's case is that while he was still in the respondent's employ as a kombi driver, he worked overtime or in excess of the statutory prescribed forty eight (48) hour per week, but nevertheless the respondent failed to pay him for overtime worked.

5.7 The relief sought by the applicant herein is the payment of overtime covering the period of eighteen (18) months.

5.8 The applicant personally gave evidence in support of his case, and this is the only evidence led in the applicant's case.

-19-

5.9 Briefly, the applicant's testimony was that he was employed by the respondent as a kombi driver, and that the kombi was servicing Manzini-Mbabane public service route.

5.10 According to the applicant's evidence, his working schedule in terms of the contract of employment between the parties was as follows; he started work from 5:00 am to 7:00 pm, from Monday to Friday; on Saturday he started work at 6:00 am and knocked off at 6:00 pm and on Sunday he reported for work at 7:00 am and knocked off at 6:00 pm,

5.11 On the contrary, the respondent denies the applicant's claim namely, overtime pay. In support of her case the respondent personally gave evidence, and the evidence of Dumsani Malaza (RW2) was led in support hereof.

5.12 The respondent denies the applicant's claim of overtime pay. The respondent disputes the alleged working schedule. According to her version, there was no agreement reached between the parties to the effect that the applicant would work overtime. She also contends that in terms of the

verbal

-20-

agreement between the parties, regarding the hours of work, it was agreed that the applicant should report for work from 6:45 am to 5:45 pm, from Monday to Saturday only. The respondent vehemently denies the fact that the applicant was working on Sundays.

5.13 In the present case, the first factual issue which is in dispute is the hours of work. Secondly, what is in dispute is the sum of E34, 727.47, being the alleged overtime pay. In order to determine whether or not the applicant is entitled to the sum of E34, 727.47, firstly, I must decide the issue of the hours of work. In particular, I need to determine whether the applicant worked overtime as alleged herein.

5.14 In casu, it is common cause that the parties entered into a verbal contract of employment. Therefore, it is difficult to know as to whose version is probably true regarding the hours of work or working schedule. This brings me to yet another issue namely, as to who bears the onus of proof in this regard; is it the applicant or the respondent?

-21-

5.15 This issue at hand is pertaining to the terms and conditions of employment. In casu, it is common cause that the contract of employment was concluded verbally and hence there are no written terms and conditions of employment, as required by Section 22 of the Employment Act of 1980 (as amended).

5.16 In the case of France Dlamini vs A to Zee (PTY) LTD, Industrial Court Case No. 86/2002, at page 4, the court, per Nderi Nduma stated as follows; "It is mandatory for an employer to fill in the terms and conditions of an employee in a Form 22 and provide a copy to the employee. Where the employer has failed to keep such record and there is a dispute as to the terms and conditions of service of the employee, the onus rests on the employer to rebut the evidence of the employee as to the terms and conditions of service. A negative inference will be drawn from his failure to produce the records of the employee showing the terms and conditions of service under which he served."

5.17 In the above cited case, what was in dispute was the terms and conditions of service. In that case, the

-22-

employer had not filled the Second schedule Form 22 as required by Section 22 of the Employment Act of 1980. The respondent in that case also failed to produce the records of the employee showing the terms and conditions of service under which the employee served.

5.18 The present case is similar to the aforementioned case in that the standard statutory Form 22 showing the terms and conditions of the applicant's employment or service was not filled as the same was not produced as evidence by the respondent in the course of these proceedings.

5.19 In the light of the case of France Dlamini vs A to Zee (PTY) LTD, I hold or conclude that the respondent bears the onus to rebut the applicant's evidence regarding the hours of work as well as the overtime allegedly worked by the applicant.

5.20 It is my considered view that the respondent failed to rebut the applicant's evidence regarding hours of work. As mentioned above herein, the respondent failed to produce any employment record or proof to rebut the applicant's version. I am inclined to agree

-23-

with the applicant that his working schedule was to the effect that he started work from 5:00 am to 7:00 pm, Monday to Friday; 6:00 am to 6:00 pm on Saturdays. The respondent's evidence regarding the applicant's hours of work is rejected.

5.21 The respondent in her testimony merely alleged (without giving any conclusive proof) that the applicant did not work overtime. From the evidence presented herein, it is not in dispute that the kombi was parked at Bhunu Mall, Manzini after work. Every morning at 5:00 am the applicant would come and drove it off to start work in the absence of the respondent (who happens to stay at Mbekelweni).

5.22 Therefore, it is clear from the evidence adduced in this case that the respondent was not able to monitor or supervise the applicant regarding the execution of his duties. The respondent could not be in a position to tell whether or not the respondent started work at 5:00 am and knocked off at 7:00 pm, and as such her version could not be said to be true. Even RW2's evidence regarding the issue of the applicant's hours of work and overtime could not assist or bolster the respondent's case in as much as

-24-

RW2's testimony is not relevant in so far as the applicant's terms and conditions of service is concerned.

5.23 The respondent in her closing submissions argues that her version is corroborated by RW2's evidence who testified that as per their arrangement with the applicant he worked in accordance with the applicant's instructions. He said that he worked the same hours the applicant used to work during the period of one (1) month, while he was working on his behalf as a stand-in driver. Again, the respondent's argument is misguided and misleading because her testimony is at variance with RW2's evidence in this regard. RW2 testified that he started work at 6:45 am, and knocked off at 7:00 pm, whereas the respondent's version is that the applicant started work at 6:45 am to 5:45 pm.

5.24 In her closing submissions the respondent also argues, with regard to overtime, that the issue of overtime is consensual and voluntary. She submits that the applicant has failed to show in his evidence that he was forced to work overtime. It is the respondent's evidence that there was no agreement

-25-

between the parties to the effect that the applicant should work overtime. The respondent seems to admit that the applicant worked overtime when one considers this argument. Her contention seems to be that, there was no agreement to work overtime.

5.25 The respondent's submission that there was no agreement between the parties that the applicant should work overtime is ill conceived and as such is rejected. The applicant is entitled to be paid overtime so long as there is evidence that he did work overtime, otherwise the respondent would be unjustly enriched at the expense of the applicant.

5.26 However, I find that the respondent has been able to rebut the applicant's evidence regarding the issue of working on Sundays. The respondent denies that the applicant worked even on Sundays in that the applicant did not give her the Sunday's takings. The applicant's version was that he used the Sunday's takings to fill up (fuel) the kombi. As the applicant was an employee he was legally obliged to remit any money earned in the course of his employment. The respondent would then decide what to do with it. The respondent did not even know as to how much

-26-

(money) was collected and how much was used for fuel. In my view, the respondent in this regard has proved on the balance of probabilities that the applicant did not work on Sundays and consequently he is not entitled to be paid overtime for allegedly working on Sundays. The applicant has failed to convince me that he officially worked on Sundays.

5.27 In the light of the foregoing, and after careful consideration of the evidence presented before me by both parties, I am satisfied that the applicant's working schedule was from 5:00 am to 7:00 am,

Monday to Friday and 6:00 am to 6:00 pm on Saturdays. Therefore, it is my conclusion that he is entitled to be paid for overtime worked (Mondays to Saturdays) covering the period of eighteen months.

5.28 Lastly, I am called upon to determine the overtime pay, that is, the actual sum of money to be paid to the applicant.

5.29 In his closing submissions the applicant alleges that his overtime pay amounts to E34,727.47. But I do not agree with his calculations herein. In my view this amount is not correct.

-27-

5.30 According to my own calculations of the overtime, the applicant worked a total of 5 hours per day x 5 days (from Monday to Friday) = 25 hours + 3 hours worked on Saturday = 28 hours per week (overtime). In a month the total overtime worked is as follows; 28 hours x 4 weeks = 112 hours. 112 hours x 18 months = 2016 hours.

5.31 From 2016 hours; 216 hours should be subtracted. 2016 hours less 216 hours is equals to 1800 hours. The 216 hours is made up of the first thirty (30) minutes of overtime worked by the applicant on each day, which qualify for payment at the applicant's normal wage rate. In a nutshell, the first thirty (30) minutes overtime, which amount to 216 hours does not qualify to be considered at the rate of one and a half (1.5) times the applicant's normal rate of wages.

5.32 Only 1800 hours qualify for payment at the rate of 1.5 times the employee's normal wage rate. Therefore, the total overtime pay is as follows; E7.29 (hourly rate) x 1.5 = E10.94 per hour x 1800 = E19, 962.00. 216 hours x E7.29 (hourly rate) = E1, 574.64. E19, 962.00 + E1, 574.64 = E21, 266.64

-28-

(Twenty one thousand, two hundred and sixty six emalangenani sixty four cents). My computation of the overtime pay is in accordance with Sections 6,7 and 8 of the Regulation of Wages (Road Transportation) order of 2006 (Legal Notice No. 182 of 2006).

6. AWARD

Having considered all the evidence adduced herein and taking into account all the circumstances of the case, I therefore make the following award:

6.1 The applicant is entitled to the overtime pay in the sum of E21, 266.64.

6.2 The respondent is ordered to pay the applicant the sum of E21, 266.64 (Twenty one thousand, two hundred and sixty six emalangenani sixty four cents) within thirty (30) days from the date of this award.

-29-

DATED AT MANZINI ON THIS 28th DAY OF JANUARY 2009.

ROBERT S. MHLANGA (CMAC ARBITRATOR)

-30-