

CONCILIATION, MEDIATION & ARBITRATION COMMISSION (CMAC)

HELD AT MANZINI

MNZ 346/07

In the matter between:-

GCINAPHI MANYATSI

APPLICANT

And

MINGREN INVESTMENTS (PTY) LTD RESPONDENT

CORAM:

Arbitrator : Ms. K. Manzini

For Applicant : Mr. T. Fakudze

For Respondent : Mr. D. Msibi

ARBITRATION AWARD – EXPARTE

1. PARTIES AND REPRESENTATION

The applicant herein is Ms Gcinaphi Manyatsi, a Swazi Female adult, whose postal address is P.O. Box 2230, Manzini. Ms Manyatsi was represented by Mr. Thabiso Fakudze, an attorney from the offices of Fakudze Attorneys.

The respondent is Mingren Investments (PTY) LTD, a legal entity in terms of the company laws of Swaziland, whose postal address is P.O. Box 5066. At the arbitration hearing, the respondent was represented by a Mr. David Msibi.

2. BACKGROUND INFORMATION

The respondent had raised a preliminary point regarding the citing of two respondents by the applicant in the report of dispute. It was clarified by the applicant that she only seeks to proceed against Mingren Investment, and therefore there was only one respondent. At late the arbitration process was allowed to continue after a ruling had been issued. It was brought to the attention of the arbitrator at the proceedings scheduled for the 13th day of January, 2009, that the respondent had moved away from the business premises that were known to him in Manzini, and pointed out that he had tried, in vain to locate his clients. He stated that as a result, he did not have instructions to continue to represent the respondent.

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The matter was postponed on this occasion, and was scheduled to resume on the 24th day of February, 2009. On this occasion, there was no appearance by both the respondent's representative, and the applicant's attorney. The applicant herself was however in attendance, and the matter was further postponed, but it was communicated to all parties that the matter would be allowed to proceed on 17th of March, 2009, as an Exparte application if there was no appearance for the respondent. Indeed, on the 17th of March 2009, only the applicant and her representative were in attendance, and the representative were in attendance, and the matter proceeded Ex Parte.

3. SURVEY OF EVIDENCE AND ARGUMENT

Not all of the evidence is summarized herein, as reference is only made to the portions that have influenced the ultimate award. The applicant was the only witness who testified, and this evidence was not subjected to cross - examination as there was no appearance for the respondent.

THE TESTIMONY OF MS. GCINAPHI MANYATSI

The applicant's testimony under oath was that she was initially employed by Buy and Save, as a

cashier on the 1st of October, 2006. According to the witness, she had been

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engaged based on the agreement that she would initially earn a sum of E927.00 per month and that after a three month probationary period, she would be confirmed as a permanent member of staff. Ms Manyatsi stated that the agreement between herself and the employer was that directly after the three month period, her salary would automatically be increased, and this would be an indication that she had been confirmed into permanent employment.

According to the applicant her salary had indeed been increased after three months and she had earned a monthly salary of E1,222.00. She stated that it had been a norm in the business for staff to be rotated between Buy and Save and Mingren Investments, and she was not at all surprised when she and other workers were transferred to Mingren Investments.

Ms Manyatsi stated that the employers had told them that the reason for the rotation was to try and curb misconduct, and misappropriation of company assets, as employees were thought to start stealing when they got too used to their work surroundings. The applicant stated that she continued to work at Mingren Investments, and during this time it came to her attention through a document she had discovered that the business of Buy and Save food town,

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had been sold to Mingren Investments. She submitted the said document as part of her evidence, and it was marked annexure 'A' This document confirmed the sale of the business, and the transfer of all rights and obligations regarding employees and also stipulated that the sale of the business would not interrupt the continued employment of employees. This sale was to be effective as from the 12th of January, 2007.

The applicant also testified that she and other employees had on all occasions had to sign for their salaries whenever they got paid. Ms Manyatsi stated that they were required to sign a two page document, but were not given the opportunity to see the first page, but were just directed to sign the last page each time. She submitted as part of her evidence copies of two contracts which were brought by the respondents to the conciliation proceedings, which documents purported to be fixed term contracts which she allegedly signed.

Ms Manyatsi stated that either of these documents were authentic. The applicant stated that even though her signature appeared on the back of each contract, she had never signed any fixed term contracts, as she was a permanent employee. She stated that her signatures were

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fraudulently obtained, as the employer used to make them sign a two page document each time they received their salaries, but had never allowed them to see the first page. She stated that she had not known that the employer was obtaining her signature for the purposes of enduring a fixed term contract, and thought she was merely signing for her salary.

She stated that the employer had alleged that she had signed the first contract on the 1st of January, 2007, but she pointed out that this was totally untrue, as she had been in Mozambique on that day. Ms Manyatsi produced a copy of her passport which reflected that she had actually taken a trip to that country on this day, and could not have been at work to sign the contract. Ms Manyatsi, in fact disassociated herself with both the contracts.

Ms Manyatsi stated that on the 13th of April, 2007, her employer had called her to the office and had told her that she no longer had a job with the respondent company as her contract had expired. Ms Manyatsi stated that this had surprised her, and she had told the employer that she was a permanent employee and was not employed on a fixed terms contract. She stated that despite her protests, she had lost her job. She stated that she strongly believed that

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she had been unfairly dismissed, and prayed for an award based on her report of dispute.

4. ANALYSIS OF EVIDENCE AND ARGUMENTS

The gist of the evidence, as advanced by the applicant is that she was a permanent employee of Mingren Investments (PTY) LTD, which had acquired the business of Buy and Save Foodtown, together with its rights and obligations, including those that pertained to the continued employment of their workers.

Ms Manyatsi stated that she had been unfairly dismissed because her employer had fraudulently obtained her signature, and had purported to use it to endorse two fixed term contracts. The impact of the contracts, and in particular the one of the 13th of January, 2007, was that her employment was based on a three months fixed term contract, which contract came to end on the 13th of April, 2009.

It is trite law that in order for a contract to be valid, and binding on the parties, it is vital that there must be an actual or apparent meeting of the minds (see S. Van der Merwe et al (2004), "CONTRACT, GENERAL PRINCIPLES", 2nd ed, page 89)

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According to the applicant she did not consent to either of the fixed term contracts, and that there was therefore no meeting of the minds in as far as the contracts were concerned. Ms Manyatsi, it would appear was misled by the respondent in that she thought she was signing for her salary, whereas the employer was making her sign the fixed term contract. She was not even allowed to see the entire document she was appending her signature to. This in my view constitutes what is known as a "iustus error", and the misrepresentation by the respondent, as to the contents of the document actually induced the applicant to sign the documents. Ms Manyatsi was mistaken as to the terms as she was merely acknowledging receipt of her salary. The said contracts were therefore void for mistake (see Allen v Sixteen Stirling Investments (PTY) LTD 1974 (4) 164 (D).

In the premises, it is my finding that Ms Manyatsi was indeed a permanent employee of the respondent contract, and therefore the termination of her employment was wrongfully terminated as it was not supported by Section 36 of the Employment Act, 1980. This is because she was not charged with any offence, and a disciplinary hearing was not conducted in order to establish her guilt or otherwise.

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In regard, the holding of a disciplinary hearing is regarded as a fundamental pre - dismissal procedure, which serves to dispel any notion that the employee was unfairly dismissed (see Van Jaarsveld & Van Eck (2002) "Principle of Labour Law 2nd edition, page 198)

In light of the foregoing I find that the applicant was dismissed in a manner that was substantively, and procedurally unfair.

AWARD

The applicant had, in her prayers, applied that she be paid in terms of the report of dispute. I find that I am unable to order that she be reinstated, as evidence was led to the effect that the respondent operations had been closed in Manzini, and that rumour had it that the operations had been moved to Nhlanguano. Furthermore, the applicant had stated that she is now employed elsewhere. I am also unable to award her payment for unpaid leave days, as no evidence was led on this issue. I am therefore not equipped with enough information on how to compute this claim.

The respondent is however ordered to pay to the applicant the following amount:-

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1. Notice pay =E1222.00

2. Compensation for unfair dismissal (6 monthsxl,222.00) E7332.00 = E8554.00
The respondent is ordered to pay this amount to the Manzini CMAC Offices (SNAT BUILDING) on or before the 30th of April, 2009.

DATED AT MANZINI ON THIS1.....DAY OF APRIL, 2009.

KHONTAPHI MANZINI ARBITRATOR