



**CONCILIATION, MEDIATION & ARBITRATION
COMMISSION (CMAC)**

HELD AT MANZINI

SWMZ 148/08

In the matter between:-

MANXOBA NXUMALO

APPLICANT

And

**EDWARD MSIBI T/A K.B.
TRANSPORT**

RESPONDENT

CORAM:

Arbitrator

: Ms K. Manzini

For Applicant

: Mr. M. Nxumalo

For Respondent

: No appearance

ARBITRATION AWARD - EXPARTE

1. **PARTIES AND REPRESENTATION**

The applicant is Mr. Manxoba Nxumalo, a Swazi male adult of twenty – four years of age. His postal address is P.O. Box 684 Matsapha. Mr. Nxumalo represented himself at these proceedings.

The respondent is Mr. Edward Msibi t/a K.B. Transport, a Swazi male adult of P.O. Box 926, Manzini. Mr. Msibi was not represented, as no one appeared on his behalf.

2. **BACKGROUND INFORMATION**

The matter was set down for a pre – arbitration hearing on the 31st of October 2008, and only the applicant was present on this date, despite proof of service. Efforts were made to telephone Mr. Msibi, but his mobile phone was constantly off. The matter was scheduled for a full arbitration hearing on the 12th of December 2008, and a letter was written to Mr. Msibi informing him of these arrangements, and further making it clear to him that these proceedings would proceed even in his absence, if he failed to appear. Mr. Msibi did not turn up even on the 12th of December 2008, despite the fact that he had been served with the letter, and his mobile phone was still off on this day. As a result these proceedings were heard as an Exparte application.

3. **THE ISSUES IN DISPUTE**

According to the certificate of unresolved dispute number 501/08, on file, the following are the issues in dispute:-

- (1) Notice pay = E1200.00
- (2) Arrear salaries = E4 980.00
- (3) Leave pay = E516.00
- (4) Overtime = E782.00
- (5) 12 Months compensation for unfair dismissal = E14,400.00

5. ANALYSIS OF EVIDENCE AND ARGUMENTS

The applicant was the only witness who gave evidence at these proceedings, as there was no appearance for the respondent.

Mr. Nxumalo testified under oath that he was employed as a minibus (kombi) driver on the 1st of September 2006, and his employer, Mr. Msibi, had undertaken to pay him a monthly salary of E1200.00. It was the applicant's testimony that on a number of occasions, Mr. Msibi had not paid him his full salary. The applicant proceeded to list the months when Mr. Msibi had failed to pay him the salary due to him:-

<u>Month</u>	<u>Salary paid</u>	<u>Amount owing</u>
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October 2006	E400.00	E800.00
December 2006	E550.00	E650.00
January 2007	E600.00	E600.00
May 2007	E740.00	E460.00
July 2007	E800.00	E400.00
August 2007	E500.00	E700.00
September 2007	E490.00	E710.00
November 2007	E1000.00	E200.00
December 2007	E200.00	E1000.00
April 2008	E540.00	E660.00

	Total	E6180.00
		=====

According to Mr. Nxumalo, he had approached his employer's wife, to ask for a day off on the 4th of May 2008, which was a Saturday, and had told her that he would ask some other person to replace him, and to drive the minibus on that day. He stated that he had asked for the day off so that he could attend a traditional ceremony at his home at Nkambeni (payment of lobola).

The applicant stated that Mrs. Msibi had allowed him to go, and she had always been the person to whom the

workers of the respondent consulted with on work issues, and from whom permission was asked if they needed time off.

The applicant stated that he had been away, on the 4th of April 2008, and on that day his employer (Mr. Msibi) had called him on his mobile phone to find out where he was. The applicant stated that he had told the employer exactly where he was, and had told him that he had received permission from Mrs. Msibi. Mr. Nxumalo stated that he had returned to Ludzeludze that day, and had gone to see his boss, who was unhappy with him because he had allowed a person who was not his employee to drive his minibus, and had left without permission. Mr. Nxumalo stated that Mr. Msibi had then dismissed him, despite the fact that Mrs. Msibi had given him the permission to be away from work, and had allowed him to find a substitute driver for the minibus.

According to Mr. Nxumalo, Mrs. Msibi had subsequently denied having given him the permission to be away from work, and also to find the substitute driver.

Mr. Nxumalo stated that he returned to the workplace the following Monday, the 6th of April, 2008 to enquire about his arrear salary payments, but Mr. Msibi had told him that he would only receive payment for that month

only. Mr. Nxumalo stated that even after he had lodged a dispute with the Commission, he had still asked for the arrear salary payments, but Mr. Msibi had told him that he would not pay him, and that he should go to CMAC and look for his money there.

Mr. Nxumalo submitted that he had been unfairly dismissed, as his dismissal was not sanctioned by Section 36 of the Employment Act, and prayed for the payment of his claims as set out in the report of dispute.

As there was no evidence to controvert the assertions of the applicant, I can only rely on the evidence led by the applicant. It would appear from Mr. Nxumalo's evidence that he was dismissed for not being at work on the 4th of April 2008, and also for providing a substitute driver for the employer's minibus.

This in my view is quite unfair as Mr. Nxumalo stated that he had first sought permission, and had received such permission to do all of this from Mrs. Msibi. To make matters worse, Mr. Msibi did not subject the applicant to a disciplinary hearing for the alleged transgressions, which he accused him of. From the reading of the Employment Act, Section 35, the applicant was an employee protected by this provision. The dismissal of the applicant was not at all in line with

Section 36, because the alleged absence from work did not even go on for three consecutive days, because Mr. Nxumalo was only away on the 4th of April 2008, and with Mrs. Msibi's permission.

In light of the foregoing, it is my finding that the applicant's dismissal was both substantively and procedurally unfair.

AWARD

Having heard the unopposed evidence of the applicant, and having found that his dismissal was substantively and procedurally unfair, I hereby order that the respondent pay the applicant the following which is in terms of the report of dispute:-

(1) Notice pay	=	E 1, 200.00
(2) Arrear wages	=	E 6, 180.00
(3) Leave pay (E1200.00/26 days = E46.16 x 12 days)	=	E 553.92
(4) Compensation for unfair Dismissal (4 months x E1200.00)=	=	E 4, 800.00
TOTAL	=	<u>E12, 733.92.</u>

There will be no order as regards the overtime claimed as no evidence was led in this regard. The amount of

E12, 733.92 is to be paid by the respondent to the applicant at the Manzini CMAC Offices, 4th Floor, SNAT Building, on or before the **31st of March 2009**.

**DATED AT MANZINI ON THISDAY OF
FEBRUARY, 2009.**

**KHONTAPHI MANZINI
CMAC ARBITRATOR**