

CONCILIATION, MEDIATION & ARBITRATION COMMISSION (CMAC)

HELP AT MANZINI

MNZ 381/07

In the matter between:-

SIXOLILE MATSENJWA APPLICANT

And

MANSER IMPORT AND EXPORT (PTY) LTD T/A MANZINI WASTE

CENTRE RESPONDENT

CORAM:

Arbitrator : Ms K. Manzini
For Applicant : Mr. H.M. Mdluli
For Respondent : Mr. B. Ngcamphalala

ARBITRATION AWARD

1. PARTIES AND REPRESENTATION

The applicant herein is Ms Sixolile Matsenjwa, a Swazi female adult of P.O. Box 5592, Manzini. The Applicant was represented by M.H. Mdluli from the M.H. Mdluli Attorneys. The Respondent is Manser Import and Export Investment (PTY) LTD t/a Manzini Waste Centre. The Respondent is a company duly incorporated in terms of the laws of Swaziland, and its postal address is P.O. Box 1592 Manzini. The Respondent was herein represented by Mr. B. Ngcamphalala from the law firm of Zonke Magagula and Company, at a later stage in the proceedings Mr. Ngcamphalala was replaced by Mr. Ian Du Pont.

2. THE ISSUES IN DISPUTE

The issues in dispute are listed in Certificate of Unresolved Dispute No. 254/08, and they read as follows:-

- a) Notice pay
- b) Additional notice pay
- c) Underpayments
- d) Leave pay
- e) Severance allowance
- f) Maximum compensation for unfair dismissal.

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It was however clarified in the opening statement of the Applicant's attorney that the claim for leave pay would not be pursued as this had been already paid by the Respondent.

3. BACKGROUND INFORMATION

This dispute was initially set down before the Industrial Court for determination, however, the Court on the 17th day of December, 2008 issued a ruling to the effect that the dispute be referred to arbitration.

4. SUMMARY OF EVIDENCE AND ARGUMENT

Only the key aspects of the evidence led is contained herein, reference being made only to those issues that have influenced the ultimate award.

The Applicant's representative only called the Applicant to testify at the arbitration hearing, whilst the

Respondent's representative called a Ms. Winite Ntshangase.

THE TESTIMONY OF MS SIXOLILE MATSENJWA

The Applicant testified under oath that she was employed by the Respondent on the month of April, 2005, as a shop assistant. She stated that she was employed by Mr. Manser

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who runs the undertaking, whilst his wife was away, and yet it was usually Mrs. Manser who was responsible for hiring staff.

She stated that she was dismissed in April, 2007, and that at the time of her dismissal she earned a sum of E988.00.

She stated that she had previously been paid a monthly amount of E875.00, and there had been no agreement with Mr. Manser as to how much he would pay her as salary, but believed that she was being underpaid. She stated that she only received an increment in March, 2007, and had been dismissed the following month.

She stated that on the day of her dismissal (27th April, 2007), she had gone for her tea break at 9:30 a.m. but had returned about 3 minutes late from the said break. The reason she was late, according to the Applicant, was that the regular wall clock which the staff used to time their breaks was out of order, and they had then resorted to using the security guard's wrist watch. According to Ms Matsenjwa this security guard's watch had been slightly ahead, and she had tried to plead with him to rely on the time on her own wrist watch, but he had refused.

Ms Matsenjwa stated that this security guard had been new, and the previous security guard had been more flexible as

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the wall clock had been out of order for some time. She stated that the said security guard had been strict and insisted that she was late, and had reported her to Mrs. Manser.

According to the Applicant, Mrs. Manser had shouted at her, and told her that she was disrespectful to the security guard, and said that she should immediately vacate the premises and return her work uniform the following day. Ms. Matsenjwa stated that Mrs. Manser had also told her that she did not require her services any longer as she had not even been employed by her. Ms Matsenjwa stated that Mrs. Manser had emphasized that she is the rightful person to employ staff, and as such, she did not take kindly to Ms. Matsenjwa being employed at the shop.

The Applicant stated that when she was dismissed she was not given a letter of dismissal, and when she returned the next day to return the uniform, Mrs. Manser had paid her her salary of E988.00 and E800.00 as leave pay. Ms Matsenjwa stated that after she left the Respondent's premises on that day she had gone to secure the services of an attorney as she believed that she was unfairly dismissed.

Ms Matsenjwa stated that she was never called by the Respondent to attend a disciplinary hearing, and refuted the claims that she had been called to attend such a hearing in

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the afternoon of the day of her dismissal. She further denied knowledge of a letter supposedly written to her on the 28th of April, 2007 which purported to be a letter of dismissal, which letter detailed a list of her alleged transgressions that led to her dismissal. The said letter was marked "SMI", and stated that she was dismissed on account of unsatisfactory performance, using a cellphone during working hours, not signing daily attendance register, leaving the shop without permission from management, indecent behaviour to customers and verbal abuse of the security officer.

Ms Matsenjwa categorically denied knowledge of this document, and its contents. She stated that she had never been trained on how to do her job, and had never been called to a disciplinary hearing

regarding poor work performance. She also stated that her employers had never tried to engage her in effort to address any issues of poor work performance on her part. The Applicant further stated that she never used her cellphone during working hours, as management required that the staff switch their phones off when they were at work. She stated that she only used her mobile phone during break time, or at lunch. She further stated that she had always signed the attendance register, as this was a requirement at work, and had never left the shop without permission. Ms Matsenjwa also denied ever abusing the security guard either verbally, or otherwise.

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Ms Matsenjwa also denied knowledge of a warning filed and marked "WC1" which stated that it was a fifth warning, and she was accused, in terms of this document, of verbally abusing the security guard, and not returning from break on time. Ms Matsenjwa stated that she had never been issued with such a warning, and had also not signed the slot provided for the employee to sign. She stated that this was not the way she signed at all.

The Applicant also was referred to "W.C.2" which purported to be a third warning, and this document stated that she had left the shop without permission from management. Ms Matsenjwa denied knowledge of such a document and further denied that the signature in the employee slot was her own.

Ms Matsenjwa was also referred to "W.C.2" which purported to be a fourth warning. This warning accused the Applicant of being rude to customers and shouting at them. Ms Matsenjwa stated that she had never ever been issued with any of the said warnings, and also denied that it was her signature in the employee slot. She stated that she always signs in the manner reflected in the Report of Dispute Form, and totally disassociated herself with all of the said warnings.

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Ms Matsenjwa was also referred to "W.C.4" which is a copy of an invoice which details notice pay of E1040.00 and salary for April, 2007 of the same amount. The said invoice reflected that these were monies that had been paid to the Applicant on the 28th of April, 2005, and further that she had been employed in June, 2005.

Ms Matsenjwa stated that she had not been paid notice pay, but had only received her salary for April, 2007 of E988.00, and leave pay of E800.00 when she was dismissed. Ms Matsenjwa also stated that she was infact employed in April, 2005, and not June as is stated in the invoice.

During cross - examination. Mr. Ngcamphalala asked the Applicant if she had ever appealed to Mr. Manser after her dismissal by Mrs. Manser. The Applicant stated that she had not done so as she feared that Mrs. Manser would not take kindly to her going to see Mr. Manser and yet she had been dismissed by her.

Mr. Ngcamphalala asked the witness if she had ever complained to her employers about her paltry salary? Ms Matsenjwa stated that she had tried to ask Mrs. Manser to address this issue, and had even asked her to write down what she had been paid, but this had been refused by Mrs. Manser. She stated that she had directed all her complaints

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to Mrs. Manser, and not Mr. Manser as ail the staff had to deal with Mrs. Manser as regards work issues.

Mr. Ngcamphalala asked the witness about the incident of the altercation with the security guard regarding the time she should have returned from break. Ms Matsenjwa stated that the said security guard had only been on duty for a day, and that on the second day of his being at this post the incident had occurred.

Mr. Ngcamphalala put it to the witness that evidence would be brought to prove that the workplace rule had always been that the staff would rely on the security guard's own watch, and that Ms

Matsenjwa had deliberately flouted the security guard's instruction on the time for her return.

The Applicant denied all of this and insisted that the management had placed the clock on the wall so that they all abided by the time reflected on it, but when it broke, the staff had decided to use the security guard's watch. Ms Matsenjwa stated that she had never raised her voice to, or verbally abused the security guard. She stated that she had politely asked him to take heed of her own watch, as his was ahead by five minutes. She stated that she had even apologized to him when he was upset by her alleged late return from break, but he had not compromised and had proceeded to report her to Mrs. Manser.

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Mr. Ngcamphalala asked the witness if there was a workplace rule in place regarding the number of people who could go out to break at a given time. Ms Matsenjwa stated that the company rules were that only one worker could leave at a time. She stated that she had gone out to her tea break alone, and was aware that she was only allowed fifteen minutes in which to take her tea. She stated that according to her own watch she had not been late, but the security guard had insisted that she had exceeded the fifteen minutes allowed to her.

Mr. Ngcamphalala asked the witness if she was aware of the rationale for only allowing one worker to go out to break at a time. The Applicant stated that she believed that the rule was in place so as to avoid a shortage of people who could render service to customers in the shop.

Ms. Matsenjwa stated under cross - examination that she had asked Mrs. Manser to write her a letter of dismissal, and she actually did receive the letter which was dated the 28th of April, 2007. She however, pointed out that she was not called upon to sign in acknowledgement of the receipt of same.

Ms. Matsenjwa also acknowledged that it was a workplace rule that the staff had to ask for permission to leave the shop, and also to sign the register when they leave the

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shop. She stated that she had never breached this rule, and that she had also never contravened the rule against answering or using her mobile phone whilst at work.

Ms. Matsenjwa further acknowledged that she had never had a good working relationship with Mrs. Manser ever since she started to work for the Respondent. Mr. Ngcamphalala put it to the Applicant that this was caused by the fact that Ms. Matsenjwa used to brag about the fact that she had been employed by Mr. Manser to the other workers. The Applicant stated that she had never done that, but acknowledged that the other staff members were aware that it was Mr. Manser who had hired her as they were there when she came to the shop looking for a job, and Mr. Manser hired her.

Mr. Ngcamphalala also put it to the witness that on the day of the incident with the security guard, Mrs. Manser had told her to return to the workplace to face disciplinary proceedings that very afternoon, but she had not done so. Ms. Matsenjwa denied all of this.

Mr. Ngcamphalala also asked the witness about annexures "WC1", "WC2", "WC3" and "WC4" (the warnings and invoice), and whether she still maintained that these had never been issued to her, and that she had never been paid notice pay. The Applicant remained resolute, and stated that she did not know anything about any of these documents.

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Mr. Ngcamphalala put it to the witness that evidence would later be adduced that she had been paid notice pay, and that she had received, and signed for the said warnings. Ms. Matsenjwa insisted that the signature on the document was not hers, and maintained that she had not received notice pay from the Respondent.

Mr. Ngcamphalala also referred the Applicant to her previous testimony that she had never been trained on how to perform her duties. He asked if she had ever asked the employer to train her. The Applicant stated that she had never asked because she had no reason to believe that she was not

doing her job well, and that her employer had never told her otherwise.

Mr. Ngcamphalala also put it to the Applicant that the workers at the Respondent enterprise had actually opted and asked the employer not to increase their salaries, rather than face a looming retrenchment exercise. Ms. Matsenjwa denied that she had ever heard of the possibility of retrenchments being effected at the workplace, and further did not know that the workers had ever requested that they not receive an increment.

During re - examination, Ms. Matsenjwa reiterated that the signature on the warnings, and the invoice did not belong to her. She also acknowledged that Mrs. Manser had not liked

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her as she had been employed by her husband whilst she was away. Ms. Matsenjwa stated that Mrs. Manser had even told her never to wear trousers at work, and yet other female members of staff wore them. Ms Matsenjwa stated that she had complied with this instruction even though she did not understand why she was being singled-out in this way.

THE TESTIMONY OF MS. WINILE NTSHANGASE

Ms. Ntshangase testified under oath that she is employed at the Respondent company, and based at the Manzini Waste Centre Shop. She stated that she started working for the Respondent in the year 2006. She stated that she was well acquainted with the Applicant as they used to work together, and had related well together.

Ms Ntshangase stated that she was aware of the Applicant's dismissal because she was present when Ms Matsenjwa has a disagreement with the security guard. She stated that she had gone to lunch at the same time with the Applicant and they had spent that time together. She stated that they had returned five minutes late. Ms. Ntshangase stated that the security guard had told them that they were late, and had only a maximum of thirty minutes to take their lunch break. Ms Ntshangase stated that the Applicant had told the security guard that "uyaphapha, usilima, fuseki wena

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mantjingelane". This loosely translated means that Ms Matsenjwa had told the security guard that he was too forward, and was also a fool, and basically told him in a very derogatory manner to get lost.

The witness stated that subsequent to this the security had gone to call Mrs. Manser, so as to report to her that he was being verbally assaulted by the Applicant. The testimony of Ms. Ntshangase was to the effect that she too had insulted the security guard, and she had been made by Mrs. Manser to sign a warning for her transgression. Ms. Ntshangase stated that Mrs. Manser had told the Applicant to take her belongings and leave the premises, and return for a disciplinary hearing. The witness stated that Mrs. Manser considered that this was the first time that she herself had committed an offence at work, hence she was only issued with a warning as a punishment.

According to the witness it was a work place rule that the staff were to report to the security guard whenever they left the shop, and he would write down when they left and when they returned in his register. She stated that the management told the workers of this rule when they were employed.

Ms Ntshangase stated that when the staff was employed they were all issued with rules and regulations which clearly

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stated that they were not permitted to use their mobile phones during working hours. She stated that as workers they would sometimes take a risk and answer their phones whilst at work as they switched the phones to silent-mode, and at one point the Applicant had been caught in this act by Mrs. Manser, who had taken her to the office to reprimand her. The witness stated that Mrs. Manser had then brought stickers to the shop which she stuck to the walls of the kitchen where they sat whilst on their

lunch and tea- break. According to the witness, these stickers were a reminder to all staff that they were not permitted to use their cellphones during working hours.

During cross - examination Ms. Ntshangase stated that she was employed by Mrs. Manser subsequent to her sending in an application letter. The witness stated that both Mr. and Mrs. Manser had known her before she was hired because her late mother had been a friend to Mrs. Manser's sister.

Ms. Ntshangase was asked if she was aware if the Applicant was issued with the said rules and regulations that she had mentioned in her evidence in chief. The witness stated that she had been employed after the Applicant, and did not know if she had received the said documents.

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Ms Ntshangase stated that she did not know how the Applicant related to the other workers, and also to the customers as she tended to mind her own business. She further stated that she and the Applicant had had a good working relationship. She was asked why she had been issued with a warning by Mrs. Manser? The witness stated that this was because she had also told the security that "uyaphapha" and "fuseki uyasenyanyisa", meaning he should get lost as he was irritating them.

Ms. Ntshangase stated that she left Mrs. Manser and the Applicant, and as a result she did not know when the Applicant was supposed to attend the disciplinary hearing, and further did not know if she eventually attended same. Mr. Mdluli put it to the witness that Mr. Ngcamphalala had not put it to Ms. Matsenjwa during cross - examination that she had been in the company of Ms. Ntshangase when the alleged insult were hurled at the security guard, and suggested that Ms. Ntshangase's testimony was a recent fabrication. Ms Ntshangase denied all of this.

Mr. Mdluli asked the witness if she had ever witnessed the Applicant being rude to customers, or behaving in an untoward manner in their presence? Ms Ntshangase stated that she could not really say whether she had or had not misbehaved in the presence of customers, but all that she

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could say was that she had never seen her doing this. Ms Ntshangase could not say whether the Respondent's ground for dismissing the Applicant for indecent behaviour towards the customers was valid or not.

Ms Ntshangase was asked if it was possible for a member of staff to leave the shop without the security guard's knowledge? Ms Ntshangase stated that she and the other workers (including the Applicant) had sometimes breached the rules and would leave the shop to quickly get something to eat, and the old security guard had let them get away with this.

Ms. Ntshangase also stated that for security reasons, the security guard would sign and make entries in the daily register regarding when a worker reported for work, and when they knocked off. She stated that there was no way an employee could get away with not having this information captured by the security guard because every member of staff, had to stop nearby the security guards post so that he took down all the relevant details.

Ms. Ntshangase was asked about the use of cell phones at the workplace, and she stated that they had kept their phones on silent, and would hide under a table so as to take calls. She stated that she did not believe that Mrs. Manser would accuse the Applicant of something she had not done,

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and said that the Applicant must have been caught by Mrs. Manser at some point.

Ms. Ntshangase testified that she was not aware of the quality of the Applicant's work, as she used to only focus on her own duties. As a result she could not say anything about Ms. Matsenjwa's work performance.

Ms. Ntshangase was asked about Mrs. Manser's alleged directive that the Applicant should not wear trousers at work. She stated that as far as she was aware there was no rule against wearing trousers at work, except that they were required to look presentable, and not show off any cleavage. Ms. Ntshangase said that she was not aware of any bad-blood between Mrs. Manser and the Applicant, and also did not know anything about Mrs. Manser's alleged dislike of the Applicant on the grounds that she had been employed by her husband.

Ms. Ntshangase was asked where the warning she had signed for at the shop was? She stated that she did not have it with her as it was kept at the shop. Mr. Mdluli put it to the witness that she had fabricated the story about the employer issuing her with warning; hence she was not even able to produce it as part of her evidence. Ms. Ntshangase insisted that she had been issued with this warning on the day of the Applicant's dismissal.

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5 ANALYSIS OF EVIDENCE AND ARGUMENTS

The core issue in this matter is whether or not the Applicant was unfairly dismissed by the Respondent.

SUBSTANTIVE FAIRNESS

It is trite that an employee shall only be deemed to have been fairly terminated from employment if the grounds for dismissal are supported by Section 36 of the Employment Act, 1980, and also that in the circumstances of the case, it was reasonable for the employer to dismiss the employee (see Section 42 of the Employment Act, 1980).

In casu the Applicant was dismissed for a host of alleged transgressions which were listed in the letter of dismissal dated the 28th of April, 2009. The said grounds stand as follows:-

- i. Use of cellphones during working hours.
- ii. Not signing daily Attendance Register
- iii. Leaving shop without permission from management
- iv. Indecent behaviour towards customers
- v. Verbal abuse to the security officer.

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It is common cause that Ms. Matsenjwa vehemently denied all of the alleged offences, and further denied that she had received and signed for any of the warnings which the Respondent alleged were issued to her. Ms. Matsenjwa further denied being paid notice pay, and denied that it was her signature on the warnings, and the invoice which reflected payment of the notice pay. She stated that she only signed in the manner shown on her Report of Dispute.

Mr. Ngcamphalala when he cross - examined the witness asserted that he would bring evidence to the arbitration hearing, in the form of oral testimony that Ms. Matsenjwa was indeed guilty of the said offences levelled against her. The only Respondent's witness who came to the fore was Ms. Ntshangase who testified that she had been with the Applicant when they went to lunch break, and exceeded their thirty minutes which the employer afforded them to take lunch. What was very disconcerting about this testimony was that Mr. Ngcamphalala had not even suggested to the Applicant in his cross - examination that such a witness existed, and furthermore she stated that she and the Applicant had both insulted the security guard when they came back from lunch. This is contrary to the Applicant's own testimony that according to the company rules only one employee could go out for a break at a time, and further more the Applicant had testified that she had not

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only been alone when she had an altercation with the security guard, but also that the cause of the argument was her tea break, which was supposed to be fifteen minutes long.

It would clearly appear that there is a serious problem with Ms. Ntshangase's testimony because her testimony is based on an altercation which took place because of a lunch break, and not a tea break as was asserted by the Applicant. It is therefore clear that Ms. Ntshangase's testimony is not one to be relied upon, as it is very difficult to believe, and appears to be highly improbable. The standard of proof in Civil cases is that of proof on a "balance of probabilities" and in casu Ms. Ntshangase's testimony in its entirety smacks of fabrication, and does not satisfy these requirements (see Schwikkard & Van De Merwe, "Principle of evidence", 2nd edition, page 544).

In the circumstances, there are no grounds to hold that Ms. Matsenjwa committed any of the offences that the employer based her dismissal on. In light of this it is my finding that she was dismissed in a substantively unfair manner.

PROCEDURAL FAIRNESS-

The position of the law is that in order for an employee to be dismissed in a procedurally fair manner, that worker has to

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be subjected to a disciplinary hearing (See J. Grogan, Workplace Law; 9th edition, pages 189.) In casu the Applicant denies that she was ever called to a disciplinary hearing. On the other hand it was contended by the Respondent's representative that Ms. Matsenjwa was called to a disciplinary hearing, but she had chosen not to attend the hearing. The principle, however, is that the employer may be entitled to proceed with a hearing in the absence of the employee if the employee refuses to attend the hearing or to participate in the hearing without good cause (see J. Grogan's' Workplace Law', 4th edition, at page 149.)

This of course pre-supposes that the hearing would be properly constituted, and evidence would be duly led, and a ruling handed down by an impartial chairperson, albeit in the absence of the employee. In casu the Respondent merely asserted that such a hearing took place, but did not produce any evidence (even perhaps in the form of minutes of the hearing, or the ruling which emanated therefrom), that proves that the said hearing did in fact take place.

Furthermore, it was suggested by the Respondent's representative that Ms. Matsenjwa was expected to appear at the said disciplinary hearing on the very afternoon of the day of the altercation with the security guard (27th April, 2007). Whilst it is true that justice dictates that the hearing

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should be held as soon as possible after the incidents, but the law does recognize that an employee needs time to prepare for the said hearing (see Oscar Mamba vs Swaziland Development & Savings Bank Industrial Court Case No., 81/96). In casu it is difficult to comprehend how Ms. Matsenjwa would have had sufficient time to prepare her defence, and secure the services of a representative, if she need one, in preparation for the hearing to be held that very afternoon.

In light of the foregoing it is my finding that Ms. Matsenjwa's dismissal was also procedurally unfair.

CONCLUSION

The Applicant had included as part of her prayers a claim for underpayments.

According to the Applicant she had earned a monthly salary of E875.00 since she was employed in April, 2005. She stated that she had only received an increment in March 2007 when she was paid E988.00. According to the Wages Act No. 16 of 1964 and Legal Notice of 2006, First Schedule, a Junior Shop Assistant's minimum salary is E973.00. This would mean that the Applicant was underpaid by a sum of E98.00 (Ninety Eight Emalangen) which is the difference

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between the amount she was paid, and the statutory amount due to her.

AWARD

Having heard the evidence and arguments for both parties, the Applicant is held to have been dismissed in a manner which was substantively and procedurally unfair.

The Respondent is hereby ordered to pay the Applicant the following amount:-

- i) Notice pay =E 973.00
- ii) Additional notice =E38 x 4 days = E152 x 1 year) = E 152.00
- iii) Underpayments =(E98 x 22 months) = E2156.00
- iv) Severance allowance = (E38 x 10 days = E380 x 1 year) = E 380.00
- v) Compensation for unfair dismissal (E973.00 x 4 months) = E3 892.00 = E7 553.00

This amount is to be paid by the Respondent at the Manzini CMAC Offices on or before the 31st day of December, 2009.

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THUS DONE AND SIGNED AT MBABANE ON THIS17th....DAY OF NOVEMBER, 2009.

KHONTAPHI MANZINI CMAC ARBITRATOR

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