



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

HELD AT SITEKI

STK 011/07

In the matter between:-

SIPHIWE MASUKU & ANOTHER

APPLICANT

And

SEBENZILE HLOPHE

RESPONDENT

CORAM:

Arbitrator

: Ms K. Manzini

For Applicant

: Mr. M. Sibandze

For Respondent

: Mr. M. Hlophe

ARBITRATION AWARD

1. **PARTIES AND REPRESENTATION**

The applicants are Siphiwe Masuku and Lungisile Masuku. Their postal address is P.O. Box 123 Mpaka, The applicants were represented by Mr. Mongi Sibandze from L.G. Shongwe Attorneys. The respondent is Ms. Sebenzile Hlophe, whose postal address is P.O. Box 57, Simunye. Ms Hlophe was represented by her husband; Mr. Milton Hlophe.

2. **ISSUED TO BE DECIDED**

The applicant's case is that they were dismissed from employment in a manner which was both substantively and procedurally unfair, as the respondent had purported to retrench them without complying with the law.

The certificate of unresolved dispute, number 442/08, listed the following as being the applicant's claims:

- (a) Notice pay
- (b) Underpayments
- (c) Payment for holidays worked
- (d) Payment for 4 days worked in January 2007.
- (e) Maximum compensation for unfair termination of services.

3. **SUMMARY OF EVIDENCE AND ARGUMENTS**

Only the key aspects of the evidence led is summarised herein, in so far as it influences the ultimate award.

The applicant's representative led Ms. Siphwe Masuku in evidence. The representative of the respondent chose not to lead any oral evidence.

THE TESTIMONY OF SIPHIWE MASUKU

Ms Masuku gave testimony under oath that she and Ms Lungisile Masuku had been employed at Ms. Sebenzile Masuku's hairdressing salon as hair-dressers. She testified that she had been employed in the month of February, 2005, whilst Ms. Lungisile Masuku was employed in June, 2006.

According to Ms. Masuku she and her co - applicant had been paid a monthly salary of E600.00 at the time of dismissal. She stated that they had reported for work each day at or about 7'oclock in the morning, and would knock off only after they had completed whatever tasks that had been assigned to them. She stated that even though the knock-off time was officially 5' o'clock in the afternoon, it was not odd for them to only be able to leave any time between 8'oclock and 10' o'clock at night.

Ms Masuku stated that they had worked seven days per week, and even on public holidays, without being paid overtime. She stated that on the 4th of January, 2007, Mrs. Hlophe their employer had informed them that their services were being terminated forthwith, and that the reason for their dismissal was that the business was not doing well, and there was no longer any money to pay their salaries.

It was the testimony of the applicant that they were not shown any records which reflected that the business was not doing well, and neither were they consulted on how they could try to sustain the business, and thereby keep their jobs. Ms. Masuku stated that they had once tried to suggest to their employer that they lower their prices, so as to attract customers, but Ms. Hlophe had not heeded this advice.

Ms. Masuku stated that even though Ms. Hlophe had dismissed them under the pretext that the business was being closed down, a lady had been employed to do their jobs and she had started work the very next day. Ms. Masuku stated that they had gone to the salon to speak to Ms Hlophe about their terminal benefits on the 5th of January, 2007, and had been confronted by the knowledge that business at the salon was carrying on as usual. The applicant stated that the new

employee was actually finishing off one of the clients who had been plaiting her hair when Ms. Hlophe had dismissed them. The applicant stated that Ms. Hlophe had not paid them anything when they left and had said nothing about their terminal benefits, despite their enquiries.

The respondent's representative did not deny any of the allegations advanced by the applicant, save to say that he questioned the claims made by the applicants. He stated that he was aware that the applicant's had worked on some holidays, but as far as he was concerned, they had been compensated for these. He however, did not have any proof to substantiate his denials.

Mr. Hlophe actually stated that the matter had dragged on for a long time, and would rather not raise any arguments which would prolong the case further. Mr. Hlophe stated that he was willing to allow the law to take its course, and stated that he had earlier offered to pay the applicants a sum of about E3, 000.00, but they had turned his offer down. He further acknowledged that the Wages Act which had been passed in November, 2006 had stipulated that hairdressers should be paid E666.00, but pointed out that prior to this he had paid the applicants well as they earned

E600.00 which was above the statutory E598.00 contained in the Act.

5. ANALYSIS OF EVIDENCE AND ARGUMENT

The crisp question that falls for determination herein is whether the dismissal of the applicants was in keeping with Section 36 of the Employment Act, 1980, and whether or not the dictates of Section 40 of the same Act were complied with when the alleged “retrenchments” were effected.

The evidence as led, points to the termination of the services of the applicant’s on the 4th of January, 2007. The witness stated that they were not given notice, as the dismissals took effect immediately. The applicants were not consulted on how the business could be kept afloat, and furthermore, the employer did not cease operations on that day, or soon thereafter. Instead, the employer engaged the services of another hairdresser, and the salon continued to operate as usual, minus the presence of the two applicants, however.

Section 40 of the Employment Act, states clearly that if an employer wishes to retrench workers, he or she should give the workers notice of not less than one month. The law further requires that the employees ought to be engaged by the employer in a consultative

discussion. It is stated in the case of **Lonhlanhla Masuku vs K.K. Investments Industrial Court Case No. 341/03 at page 7** that the aim of the said consultation between the employer and employees must include the following:-

- a) Discussions of the reasons and need for retrenchment;
- b) Consideration of options to avoid or minimizing the retrenchment;
- c) Establishment of objective and fair criteria for identifying redundant positions and/ or employees;
- d) Discussion of the terminal benefits to be paid to the retrenched workers;
- e) Establishing a time frame for the retrenchment exercise.

In light of the foregoing, I do not believe that the employer in this case engaged in effective consultation. I am further not inclined to believe that the business was in genuine financial difficulty, seeing as the employer employed a new hairdresser and carried on operating the salon without even a single day's break in operations.

It is clear in my mind that the termination of the services of the two applicants was not a genuine retrenchment. It was in my considered opinion, simply an outright dismissal camouflaged as a retrenchment.

In light of the foregoing I find that the dismissals were both substantively and procedurally unfair.

CLOSURE

The applicant's claims stand as follows:-

Siphiwe Masuku

(1) Notice pay	= E 600.00
(2) Underpayments	= E 198.00
(3) Payment for holidays worked	= E 655.00
(4) Payment for 4 days worked in January	= E 11.00
(5) Compensation for unfair dismissal (12 months)	= E7 992.00

Lungisile Masuku

(1) Notice pay	=E 600.00
(2) Underpayments	=E 198.00
(3) Holidays worked	=E 530.00
(4) Compensation for unfair dismissal (12 months)	= E7, 200.00.

I have considered the fact that the respondent did not put into dispute, or try to controvert the authenticity of the claims made by the applicants. The respondent stated clearly that he preferred to allow the law to take its course, and only voiced a concern regarding the amount of compensation claimed by the applicants.

AWARD

Having heard the evidence and arguments of all the parties, it is hereby ordered that the respondent is to pay the applicant's the following amounts:-

SIPHIWE MASUKU

1) Notice pay	=E 600.00
2) Underpayments	=E 198.00
3) Payment for holidays worked	= E 655.00
4) Payment for 4 days worked in January	= E 11.00
5) Compensation for unfair dismissal (6 months x E600.00)	= E3, 600.00
Total	= <u>E5, 064.00</u>

LUNGISILE MASUKU

1) Notice pay	= E 600.00
2) Underpayments	= E 198.00
3) Payment for holidays worked	= E 530.00
4) Compensation for unfair dismissal (6 months x E600.00)	= E3, 600.00
Total	= <u>E4, 928.00</u>

The said amounts are to be paid to the applicants at the Siteki CMAC Offices not later than the **28th of February, 2009.**

DATED AT MANZINI ON THISDAY OF JANUARY, 2009.

**KHONTAPHI MANZINI
ARBITRATOR**