

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

Held in Manzini

**MNZ 686/07**

In the matter between:

**Nomphumelelo Simelane**                      **Applicant**

AND

**Buhle Restaurant**                              **Respondent**

**CORAM:**

Arbitrator	MR Robert S. Mhlanga
For the Applicant	Mr J. Dlamini
For the Respondent	Mr D. Msibi

**ARBITRATION AWARD**

**VENUE : CMAC OFFICES ENGULENI BUILDING GROUND FLOOR, MANZINI**

**1. DETAILS OF HEARING AND REPRESENTATION**

1.1 The Applicant is Nomphumelelo Simelane, and she was represented by Mr John Dlamini a Union official. I will refer to the Applicant as Miss Simelane or the Applicant as the case may be.

1.2 The Respondent is Buhle Restaurant, which was duly represented by Mr David Msibi.

**2. BACKGROUND OF THE DISPUTE**

2.1 The Applicant is the Respondent's former employee.

2.2 The dispute between the parties is in relation to overtime pay, it being alleged by the Applicant that, while she was under the Respondent's employ, she used to work overtime, but the Respondent never paid her for overtime worked.

2.3 The Applicant also alleged that the Respondent unlawfully deducted from her salary for January, 2007 a sum of E250-00.

2.4 The overtime pay claimed by the Applicant dates from December, 2006 to September, 2007.

2.5 The total amount claimed by the Applicant is E5, 351-00 which is respect of overtime pay plus the said same of E250-00.

2.6 The Applicant, before she reported a dispute, demanded from the Respondent the payment of her overtime as evident from her letter of demand dated 10<sup>th</sup> October, 2007.

**-2-**

2.7 Following the Respondent's failure to comply with the Applicant's aforesaid demand; subsequently the Applicant reported a dispute to CMAC.

2.8 The dispute was conciliated upon, but unfortunately it was not resolved, hence the commission issued a Certificate of Unresolved dispute herein.

2.9 The parties by consent referred the matter to arbitration for the determination of the unresolved dispute.

2.10 A pre-arbitration meeting was held on the 3<sup>rd</sup> July, 2008, the purpose of this meeting inter alia, was to enable the parties to exchange the documents to used (if any) during the arbitration hearing, to determine the number of witnesses each party may call and to set a date suitable to the parties for the arbitration hearing.

### **3. ISSUE TO BE DECIDED**

In the present case the issue I am called upon to decide is the overtime pay allegedly owed by the Respondent to the Applicant. In other words I have to determine whether or not the Applicant is entitled to the alleged overtime pay which is set out in her report of dispute (see Annexure "A" attached thereto).

### **4. SUMMARY OF EVIDENCE 4.1 APPLICANT'S CASE**

4.1.1 The Applicant was the only witness in her case.

4.1.2 Nompumelelo Simelane, hereinafter referred to as the Applicant testified under oath, that she was

-3-

formerly employed by the Respondent (Buhle Restaurant) as a waitress on the 15<sup>th</sup> December, 2006.

4.1.3 It was the Applicant's testimony that her working schedule was to the effect that she started work at 7:00am and knocked off at 6:00pm from Monday to Sunday. She also testified that she worked even during the public holidays. The Applicant said that she worked three (3) Sundays per month. The Applicant stated that during Sundays and public holidays she started work at 8:00am and knocked off at 4:00pm. The Applicant alleged that she worked eleven (11) hours per day. The Applicant said that the Respondent owes her overtime for the period from December, 2006 to September, 2007.

4.1.4 The Applicant further stated that she never at any stage waived her right to claim her overtime pay from the Respondent for overtime worked (emphasis added).

4.1.5 On the other hand, the Applicant testified that the Respondent unlawfully deducted a sum of E250-00 from her salary in that she never authorized the said deduction.

4.1.6 With regard to lunch hour, the Applicant alleged that she was not allowed to go to lunch or to spend the lunch hour the way she would like; but she was restricted to eat inside the Respondent premises and she was allocated time which was less than the statutory prescribed lunch hour.

### **CROSS EXAMINATION**

4.1.7 During cross examination the Respondent's representative put it to the Applicant that it is not

-4-

true that she worked overtime while she was in the Respondent's employ. In response, the Applicant disputed this allegation; the Applicant maintained that she used to work overtime. She said that she marked in her calendar each time she had worked overtime.

4.1.8 The Applicant was also asked as to what were the days on which she worked overtime in December, 2006. The Applicant's response was not clear, the Applicant was evasive in that she failed to specifically mention the days on which she allegedly worked overtime in December, 2006.

4.1.9 The Applicant testified that she was given or allowed to take (2) days off duty per month, and this occurred every month end.

4.1.10 The Applicant conceded that she used to go to lunch during the lunchtime.

4.1.11 The Applicant also testified during cross examination that she was supposed to be paid overtime for working on Sundays at double or two times the normal hourly rate.

4.1.12 Under cross examination the Applicant admitted that there was a time when she was absent from work due to sickness.

4.1.13 The Applicant also admitted that she made a mistake in her computation of overtime by including the days when she was not at work.

4.1.14 During the cross examination the Applicant disputed the fact that she was working eight (8) hours a day.

-5-

4.1.15 The Applicant admitted that she did not claim the payment of overtime while she was still working for the Respondent.

## **4.2 RESPONDENT'S CASE VERONICA THWALA'S TESTIMONY**

4.2.1 Only one (1) witness testified on behalf of the Respondent and that was the Respondent's Director Mrs Veronica Thwala. I will refer to this witness as Mrs Thwala or RW1 as the case may be.

4.2.2 Mrs Veronica Thwala duly sworn testified that she is the Respondent's Director. She testified that the Applicant was Respondent's former employee. She stated that the Applicant was initially engaged on a temporary basis in or about December, 2006 and she worked for one (1) month (December, 2006).

4.2.3 Mrs Thwala testified that the Applicant was reengaged in or about January, 2007 as a waitress. In or about February, 2007, it is said that the Applicant had a shortage of E250-00, and consequently her services were terminated by the Respondent.

4.2.4 Mrs Thwala further stated that the Applicant was again re-engaged in March, 2007, and her salary was E650-00 per month. She said that in April, 2007, the Applicant's salary was increased from E650-00 to E700-00 per month.

4.2.5 Mrs Thwala testified that on or about the 30<sup>th</sup> July, 2007, the Respondent got a tender to render

-6-

catering services at the Dinner which was held at Mavuso Trade Centre. She said that she had been informed by the organizers of the Dinner that the Dinner would be over at 10:00pm or thereabout.

4.2.6 It was Mrs Thwala's testimony that she promised her employees that they would be paid overtime for having worked at the said Dinner on that night. Mrs Thwala said that the overtime to be paid to the employee was not yet agreed upon; she stated that she was going to give them some money as a token of appreciation for the work done.

4.2.7 It was Mrs Thwala evidence that the Dinner continued beyond 10:00pm. She said that as a result, the Applicant and two (2) of her colleagues abandoned work and they went home before the Dinner was over. Mrs Thwala stated that only the Chef and herself were left to do the catering. She said that she was forced to fetch from home her daughter-in law to assist during the dinner (to serve the people with food).

4.2.8 RW1 (Mrs Thwala) testified that, on the following, she summoned all the employees (Applicant included), who deserted work at Mavuso Trade Centre to explain why they did that. RW1 said that the other two (2) employees apologized to her for their misconduct, and they signed a

Written Warning. She said that Nomphumelelo Simelane (Applicant) refused to apologize and she (Applicant) did not sign the Written Warning. She said that the Applicant only demanded the payment of her salary (E700-00) for July, 2007; which was eventually paid to her.

-7-

4.2.9 It was RW1's evidence that, following the incident at Mavuso Trade Centre, the Applicant resigned from the Respondent's employment.

4.2.10 RW1 (Mrs Thwala) disputed the Applicant's claim for overtime. RW1 stated that the Applicant was not entitled to any overtime pay because, she never worked overtime while she was in the Respondent's employ. She said that the Applicant was working the normal eight (8) hours a day. RW1 testified that the Applicant's working schedule was to the effect that she started work from 8:45am to 5:30pm (knock off time) during the weekdays (Monday to Saturday). On Sunday, the Applicant started work from 8:30am to 4:00pm. RW1 alleged that in the business she is operating (Restaurant), Sunday is a working day.

4.2.11 Mrs Thwala further testified that the Applicant was given 30 minutes for lunch, and 15 minutes for tea break. She alleged that the Respondent provided the Applicant with free meals for lunch and breakfast.

4.2.12 RW1 also testified that there was a time when the Applicant was sick (she had a miscarriage) and the Doctor at the RFM Hospital gave her two (2) days sick leave. RW1 stated that she also gave the Applicant three (3) more days to rest at home. She referred the arbitrator to Annexure "R2", being a copy of the sick sheet issued by RFM Hospital which recommended that the Applicant should be off duty for two (2) days.

-8-

4.2.13 Mrs Thwala further testified that the Applicant was given four (4) off days per month. She explained that the Applicant would normally knock off at 3:30pm on Friday and would report for duty on Monday at 8:30am in the following week. In other words the Applicant would be at home on Saturday and Sunday in that particular week; and this occurred twice per month.

4.2.14 Mrs Thwala stated that the Applicant never at any stage during the currency of the reemployment with the Respondent, complained about the nonpayment of her overtime nor did she demanded any overtime. Mrs Thwala said that the Applicant demanded payment of overtime after she had left the Respondent's employment.

4.2.15 Mrs Thwala in her testimony referred the arbitrator to Annexure "R1", which is said to be the salary record. Mrs Thwala explained that the 8 hours which appears twice under the overtime column, in Annexure "R1" was mistakenly entered under the overtime column. She said that this does not mean that the Applicant worked overtime of eight (8) hours on each instance as it may appear therein, but the eight (8) hours should have reflected as the basic hours worked per day. She stated that the total of 16 hours which reflected therein under the overtime column were wrongly entered or recorded.

4.2.16 On the other hand, Mr Thwala alleged that the Applicant breached the contract of employment between the parties in that she (Applicant) unceremoniously left the Respondent's employ without giving the Respondent sufficient notice.

-9-

4.2.17 With regard to the sum of E250.00 which was deducted from the Applicant's salary; it was Mrs Thwala's testimony that the Applicant consented to the aforesaid deduction (following the Applicant's shortage of E250.00).

### **Cross Examination**

4.2.18 During cross-examination RW1 (Mrs Thwala) confirmed that the workers had chosen a certain Mr Mahlinza (an employee) to be their representative at the workplace.

4.2.19 It was put to RW1 by the Applicant's representative that as per his instructions the workers did not have a representative and that the said Mr Mahlinza was never elected or appointed by the employees to be their representative. In response RW1 maintained that Mr Mahlinza was chosen by the employees to be their representative at the workplace.

4.2.20 It was further put to RW1 that it was not true that the Applicant was initially engaged as a temporary employee. In response RW1 maintained that the Applicant was in or about December 2006 engaged as a temporary employee.

4.2.21 It was put to RW1 that the Applicant was engaged in December 2006 and that she was from that date in continuous employment until the time of her dismissal. RW1 disputed this allegation.

4.2.22 RW1 was also asked whether she had the Applicant's written consent before she deducted the sum of E250.00 from the Applicant's wages. RW1 answered to the affirmative; she

-10-

(RW1) said that the Applicant consented as shown in Annexure "R1".

4.2.23 It was further put to RW1 that Annexure "R1" is not the Applicant's consent, but that it is an acknowledgement of receipt of monthly wages by the Applicant. RW1 disputed this; she insisted that the Applicant consented to the deduction of the sum of E250.00 from her salary, to make up for the shortage of E250.00 caused by the Applicant in her takings.

4.2.24 The Applicant's representative put it to RW1 that the total of 16 hours (8hours X 2) which reflect on Annexure "RW1" under the overtime column in this document, is indeed an overtime owed to the Applicant by the Respondent.

4.2.25 RW1 vehemently denied this allegation. RW1 reiterated that the 8 hours which appears twice under the overtime column in Annexure "RW1" was not overtime. She said that this was erroneously entered or recorded under the overtime column. She said that the Applicant was working the normal eight (8) hours per day (there was no overtime).

4.2.26 It was also put to RW1 that the Applicant never at any stage waived her right to claim overtime from the Respondent. It was said that the fact that the Applicant never demanded from the Respondent her overtime pay while she was still working for the Respondent, does not mean that she is precluded from claiming it now. In response RW1 disputed this allegation.

-11-

## **5. Analysis of Evidence and Submissions**

5.1 My analysis will mainly focus on the evidence which I deem relevant to my Award herein.

5.2 The issue which I am called upon to decide is overtime. However, the applicant in her prayers also seeks the payment of the sum of E250.00 which was allegedly deducted by the Respondent from the applicant's salary for January 2007.

5.3 Briefly, the Applicant in her closing submissions argues that she worked overtime. The Applicant further submits that the Respondent has failed to give evidence to dispute her allegations herein. The Applicant submits that the Respondent has an obligation in terms of Section 151 of the Employment Act 1980, as amended, to keep records that were to dispute the Applicant's allegations pertaining to the overtime claim.

5.4 With regard to the deducted sum of E250.00 from the Applicant's salary; the Applicant argues that it was wrong for the Respondent to deduct the aforesaid sum from the Applicant's salary for January 2007 without the Applicant's consent and that this was in contravention of Section 57 of the Employment Act 1980.

5.5 Regarding the Respondent's counter-claim; it is the Applicant's argument that the Respondent is

not entitled to the alleged counter-claim. It is argued that the Respondent has failed to report a dispute against the Applicant. The Applicant prays that the Respondent's counterclaim be dismissed.

-12-

5.6 On the contrary, the Respondent in its closing submissions contends that the Applicant never worked overtime; she worked for eight (8) hours per day like all the Respondent's employees. The Respondent denies that the Applicant worked all calendar days as alleged by the Applicant in that, she used to take two (2) days off duty, fortnightly. It is also submitted that the Applicant wrongly claimed overtime for days when she was not at work; for instance there was a time when she was on sick leave. It is submitted that the applicant also conceded during cross-examination that she was given a sick leave as per Annexure "R2", plus three (3) days authorized by the Respondent.

5.7 The Respondent also contends that Sunday is a normal working day. On Sunday it is alleged that employees resume their duties from 8:30 a.m to 4:00 p.m. With regard to Public Holidays, the Respondent submits that in the event employees (including the Applicant) had worked on a Public Holiday, they were paid or given off days.

5.8 The Respondent further contends that it has proved, through RW1's evidence, that the Applicant did not work all calendar days as alleged by the Applicant. The Respondent submits that the Applicant was proved to be a liar.

5.9 It is submitted herein that the Applicant is not entitled to the claim of overtime, wherefore it is prayed on behalf of the Respondent that the applicant's Application for the payment of overtime be dismissed.

-13-

5.10 May I state that each case depends on its own merits. In the present case as I have mentioned above herein, the issue which falls for determination is overtime. Therefore, the issue of the alleged unlawful deduction of the sum of E250.00 by the Respondent from the Applicant's salary for January 2007 cannot be considered, because it does not form part of the issues which were conciliated upon. The issue of the unlawful deduction of the sum of E250.00 does not appear in the Certificate of Unresolved Dispute. According to the Certificate of Unresolved Dispute in this case, which was issued on the 5<sup>th</sup> June 2008; in paragraph 2 thereof, the issue in dispute is overtime. The nature of dispute herein is unfair Labour Practice, according to the Certificate of Unresolved Dispute. The Commissioner recorded his reasons for the non-resolution of the dispute as follows; "The Applicant stated that she worked overtime at the respondent's undertaking but was not remunerated for same, which allegation was denied by the Respondent. The dispute is therefore certified Unresolved." In this regard see, the case of Swaziland Development and Savings Bank v SUFIAW (Industrial Court ; \ case No.418/2005).

5.11 There is nowhere in the said Certificate of Unresolved Dispute, where the alleged unlawful deduction of E250.00 is mentioned. Even in her Report of Dispute, in particular paragraph 5.1 thereof, where the applicant was expected to state the nature of the dispute; unpaid overtime was stated as the nature of the dispute. In paragraph 5.3 of the same Report of Dispute, where the Applicant was supposed to summarize all the facts giving rise to the dispute; she has not mentioned

-14-

the issue of the deducted sum of E250.00 from her salary by the Respondent. Even in her letter of demand dated 10<sup>th</sup> October 2007, she only claims for unpaid overtime, the sum of E250.00 is not claimed. In light of the foregoing, the applicant's claim for the payment of the deducted sum of E250.00 is rejected.

5.12 On the other hand, the respondent's counter-claim cannot be considered; I cannot take cognizance of this counter-claim because it has never been conciliated upon. In this regard, see the case of,

Hub Supermarket v Andrew McCarter (ICA Case No.18/2005). On the other hand, the Respondent has failed to disclose the amount being claimed in its counter-claim.

5.13 With regard to the issue of the alleged unpaid overtime; I am called upon to decide whether the applicant is entitled to the overtime claimed herein. The Applicant's claim for unpaid overtime is three-fold namely; overtime for the period from December 2006 to September 2007; overtime for working on Sundays and as well as overtime for working during Public Holidays. In respect of overtime for the period from December 2006 to September 2007; the Applicant claims a sum of E3271.15. The said sum, according to the Applicant's calculation, is made up as follows; Eleven (11) hours per day x 6 days= 66 hours; 66 hours - 48 hours (normal working week) = 18 hours; 18 hours x 4 weeks x 9 months = 648 hours. 648 hours is then multiplied by the hereby rate x 1.5 = overtime pay (aforementioned).

5.14 In support of this claim, the Applicant testified that she started work at 7:00a.m and she knocked off at 6:00p.m six (6) days a week

-15-

namely, from Monday to Saturday. According to the Applicant's version she worked a total of eleven (11) hours per day; which means that she worked 3 hours in excess of the statutory prescribed eight (8) hours per day.

5.15 However, during cross-examination the Applicant admitted that there were days on which she was not at work, and thus she conceded that her computation of the overtime claim was not accurate. For instance, there is undisputed evidence that the Applicant was once given two (2) days sick leave. There is also evidence by RW1 that the Applicant was given three (3) days extra following her miscarriage, which evidence was not disputed by the Applicant. During cross-examination the Applicant testified that she was given two (2) days offdays per month; but surprisingly the Applicant claimed to have worked overtime even during off days because in her evidence in chief she claimed to have worked all calendar days since December 2006 to September 2007.

5.16 The Respondent in the form of RWI's testimony disputed the Applicant's allegations that she worked overtime totaling 648 hours for the period from December 2006 to September 2007. In particular the Respondent denied that the Applicant used to start work from 7:00p.m to 6:00p.m from Monday to Saturday. According to RWI's testimony, the Applicant's working hours were to the effect that she started work from 8:45a.m to 5:30p.m during the six (6) days (Monday to Saturday); while on Sundays she started work from 8:30a.m to 4:00p.m. Again, this evidence was never challenged by the Applicant and as such it remains uncontroverted.

-16-

5.17 With regard to the Applicant's overtime claim for the period from December 2006 to September 2007, I am unable to accept her testimony that she worked overtime totaling 648 hours as she alleged herein.

5.18 May I turn to the Applicant's claim for overtime worked on Sundays. In support of this claim, the applicant testified during her evidence in chief that she worked even on Sundays. She alleged that on Sundays she started work at 8:00a.m and knocked off at 4:00p.m. However, the Respondent through Mrs Thwala's (RW1) evidence, disputed working hours or schedule Mrs Thwala (RW1) on the contrary testified that on Sundays the Applicant used to begin work at 8:30a.m and knocked off at 5:30p.m. Again the Respondent's evidence in this regard was never disputed or challenged by the Applicant through her representative during cross-examination. Since the Respondent's testimony regarding the issue of the Sunday's working schedule is uncontroverted, I am inclined to accept it as probably true.

5.19 On the other hand, the Respondent alleges that in its business Sunday is a working day. I do not agree with the Respondent's argument as it is not promised on any legal basis. Sunday is not a normal working day and as such an "overtime is payable at double or two time the Applicant daily rate. According to the Regulation of Wages (Hotel, Accommodation, Catering and Fast Food Trades) order 2008, the normal hours of work shall consist of forty-eight hours (which shall exclude six hours duty free for meal breaks) spread over a period of six days. It is

-17-

not in dispute that the Applicant used to work on Sundays. According to RW1's evidence the Applicant used to work two (2) Sundays per month.

5.20 Lastly, let me look at the issue of overtime for working during Public Holidays. It is the Applicant's case that she worked seven (7) Public Holidays. The Respondent has not denied that the Applicant worked even on Public Holidays and that she worked for seven (7) Public Holidays. As this evidence is not in dispute, I am inclined to accept it as probably true.

## **6. Conclusion**

6.1 In the light of the forgoing analysis of evidence herein; it is my conclusion that the Applicant's claim for overtime allegedly worked during the period from December 2006 to September 2007 should fail. On the balance of probabilities, the Applicant has failed to make out a clear case against the Respondent to the effect that she worked overtime during the period in question. On the other hand, the Respondent has been able to rebut the Applicant's evidence. As I stated above, the Applicant through her representative has failed to dispute Mrs. Thwala's evidence, to the effect that she never worked overtime during this period and or at any given time. RWI (Mrs. Thwala) disputed the Applicant's alleged working hours (7.00am to 6.00pm). Mrs. Thwala testified that the Applicant worked for the normal eight (8) hours per day. She said that the Applicant began work from 8.45am to 5.30pm. This evidence was never disputed or denied by the Applicant, and as such it is acceptable as it remains uncontroverted

-18-

6.2 However, I find that the applicant is entitled to be paid overtime for working during the dinner which was held at Mavuso Trade Centre on the 30<sup>th</sup> July 2007. From the evidence led herein, it is not in dispute that the Applicant was one of the Respondent's employees who worked on the day in question. According to Mrs. Thwala's evidence, the applicant (Nomphumelelo Simelane) worked overtime on that day. Mrs. Thwala testified that at about 10.00pm, the Applicant and two (2) other employees abandoned work and went home, due to the fact that the dinner which was expected to be over by 10.00pm was still ongoing. Mrs. Thwala testified that she had promised to give the employees (Applicant included) some money for having worked on that night. It is common cause that the Respondent did not pay the Applicant overtime. The Respondent has not denied the fact that the applicant's overtime was not paid.

6.3 It is my considered view that the Applicant is entitled to be paid overtime which is equivalent to four and a half hours (4.5 hours). The Applicant worked overtime from 5:30p.m to 10:00p.m on the



30<sup>th</sup> July 2007; and this is based on the fact that she left Mavuso Trade Centre at about 10:00p.m. The amount to be paid is calculated as follows; 4.5 hours x E3.37 (hourly rate) x 1.5 = E22.75.

6.4 Regarding the Applicant's claim for working on Sundays; it is my conclusion that the Applicant is entitled to be paid overtime for working on Sundays. However, I do not agree with the Applicant's computation of this claim, which is as follows: 3 Sundays per month x 9 months = 27

**-19-**

Sundays; 27 Sundays x 8 hours (per Sunday) = 216 ; E700/26/8 hours x 2 x 216 hours = E1, 453.84. In her calculation of this claim, the Applicant inter alia, based it on the allegation that she worked three (3) Sundays per month. The Applicant's allegation that she worked three (3) Sundays a month was disputed by the Respondent through RW1's testimony, which is to the effect that the Applicant worked 2 Sundays per month. This evidence as I stated above herein remains uncontroverted, hence my acceptance of same.

6.5 According to my findings, the Applicant should be paid overtime for 18 Sundays worked, which is calculated as follows: 2 Sundays per month x 9 months = 18 Sundays; E700/26 = E26-92 (daily rate) x 2 (double rate) x 18 Sundays = E969-12.

6.6 It is my further conclusion that the Applicant is entitled to be paid overtime for working during seven (7) public Holidays. The amount to be paid to the Applicant is a sum of E376.92.

6.7 Overall, it is my finding that the Applicant is entitled to be paid by the Respondent a total sum of E1 368.79, being in respect of unpaid overtime.

## **7. Award**

7.1 Pursuant to my foregoing conclusion and findings herein; and having taken into account the circumstances of the case; I hereby make the following Award;

- (I) That the Respondent should pay the Applicant her overtime in the sum of E1, 368-79.

**-20-**

- (II) (ii) The Respondent is ordered to pay the Applicant the sum of E1, 368.79 (One Thousand, Three Hundred and Sixty Eight Emalangenji; Seventy Nine Cents) within seven (7) days from date of receipt of this award.

DATED AT MANZINI ON THIS 24<sup>th</sup> .DAY OF JULY, 2009.

ROBERT S. MHLANGA (CMAC ARBITRATOR)

**-21-**