IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION

HELD AT MANZINI CMAC REF NO: SWMZ 171/09

In the matter between:

PETER BHEKIZITHA DLAMINI APPLICANT

AND

TOOLPLAST (PTY) LTD RESPONDENT

CORAM
ARBITRATOR: VELAPHI DLAMINI
FOR APPLICANT: IN PERSON
FOR RESPONDENT: NO APPEARANCE
NATURE OF DISPUTE: UNPAID WAGES

DATE(S) OF HEARING: 10TH AUGUST 2009

EX PARTE ARBITRATION AWARD

1. DETAILS OF HEARING AND REPRESENTATION

1.1 The arbitration hearing of this matter was held on the 10th August 2009 at the Conciliation Mediation and Arbitration Commission offices (CMAC or Commission) situated at 4th Floor SNAT Building, Manzini.

1.2 The Applicant is Peter Bhekizitha Dlamini an adult Swazi male of P. O. Box 882 Hlathikulu. Dlamini appeared in person to prosecute his application. I shall refer to the Applicant as such or by his names.

1.3 The Respondent is Toolplast Proprietary Limited, a company of P. O. Box 1401, Manzini (hereinafter referred to as Toolplast or the company or the Respondent).

1.4 There was no representation on behalf of the company during the hearing.

2. BACKGROUND OF DISPUTE

2.1 The Applicant reported a dispute for unpaid wages at the Commission's office at Enguleni Building in Manzini on or about the 14th April 2009.

2.2 In summarizing the issues giving rise to the dispute, Dlamini stated that the Respondent failed to pay him his wages for three months, from January to March 2009.

2.3 It is recorded in the Report of Dispute that it so transpired that on the 5th January 2009, after the Christmas break, when Dlamini reported for work, he was instructed by the Respondent's Manager to go back home because there was no work for him and his colleagues.

2.4 According to the Report of Dispute, the lay-off was for a period of a month. However, when the Applicant returned to work in February 2009, the Manager again instructed them to leave until March 2009.

2.5 It is Dlamini's statement that in March 2009 when he reported for work, he was ordered by the Manager to go back home and the reason was still that the company did not have work for them.

2.6 In terms of the summary of facts in the Report of Dispute, the Respondent's Manager made an undertaking to pay Dlamini his wages for the three months he was not at work, however at the end of March 2009, the Respondent reneged on the undertaking made to the Applicant and his colleagues.

2.7 It was Dlamini's contention that the company violated the provisions of Section 27 of the Employment Act 1980, when it failed and/or refused to pay his three months wages.

2.8 The outcome that the Applicant required at conciliation was payment of the following wages; January 2009-E3 020.40 (Three Thousand and Twenty Emalangeni Forty Cents), February 2009 -E3 020.40 (Three Thousand and Twenty Emalangeni Forty Cents), March 2009 - E3 322.44

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(Three Thousand Three Hundred and Twenty Two Emalangeni Forty Four Cents).

2.9 The dispute was conciliated by the Commission, however, it remained unresolved and a Certificate of Unresolved Dispute No: 344/09 was then issued by the Commission. On the 2nd June 2009, the parties consented to referring the dispute to arbitration. I was subsequently appointed to determine the matter.

3. COMMON CAUSE ISSUES

3.1 Although the Respondent was not represented during the hearing, ex facie the Certificate of Unresolved Dispute, all the issues are common cause.

3.2 There is consensus that the Respondent is indebted to the Applicant in respect of three months wages in the total amount of E9 363.24 (Nine Thousand Three Hundred and Sixty Three Emalangeni Twenty Four Cents).

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3.3 It is agreed that the cause of such liability arises out of the lay-off of a number of Respondent's employee's, including the Applicant, due to the global economic recession which hit the manufacturing industry including Toolplast hard, such that its orders had diminished since September 2008.

3.4 There is no dispute that the Respondent was willing to pay off the arrear wages of the Applicant once its financial woes ameliorated.

4. ANALYSIS OF EVIDENCE AND LAW

4.1 As alluded above, the hearing was held in the absence of the Respondent, who was unrepresented despite proof that the invitation to attend arbitration was properly served upon her.

4.2 Before analyzing the Applicant's evidence, it behoves me to opine on the legal basis upon which an arbitrator has jurisdiction to proceed and hear a matter ex parte.

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4.3 On the 2nd July 2009, the Commission issued out an invitation to the parties to attend arbitration to be held at fourth floor, SNAT Building Manzini on the 10th August 2009. The invitation is "CMAC Form 9" under schedule 2 of the Rules of CMAC. According to "CMAC Form 20", the proof of service - hand delivery.

4.4 Form 9 was served on the Respondent through Ms Busisiwe Mazibuko, a receptionist/secretary employed by the company on the 8th July 2009.

4.5 Now, Rule 8(l) (a) (iii) provides;

"a party shall serve a document on the other party or parties to the dispute-by handing a copy of the documents to -... a person who appears to be at least sixteen (16) years old and in charge of a party's

place of residence, business or employment"

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4.6 In Rule 8(l) (a) (iii) of the CMAC Rules, the word "appears" does not have the same meaning as the word "actually".

4.7 The word "appears" has the same meaning as the word "apparently" used in Rule 4(2) (b) of the High Court Rules dealing with the same subject of service of process.

4.8 The learned authors HJ Erasmus et al in Superior Court Practice, Juta (2004) pg B1 - 23 in a commentary of Rule 4 of the South African Superior Court Rules, which is part materia with Rule 4 of the High Court Rules, state that "apparently" means "seemingly" as opposed to "actually".

4.9 In my view, Busisiwe Mazibuko may not have been actually in charge of Toolplast, but at the time the Commission effected service of the invitation to attend the arbitration, she was seemingly in charge.

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4.10 The next question to decide is whether or not the Respondent was given sufficient notice of the arbitration.

4.11 Rule 24 of the CMAC Rules provides that;

"the Commission shall give the parties at least fourteen (14) days notice in writing of a arbitration hearing, unless the parties agree to a shorter period".

4.12 Ex facie form 20, the Respondent was served on the 8th July 2009 notifying Toolplast of an arbitration to be held on the 10th August 2009.

4.13 According to Rule 2;

"CMAC days means any day other than a Saturday, Sunday or public holiday, and only CMAC days shall be included in the computation of any time expressed in days by these rules or fixed by any order of Court".

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4.14 If Saturdays, Sundays and public holidays are excluded in the computation of days when serving CMAC process, then the Respondent has been given twenty one days notice, which is consistent with Rule 24.

4.15 Having made the above observations pertaining the service of the invitation for arbitration, I was satisfied and reached the conclusion that there was proper notification.

4.16 Now Rule 27 (i) (b) states that;

"if a party to a dispute fails to attend an arbitration hearing or is not represented at an arbitration, and the Commissioner is satisfied that the party not in attendance or not represented was property notified of the arbitration hearing, and that there is no just and reasonable explanation for that party's failure to attend or non-representation, the commissioner may... proceed to arbitrate the dispute in the absence of that party, if the party against whom relief is sought fails to attend the

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hearing or is not represented" (emphasis added)

4.17 From a careful perusal of the record, there was neither an inscription on file, nor any correspondence in respect of an explanation that was furnished by the Respondent for non

representation on the 10th august 2009.

4.18 When the Applicant applied for an invocation of Rule 27(1)(b), after considering the above issues, I ruled that the matter proceed ex parte.

4.19 Although the matter was head ex parte, this did not mean that the facts and evidence placed before me by the Applicant guarantees an automatic arbitration award by virtue of the Respondent's default of appearance.

4.20 I am still bound to evaluate the facts and evidence led by the Applicant, to determine if he has made out a case for the claims as they stand in his Report of Dispute.

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See Wilton V Gatonby and another 1964 (4) SA 160 (w) at 166

4.21 The Applicant testified under oath and he was the only witness in proof of his claim.

4.22 Dlamini's evidence was a repetition of the facts he recorded in the Report of Dispute part of which I have already summarized supra.

4.23 The only addition in his evidence was that he was employed on the 18th March 1996 as an electrician and at the time of reporting the dispute, his wages was 16.78 per hour and he worked 180 hours per month which represented monthly wages of E3 020.40 (Three Thousand and Twenty Emalangeni Forty Cents).

4.24 Regulation 19 of the Regulation of Wages (Manufacturing and Processing Industry) Order 2008 outlines the form and procedure for laying off employees in that undertaking.

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4.25 Regulation 19 (1) provides that;

"due to proved circumstances beyond the employer's control an employer may lay-off employees for up to fourteen working days, on condition that no lay-off may be effected without the written consent of the Commissioner of labour.Such consent shall be granted after the meeting between the employer and the workers or recognized workers organization ".

4.24 Now regulation 19(3) states that;

"the employer shall give-(a) a permanent employee fourteen days notice before the lay off..".

4.25 However, Regulation 19(4) stipulates that;

"An employer may apply to the Commissioner of Labour for a temporary exemption for a specified period

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according to the circumstance of the enterprise. From the application of regulation 17(3) (a), after negotiation with the employees organization, for a reduction of the period of notice be given to employees, before lay-off"
4.26 A summary of the provisions of Regulation 19 is this; an employer is permitted to lay-off employees for a period of fourteen days, provided that the written consent of the Commissioner of Labour is granted, after a meeting of the workers and or a trade union, provided further that the employer shall give permanent employees fourteen days prior notice of such lay-off, unless the Commissioner of Labour approves a reduction of the period of the prior notice, provided that such request for exemption shall come after negotiations with the workers or trade union on the reduction.

4.27 I am not legally permitted to have recourse to minutes of the conciliation meeting between the

parties, to observe if the provisions of Regulation 19 were ever discussed.

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4.28 However, from the contents of the Certificate of Unresolved Dispute there is nothing to demonstrate that the Respondent contended that it complied with the provisions of Regulation 19, cited supra.

4.29 Further, by its non-representation during the arbitration to justify its conduct of the 5th January to March 2009, there are no facts nor evidence proving that Toolplast applied the provisions of Regulation 19 when laying - off the Applicant.

4.30 It 'seems to me that since the Respondent was decrying the effects and consequences brought about by the global economic recession on its business, and could not sustain its operations with a full complement of its workforce on the 5th January 2009, it was not without a remedy. It should have invoked Regulation 19(4) in order to abridge the period of notice, but the company did not.

4.31 Although Regulation 19(4) permitted an abridgment of the notice, it is prohibited for an employer to extend the lay-off for a period exceeding fourteen days.

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4.32 The Applicant's evidence that for three months, commencing 5th January to March 2009, he tendered his services to the Respondent remains unchallenged. Moreover, according to the Certificate of Unresolved Dispute, the quantum claimed for tendering those services in the total sum of E9 363.24 is not disputed.

4.33 According to the learned author JOHN GROGAN, the employer's duty to pay and the commensurate right to a wage for the employee arises not from the actual performance, but from the tendering of services.

See Workplace Law 8th edition pg 63

Reikert's Basic Employment Law 2nd Edition pg 62

4.34 The Concise Oxford English Dictionary's contextual meaning of the word "tender" is "offer or present formally".

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4.35 Bryan A. Gamer's Black's Law Dictionary 8th Edition defines "tender of performance" as;

"an obligor's demonstration of readiness, willingness, and ability to perform the obligation".

5. CONCLUSION

5.1 I am satisfied that the Applicant tendered his service for three months from 5th January to March 2009, but was prevented by the Respondent from actual performance on grounds that there was no work for him.

5.2 It is my finding that the lay-off was not sanctioned by the Regulation of 'Wages (Manufacturing and Processing Industry) Order, 2008, thus unlawful.

5.3 In my view therefore, the Applicant is entitled to his three months wages as claimed.

5.4 The following order is made.

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6. AWARD

6.1 The Respondent is directed to pay the Applicant three months wages in the sum of E9 363.24.

6.2 The Respondent is ordered to pay the aforesaid arrear wages at the Commission's offices at SNAT Building Manzini, by the 30th October 2009.

6.3 No order for costs is made.

DATED AT MANZINI ON THIS 29th DAY OF SEPTEMBER 2009

VELAPHI DLAMINI

CMAC COMMISSIONER