



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

**HELD AT MANZINI**

**MNZ 312/07**

In the arbitration matter between:-

**VUSI M. KUNENE**

Applicant

and

**TOTAL MONENI FILLING STATION**

Respondent

**CORAM:**

Arbitrator : Commissioner M.B. Mkhonta

For Applicant : Mr. Patrick Mamba (Applicant's Representative)

For Respondent: Mr. Siphon Mnisi (Respondent's Representative)

---

**ARBITRATION AWARD**

---

**DATE OF ARBITRATION:** 17<sup>th</sup> September 2007, 28<sup>th</sup> September 2007, 8<sup>th</sup> October 2007, 19<sup>th</sup> October 2007, 26<sup>th</sup> October 2007, 14<sup>th</sup> February 2008, 22<sup>nd</sup> August 2008 and 29<sup>th</sup> September 2008

**VENUE:** CMAC OFFICES, MANZINI

**1. PARTIES AND HEARING:**

The Applicant in this matter is Mr. Vusi M. Kunene of P.O. Box 4055, Manzini hereinafter referred as the Applicant, Mr. Kunene or as the employee.

The Respondent is Total Moneni Filling Station of P.O. Box 2309, Manzini, hereinafter referred as the Respondent, the company or the employer.

## **2. REPRESENTATION**

The Applicant was represented by Mr. Patrick Mamba. The Respondent was represented by Mr. Siphon Mnisi.

## **3. ISSUES IN DISPUTE**

Applicant submitted that Respondent constructively dismissed him on the 3<sup>rd</sup> April 2007. Applicant claimed notice pay, leave pay, twelve (12) months compensation for unfair dismissal and any alternative relief. On the other hand, Respondent submitted that Applicant resigned on his own accord and that the company had fully discharged its obligations to him.

## **4. BACKGROUND INFORMATION**

Applicant was employed as a Back Office Administration Manager on the 7<sup>th</sup> April 2006 at Respondent's undertaking and as the time of his termination, he was earning E5, 850.00/month. In addition, Applicant submitted that he remained in continuous employment at Total Moneni Filling Station until his services were constructively terminated on or about the 3<sup>rd</sup> April 2007. Applicant averred that his forced dismissal

came about because of the intolerable working conditions he encountered at the company which conditions included; being forced to sign a final written warning without having received any prior warnings and without being tried for any offence, being forced to sign a letter for poor performance (which he refused to do), failure by his employer to appropriately compensate him for the increase in duties/responsibilities after he took over same from his previous supervisor who left the company's employ.

Respondent disagreed with Applicant and argued that the company was entitled to evaluate Applicant's performance as he was not performing up to the required standard despite being trained by Respondent. Furthermore, Respondent submitted that Applicant had previous verbal warnings in his file for using the company vehicle without permission and that Applicant was not dismissed but resigned of his own volition.

The dispute was unsuccessfully conciliated by CMAC and a Certificate of Unresolved Dispute No: 436/07 was issued. Both parties consented to arbitration on the 6<sup>th</sup> June 2007 and I was appointed Arbitrator on the 23<sup>rd</sup> August 2007.

## **5. OVERVIEW OF EVIDENCE**

As the onus in constructive dismissal cases rests with the employee, the parties agreed amongst themselves that the Applicant will be the first to make submissions. Furthermore, the parties thereafter proceeded to submit documents they would refer to during the arbitration proceedings, starting with the Applicant: -

- Applicant's contract of employment - APP 1

- Report of Accident - APP 2
- Performance Review One - APP 3
- Performance Review Two - APP 4
- Final Written Warning - APP 5
- Letter of Resignation - APP 6
- Response to Resignation - APP 7
- Report of Dispute Form - APP 8
- Certificate of Unresolved Dispute - APP 9
- Proposal for cash handling - APP 10
- Pump Attendant duties and responsibilities - APP 11
- Lubricant's daily control sheet - APP 12
- Cash Form - APP 13
- Activity task sheet - APP 14
- Expired stock report (Dec 2006 - Jan 2007) - APP 15
- Comparison of records - APP 16

Applicant indicated that only one witness i.e. Mr. Vusi Kunene, would testify in his own defence.

Respondent submitted the following documents to be relied upon during the arbitration proceedings:

- Applicants contract of employment - RES 1
- Report of accident - RES 2
- Performance Review One - RES 3
- Letter of apology - RES 4
- Performance Review Two - RES 6
- Final written warning - RES 7
- Report dated 23<sup>rd</sup> March 2007 - RES 8
- Applicant's resignation letter - RES 9
- Response to resignation - RES 10

- Repairs invoice – RES 11
- Report of Dispute – RES 12
- Certificate of Unresolved Dispute – RES 13
- Carson Auto engine report receipt – RES 14
- MTN – missing cards report – RES 15

Respondent indicated that they would lead evidence through the following witnesses:

- Mr. A. Samuels
- Mrs. N. Samuels
- Mr. Mduduzi Mdluli
- Mr. Thokozani Malinga
- Dumsile Gamedze
- Khanyisile Dlamini
- Nomcebo Dlamini

## **6. ANALYSIS OF EVIDENCE AND ARGUMENTS**

Whilst it is not my intention to detail all the evidence that was adduced by the parties, I will however, give a brief account of the evidence that has influenced my ultimate award, beginning with the common cause items.

### **Common cause issues**

The following issues were noted as common cause issues:

- That Applicant was employed as a Back Office Administration Manager with effect from the 7<sup>th</sup> April 2006,

- That he was in continuous employment until the 3<sup>rd</sup> April 2007 and that he was an employee to whom Section 35 of the Employment Act (1980) as amended applied, and
- That as at his last date of service, Applicant was earning E5, 580.00/month.

### **Applicant's Version**

Applicant submitted that he was constructively dismissed by Respondent on the 3<sup>rd</sup> April 2007 and that he was forced to resign as a result of a number of issues occasioned by Respondent. These issues included: failure by Respondent to effectively communicate with him and when he did it was via letters and his inability by employer to afford him an opportunity to listen to his concerns or grievances. Applicant furthermore submitted that his relationship with Respondent came to a head on the 26<sup>th</sup> March 2007 wherein he was suspended from work verbally, for failure to submit a report on what had transpired on the 23<sup>rd</sup> March 2007. On this specific date (23<sup>rd</sup> March 2007), Applicant testified that he had gone to AD Enterprises to replenish stock for the Filling Station's convenience shop and he was telephonically contacted by Thokozani Malinga (a work colleague) who told him that a certain Dlamini who was a husband to Mrs Dlamini who worked for Dynamic Distributors which is also owned by Respondent, was looking for him. Applicant highlighted that this gentleman (Dlamini) was looking for him and was in the company of other men, and that he appeared to be very violent. Applicant clarified that he often worked with Mrs Dlamini on issues of salaries and accounts. According to Applicant, Thokozani Malinga had warned him not to come to the filling station alone as Dlamini wanted to beat him. Following the purchase of the goods at AD Enterprises, Applicant testified that he then went to the Police Station (after 4pm) to ask for

their help based on what Thokozani Malinga had said to him. Applicant then submitted that the police tried to contact Dlamini who indicated that he was now out of town and he would return late. Mr. Kunene indicated that he waited for Dlamini to come to the police station until after 10pm when the police changed shift.

The following morning, Applicant testified that he went to the filling station, found Dlamini's cell number and called him to request for a meeting, which meeting was held in the presence of John Hlatshwako, a certain gentleman whose name is Reggie who works at Carson Wheels and Mduduzi Mdluli who also worked at the filling station. At this meeting, Applicant testified that Dlamini apologised for his behaviour. Applicant averred that it was the report on this incident that led to his suspension from work on the 26<sup>th</sup> March 2007 after Respondent's Mr. F. Samuels had requested that he submits a report on the altercation the previous day. Applicant emphasized that he gave the report to Mr. Samuels who said that the report was "*hog wash*" after which he verbally told him to go home and to come back the following day at 2pm with the correct report. Mr. Kunene submitted that on the 27<sup>th</sup> March 2007, he went to the filling station as instructed and submitted a letter to Mr. Samuels where he explained his difficulty in meeting his request for a report mainly because he was not present at the filling station the day Dlamini came to look for him (letter was dated 27<sup>th</sup> March 2007 and which was included in Respondent's bundle of documents as Page 13).

Applicant also testified that after he had handed the report to Mr. Samuels, Respondent then gave him two letters both dated 26<sup>th</sup> March 2007 (which were included in Respondent's bundle in Page 10, being a performance review and page 12 being a Final Warning). Applicant specifically indicated that both letters were handed to him after his

suspension from work by Respondent. At this point, Applicant averred that his relationship with Respondent had deteriorated, having taken a “*turn for the worse*” the previous year in November 2006 for a number of reasons which included:

- a) Respondent turning down his request for a salary adjustment. Mr. Kunene highlighted that he had felt that he deserved the increase for having acted as a Manager for about five months and following the review of two of his subordinates’ salaries i.e. Thokozani Malinga and Mduduzi Mdluli in August and October 2006 respectively;
- b) Respondent’s inability to afford him an opportunity to discuss his concerns. Applicant referred to a meeting that was held on the 10<sup>th</sup> November 2006 wherein instead of affording him an opportunity to table his request for a salary adjustment, Respondent had instead given him a performance review letter dated 10<sup>th</sup> November 2006 (page 7 of Respondent’s bundle);
- c) Respondent’s tendency to verbally assault him in front of both his subordinates and customers;
- d) The lack of trust which culminated in an audit being undertaken by Respondent on suspected cash losses (refer to APP 16 being report submitted by Mrs. Nomcebo Dlamini);
- e) Respondent requesting him on the 8<sup>th</sup> February 2007 to write a time sheet on his work activities (refer to APP 17 and an example of the time sheet submitted as APP 15). Applicant indicated that the request for him to complete a time sheet on his daily activities was designed by Respondent to make his working environment unbearable and that this request was not “*normal*”;
- f) Respondent giving him a Final Warning on the 27<sup>th</sup> March 2007, without affording the right to be heard through a disciplinary



hearing and following formal charges being put to him (page 12 of Respondent bundle); and

- g) Respondent's inability to appreciate his commitment to the company through other initiatives that he implemented i.e. he introduced new cash handling procedures and also clearly defined the duties and responsibilities of Petrol Attendants (refer to APP 10 and 11).

Applicant finally testified that on resignation, he indicated his key reasons that forced him out of the company (APP 6) but that Respondent had neither bothered to engage him on his reasons nor did grievance procedures exist internally within the company which he could have utilized to pursue his concerns especially as he was the first and last level of authority within the company.

Under cross-examination, Applicant confirmed the following:

- a) That he was employed by Respondent on a written contract of employment which also defined what his duties and responsibilities were, and that this document was legally binding to him (refer to page 1 of Respondent's bundle);
- b) That he indeed wrote the letter attached in page 6 of Respondents bundle, following his involvement in an accident in one of the company cars. Applicant highlighted that the accident had not been caused by his negligence but happened by mistake (even though he conceded that the Police had fined him E60 for reckless driving which fine he had accepted and paid). Mr. Kunene however accepted that he had not taken the car to a professional mechanic after the accident particularly when the car overheated on the morning following the accident, preferring to sort out the overheating incident himself but claimed that this

- was not evidence of failure on his part to take due care of the company's properties; and
- c) That he refused to acknowledge receipt of the performance review letter written to him by Respondent dated 10<sup>th</sup> November 2006, ostensibly because he wanted Respondent to engage him first on the issues noted in that letter. Furthermore that this had occurred despite that he had accepted that the issues referred to in that letter e.g. filing of documents, were part of his responsibilities in terms of his contract of employment although he later argued that his letter of employment did not specifically refer to his employer having a right to assess and/or evaluate his performance.

At the conclusion of Applicant's case, Respondent applied for the dismissal of the dispute on the basis that Applicant had failed to prove that his contract of employment was breached by Respondent thus leaving him with no option but to resign from employment. Respondent submitted that the onus to prove that constructive dismissal had occurred, lay with Applicant and if Applicant does not fully discharge this onus, Respondent must be discharged of the responsibility to make submissions on the merits of the application. The application for '*absolution from the instance*' was dismissed by the Arbitrator and the Respondent was then obligated to make submissions on the merits of Respondents case/defence. The Arbitrator indicated that he would appreciate the benefit of Respondent's submissions on the merits of the dispute so as to fully address the question of whether Applicant had fully discharged its onus to prove that constructive dismissal had indeed taken place.

### **Respondent's Version**

Respondent began his submissions by highlighting the following:

- a) That Respondent had not materially breached Applicant's contract of employment and that to the contrary, Respondent had through a number of correspondences to Applicant, merely sought to counsel Applicant on his obligations in terms of the contract between the two parties e.g. in the letter to Applicant dated 10<sup>th</sup> November 2006 attached in Respondent's bundle of documents on page 7;
- b) That Respondent in engaging Applicant was exercising his rights to manage the company in a manner that best suited the circumstances - which powers Respondent exercised in line with Applicant's contract of employment. In addition, that all the letters sent to Applicant by Respondent were designed to assist Applicant to fully appreciate his duties and responsibilities and also to hold him accountable to same in line with his work contract;
- c) That Applicant resigned from the company on his own accord but failed to substantiate this assertion in terms of; how the working conditions were intolerable and unbearable, how Respondent breached Applicant's contract of employment and what alternative remedies were invoked by Applicant to resolve his concerns other than resignation. In this regard, Respondent noted that Applicant had relied on subjective insinuations and conclusions that had influenced his submissions to the arbitration, without providing witnesses to back his assertions or any documentary evidence to confirm that he had written to the employer to complain about the employer's inability to address his grievances. In addition, Respondent indicated that Applicant had failed to prove that his working conditions were unbearable to an extent that he was barred or prohibited from executing his

- duties and that there was no alternative option other than to resign;
- d) That Respondent was faced with an employee who could not perform to the requirements of his employment contract and that Respondent had no choice but to seek to address this;
  - e) That salary increases are generally not an enforceable right but issues that are subject to consultation and agreement by both parties to the employment contract and Applicant was wrong to assert that the non-sanctioning of his increase was legally wrong. In addition, Respondent submitted that Applicant failed to justify his right to an increase on the basis of any fair criteria i.e. that the two employees who were sanctioned an increase were in all respects of the same working conditions to him and that by not sanctioning his increase, Respondent committed an unfair labour practice. Respondent also highlighted that Applicant had not disclosed a material fact to the arbitration i.e. that when he demanded an increase, he was a mere five months into his employment contract and that in any event, any grievance on salaries fell within the dispute resolution competency of CMAC – which route, the Applicant did not pursue;
  - f) That Applicant had been warned several times verbally prior to the formal warning of the 26<sup>th</sup> March 2007 (page 12 of the Respondents bundle of documents) and that the abuse of the company vehicle had taken place on numerous occasions before, despite clear instructions from the employer. Respondent noted that the warning of the 26<sup>th</sup> March 2007, must be viewed in context of all prior attempts to address the issue of vehicle abuse, which attempts had not yielded positive results from Applicant, despite his letter on page 6 of the Respondents bundle of documents; and

g) That Applicant had not indicated the full impact of the altercation that took place at Respondent's premises when Dlamini came looking for him on suspicion that he (Applicant) had a relationship with his wife (who also happened to work for Respondent at another company he owned). That this specific event had caused Applicant much embarrassment and had brought the company into disrepute as it occurred in the full view of other employees and customers.

Respondent then proceeded to submit evidence through three witnesses namely Mr. A. Samuels, Mrs. N. Samuels and Mr. Mduduzi Mdluli, and not the seven witnesses Respondent initially indicated he would use, beginning with Mr. Mduduzi Mdluli.

### ***Testimony of Mr. Mduduzi Mdluli***

Mr. Mduduzi Mdluli (hereinafter referred to as Mr. Mdluli or the 1<sup>st</sup> witness) testified that he was employed by Total Moneni Filling Station as a supervisor in 2006 and that when Applicant resigned from the company, he was his (Mr. Mdluli's) supervisor. The witness indicated that Applicant had told him that he had disagreements with the company owner, Mr. A. Samuels which led him to resign but that Applicant did not give him the details of the disagreements. In addition, Mr. Mdluli testified that he was not aware of any open hostilities between the two (Mr. A. Samuels and Applicant), that he had never seen them openly quarrel and that since his employment within the company, he had specifically not seen Mr. Samuels rebuking Applicant either in front of employees or customers nor had he seen him quarrelling with any of the other employees who worked at the filling station.

The witness further submitted that he vividly recalls an incident involving one, Nomcebo Dlamini and her husband. In respect to this incident Mr. Mdluli testified that the husband, Mr. Dlamini came to the filling station with Nomcebo Dlamini and was in a “*fighting mood*”. He (Mr. Dlamini) demanded to talk to Applicant who fortunately had gone to replenish stock in Matsapha and that he (Mr. Mdluli) then telephoned him warning him about Nomcebo’s husband and advising him not to come back to the shop as he perceived the situation to be too dangerous. Mr. Mdluli also testified that this incident occurred in the full view of customers and employees and was concluded after Mr. Dlamini held a meeting with Applicant which meeting took place on another day.

Under cross-examination Mr. Mdluli emphasized that he had decided to telephone Applicant to pre-warn him about Mr. Dlamini and that the situation at that time warranted that he be warned as Mr. Dlamini was in a “*fighting mood*”. Even though Applicant put it to the witness that he was lying about the incident and the so-called meeting between Mr. Dlamini and Applicant, Mr. Mdluli insisted that his version of events was truthful and was being done under oath i.e. that he had personally called Applicant to pre-warn him about Mr. Dlamini’s presence at the filling station, that they had exchanged cars so that Mr. Mdluli then took the shop stock to the filling station and that Applicant told him that the matter had been resolved after his meeting with Mr. Dlamini.

### ***Testimony of Mrs. Nonhlanhla Samuels***

Mrs. Nonhlanhla Samuels (hereinafter referred to as Mrs. Samuels or the 2<sup>nd</sup> witness) testified that she was the co-director of Total Moneni Filling Station together with Mr. Alberto Samuels and that she knew Applicant having been previously employed in the Administration

Office. Mrs. Samuels submitted that she was basically responsible for supervision on the staff and would spend about two-three hours a day at the filling station. Generally she indicated that her work included; banking and stock reconciliation, review of stock movements and ensuring that stock was replenished as necessary although she confirmed that she was the sleeping partner and that her husband was more involved with the day to day administration of the filling station including issues of salaries. She further denied having ever quarreled with Applicant or having issued him with contradictory instructions to those issued by Mr. Samuels. Mrs. Samuels recalled that she was the one who requested Applicant to start completing a time sheet as Mr. Kunene was always behind in terms of work and she hardly found him at the back office doing normal administration work like filing, reconciliations and reviewing stock movements. The witness also denied ever threatening Applicant with dismissal and that Applicant even failed to engage her that he was now leaving the shop i.e. that he merely telephoned her and told her that he was now leaving, that this occurred without both of them ever sitting down to discuss whatever concerns he had.

Under cross-examination, Mrs. Samuels confirmed that whilst on paper Applicant was meant to report to him, in reality he reported to Mr. Samuels and proof to this was that all correspondence he wrote to the company was submitted to Mr. Samuels including his decision to resign. She however confirmed that she wrote Applicant a letter dated 8<sup>th</sup> February 2007 which was highlighting concerns on stock not being replenished effectively and placed on the appropriate shelves as well as a reminder on her request that Applicant provides a daily time sheet of his work activities for the directors' attention. Mrs. Samuels also confirmed that the time sheet request was not specifically meant to indicate Applicant's activities per minute but a summary of his daily

work so that it could make supervision easier and that moreover, if this had led to the work environment being unbearable, then the least Applicant could have done was to engage her directly on his concerns, which he failed to do. The witness furthermore confirmed that the dual reporting must be viewed in context e.g. that cheques should not be accepted unless authorized by either Mr. Samuels or herself as the second senior person - which to her was common sense and that this could not have caused Applicant any confusion with regards to so-called conflicting or contradictory instructions. Mrs. Samuels also confirmed that she does not deny that Applicant may have had concerns, but that she questions his reason to resign without effectively engaging his employers on his concerns and that she had confirmed to him and Thokozani in a meeting she held with them, the need to discuss matters.

### ***Testimony of Mr. Alberto Samuels***

Mr. Alberto Samuels (hereinafter referred to as Mr. Samuels or the 3<sup>rd</sup> witness) testified that he was the Managing Director of Total Moneni Filling Station and that he had recruited Applicant on a formal contract of employment in 2006 as the Back Office Administrator. Mr. Samuels further testified that Mr. Kunene was confirmed to his position after the probation period and that this was done based on; the potential he had displayed when he was recruited and the hope that he would grow into his position as they were all new in the running of a filling station. The 3<sup>rd</sup> witness also testified that contrary to his hope and expectations, Applicant's performance did not improve and that as a result of this, he had engaged him and had written to him on several occasions, reminding him about his job responsibilities as he was not doing what he was supposed to e.g. that he discussed with Applicant his inability to prepare proper accounts and that as a direct result of this



conversation, Applicant had requested for help in doing this. In addition, Mr. Samuels also mentioned the issue of the letter dated 10 November 2006 (RES 3) which letter highlighted certain duties that Applicant was not carrying out effectively which included; inability to file documents properly resulting in a messy office, taking cheques which had not been authorized by one of the directors which cheques were a challenge especially when they were not honoured at the bank, failure to verify stock before purchases e.g. duplicating orders for pies which were perishable, buying chicken feed in a haphazard manner, making incorrect banking entries, being away from his work station consistently and no effective controls to manage shrinkages. Mr. Samuels indicated that Applicant was trained at the Total Offices in Johannesburg (which was standard training as part of the Total package) and in Hluhluwe (which was additional training organized by management at the company's cost to supplement his knowledge). The 3<sup>rd</sup> witness confirmed that despite his appeals, Applicant continued to do as he pleased not necessarily what the business required.

Mr. Samuels furthermore testified that he again engaged Applicant and also wrote him a letter dated 26<sup>th</sup> March 2007 (RES 6) seeing that there was no improvement, emphasizing; the need for him to follow established accounting principles, putting in place effective shrinkage systems, assisting with stock take and preparing monthly reports. The 3<sup>rd</sup> witness confirmed that at all material times, Applicant reported to him although he often did report to Mrs. Samuels in his absence as she also worked at the back office and handled administrative/minor matters. Mr. Samuels indicated denied that they frequently issued Applicant with conflicting instructions and wondered why if it was true, he had not taken this up with them. In addition, Mr. Samuels confirmed that Applicant was never refused an audience to discuss any matter.

In respect to Applicant's claim that he was verbally abused as was stated in the Report of Dispute (RES 12), Mr. Samuels confirmed that he recalls writing to Mr. Kunene before he resigned about the abuse of the company vehicle and giving him a Final Warning (in the context of previous verbal warnings vehicle abuse and noting that formal action will be taken in the event this continued which may lead to his dismissal). Mr. Samuels specifically; denied ever receiving a letter dated 24<sup>th</sup> May 2006 from Applicant, indicated that overtime was built into Applicants salary from the time he was recruited as the business operations were unknown then, denied insulting Applicant in the full view of customers and employees and challenged Applicant to call one witness that he behaved in this manner, agreed that he indeed increased salaries of some employees but indicated that this was to done to bring their wages in line with the Wages Order and that in any event, Mr. Kunene earned much more than they did. Mr. Samuels furthermore alluded to the incidence involving a certain Mr. Dlamini and his wife and confirmed that in his opinion, that is what caused Applicant to resign i.e. that he was too embarrassed to continue working as a result of that incident and that he demanded a full report from Applicant on why Mr. Dlamini had had come to the filling station, caused chaos which brought the company into disrepute.

In explaining the circumstances of Applicants resignation, Mr. Samuels indicated that Applicant phoned him at home and told him that he was quitting which he followed up by submitting his resignation letter dated 3<sup>rd</sup> April 2007 (RES 9) and he responded to (RES 10). He confirmed that he did prior to his resignation without notice, request him to clarify a number of issues including the issue of missing MTN stock (letter dated 26<sup>th</sup> March 2007).

Under cross-examination, Mr. Samuels confirmed that he was duty bound to request for a full report on the incident involving a certain Dlamini and his wife as this had brought disrepute to the company. He denied that this could have caused Applicant to resign indicating that he turned back the first report Applicant had submitted to him as it did not contain material facts about the incident that he had received from the personnel on duty that day hence he had decided to give Applicant time off to write an acceptable report. He denied that Applicant had been suspended and emphasized that he had merely been given time off to address an incident that he considered as very important given Applicant's position and the fact that this incident had occurred on company premises. Mr. Samuels again emphasized that; the company had been very patient with Applicant despite his shortcomings and that the formal communication to Applicant was meant to record the company's management of his shortcomings (in addition to all the verbal discussions held with Mr. Kunene). Whilst he confirmed receiving APP 10 (being cash handling guidelines), he denied ever seeing APP 11 (which was a document on pump attendant duties). Mr. Samuels also submitted that whilst Applicant may have submitted recommended working guidelines for other staff members, he did not implement these as the person who was responsible for their supervision.

## **7. CONCLUSIONS**

The question which I must address is whether the resignation of Applicant on constructive dismissal grounds meets the criteria of constructive dismissal as indicated in the Employment Act, 1980 as amended (hereinafter referred to as the Act) and as guided by the applicable case law. Section 37 of the Act provides that:

***“When the conduct of an employer towards an employee is proved by the employee to have been such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves his employment, whether with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by his employer”.***

In ***Andre Van Niekerk: Unfair Dismissal, (2002) Siber Ink at Page 19***, Van Niekerk A defines constructive dismissal as an incident wherein:

***“An employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee”,...that “in most instances constructive dismissal is triggered by a resignation”.***

Van Niekerk goes on to argue that:

***“the nature and extent of the right to claim unfair dismissal in these circumstances is often misunderstood and that law reports are littered with cases in which employees, having resigned in arduous but not intolerable working conditions, seek vengeance on their erstwhile employers. The courts have been less than generous in extending assistance to employees in these circumstances and a high proportion of constructive dismissal cases fail at the first hurdle i.e. the requirement to prove existence of dismissal”, ...that “the courts have adopted an objective approach to***

***constructive dismissal. It is not the employee's say so or perception of events that establishes intolerability, or even the employer's state of mind. What is relevant is the conduct of the employer in an objective sense", ...that "this implies not only that the test should be objective but that it should be an act of final resort when no alternatives remain. The courts have also confirmed that the use of 'intolerability' means that there is an onerous burden on the employee. It requires the employee to show that, in the circumstances, continued employment would be 'objectively unbearable'. More recent judgements and awards have emphasized this strict approach to constructive dismissal and, in particular, the requirement that the employee establish some harsh, antagonistic or otherwise hostile conduct on the part of the employer that precipitates the employee's resignation. In summary, the relevant considerations include the following:***

- o The employer's conduct does not have to amount to a repudiation of the employment contract.***
- o The employee who claims constructive dismissal must objectively establish that the situation has become so unbearable that he or she cannot be expected to work any longer.***
- o The employee must show that he or she would have carried out on working indefinitely, but for the employer creating the unbearable circumstances.***
- o The employee must exhaust all possible remedies before resigning.***

**John Grogan: Workplace Law, 8<sup>th</sup> Edition, (2005), Juta & Co Ltd at Page 113**, highlights examples of intolerability and indicates that these include but are not limited to:

***“an offer of inferior employment coupled with a threat of dismissal if an employee did not accept the offer; unlawful deductions from an employee salary; sexual and other forms of harassment; unjustified disciplinary action; the denial of company transport or exerting undue influence on the employee to resign. In making out a case for constructive dismissal, employees who have resigned must show that they were subject to coercion, duress or undue influence. The mere fact that an employee has been issued with an unreasonable instruction does not in itself justify resignation and a subsequent claim for constructive dismissal, especially if the employee failed to use the employer’s grievance procedure or some other method that he or she could have sought relief”.***

Grogan J goes on to argue in **Page 115** that:

***“the employee’s mere subjective feeling that he or she has been unfairly treated is not in itself sufficient”, ...that “the test for whether the employer has rendered the prospect of continuation of the employment relationship intolerable, is objective i.e. the existence of a constructive dismissal cannot be determined from the state of mind of the employee alone”.***

In **Page 116**, Grogan J concludes his analysis of constructive dismissal by arguing that:

***“the central question is then whether the conduct of the employer that prompted the employee to resign was fair or unfair. In other words, a constructive dismissal is not inherently unfair; a court will consider the circumstances with a view to establishing whether the employers conduct was justified”.***

Let me go one step further in highlighting the criteria for the evaluation of constructive dismissal disputes and refer to Zondo JP’s conclusions in **Solid Doors (Pty) Limited v Commissioner Theron & Others (2004) 25 ILJ 2337 (LAC)** at para 28:

***“That there are three requirements for constructive dismissal to be established. The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment intolerable. All these three requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent, constructive dismissal is not established. Thus, there is no constructive dismissal if an employee terminates the contract of employment without the two other requirements present. There is also no constructive dismissal if the employee terminates the contract of employment because he cannot stand working in a particular workplace or for a certain company and that is not due to any conduct on the part of the employer”.***

From the submissions of Applicant, he highlighted the following incidences as the basis of his decision to resign, arguing that these instances created an 'intolerable' employment environment for him which he found untenable and thus had no other option but to resign:

- a) That Respondent turned down his request for a salary adjustment in late 2006. Mr. Kunene highlighted that he had felt that he deserved the increase for having acted as a Manager for about five months and following the review of two of his subordinates' salaries i.e. Thokozani Malinga and Mduduzi Mdluli in August and October 2006 respectively. In clarifying Respondent's position, Mr. A Samuels testified that when Applicant requested for this increase, he was a mere five months into his employment contract, that he has told them that he earned E3, 200.00 in his previous employer and he was offered E5, 850.00 at Respondent's company which amount was way above government regulations but that it also included an amount built in as overtime as they were not aware of the extent of the operations because Total Moneni Filling Station was starting from scratch. Moreover, Mr. Samuels submitted that both Thokozani Malinga and Mduduzi Mdluli had received increases so as to bring them in line with the provisions of the Wages Order in respect to Service Stations. Salary increases disputes fall within the classification of disputes which parties to the disputes, must necessarily engage on and are distinct from 'disputes of rights' - where the basis for the dispute may be a contractual provision, a provision in a collective agreement or a provision in the statutes. Unless they are specifically provided for in the contract of employment or a collective agreement, they cannot be regarded as 'disputes of right'. Analysed differently,



can Respondent's conduct in this instance be viewed as unfair as argued by Grogan J enough to justify a claim of constructive dismissal? In making his assertion, Applicant indicated that Respondent had recently reviewed the salaries of Thokozani Malinga and Mduduzi Mdluli to bring them in line with the minimum wages and that Applicants demand was unfair because he was paid way above the levels of these two employees. Just because Applicant felt that Respondent's action was unfair did not actually render Respondents actions in this instance unfair. Again as noted by Grogan J, *"the employee's mere subjective feeling that he or she has been unfairly treated is not in itself sufficient", ...that "the test for whether the employer has rendered the prospect of continuation of the employment relationship intolerable, is objective i.e. the existence of a constructive dismissal cannot be determined from the state of mind of the employee alone"*.

- b) That Respondent had been unable to afford him an opportunity to discuss his concerns. Applicant referred to a meeting that was held on the 10<sup>th</sup> November 2006 wherein instead of affording him an opportunity to table his request for a salary adjustment, Respondent had instead given him a performance review letter dated 10<sup>th</sup> November 2006 (RES 3). Mr. Samuels indicated in his testimony that he had verbally discussed Applicant's performance with him on a number of occasions and only after the performance had not improved, did he then begin to formally write to him a number of letters (which both parties submitted as evidence i.e. RES 3, RES 6 and RES 9). In addition, Mr. Samuels testified that Applicant had been trained in the operations of the filling station at Total Johannesburg and Hluhluwe. The logic of this submission is that Applicant was well trained in the discharge of the responsibilities he had been given and therefore

had no reason not to perform to the required level. Moreover, Applicant did not repudiate this aspect of Mr. Samuels and thus left it unchallenged. Applicant was employed on the 7<sup>th</sup> April 2006 and the first formal letter submitted to the arbitration about his performance was dated 10<sup>th</sup> November 2006, over six months after his employment. On paragraph two, this letter states that, *“I have on several occasions, both verbally and in writing, pointed out to you that your general lack of applying daily accounting practices, one example being...”*.

The point I make here is that it would seem to me implausible for Applicant to aver that Respondent had never sat down with him to discuss aspects of his work prior to the 10<sup>th</sup> November 2006. In the context of these prior discussions, surely Applicant would have had the opportunity to place his side of the story before Respondent. In any event this specific letter and the contents thereof, went unchallenged by Applicant even though he continued to maintain that he was never given a fair hearing by Respondent. This specific assertion by Applicant is clearly not believable particularly in the context of the events and certainly in the context of Mrs. N. Samuels’s testimony, which plainly asserted that she treated Applicant like a brother and consistently engaged him. Under cross examination, Applicant also argued that his letter of employment did not specifically refer to his employer having a right assess/evaluate his performance which assertion was obviously wrong given the contents of APP1 and in reference to the Code of Good Practice: Termination of Employment – Managing Poor Performance;

- c) That Respondent had the tendency to verbally assault him in front of both his subordinates and customers. The challenge I have with this submission by Applicant is that it was not

corroborated by any witnesses and was rejected by Mr. Samuel's during his evidence in chief. In addition, Respondent's Mr. Mduduzi Mdluli evidence corroborated Mr. Samuel's testimony when he confirmed that he had never seen Mr. Samuel openly quarrelling with any employee whether in front of customers and in front of other employees;

- d) That Respondent demonstrated a lack of trust to him which culminated in an audit being undertaken by Respondent on suspected cash losses (refer to APP 16 being report submitted by Mrs. Nomcebo Dlamini). In this regard, I fail to understand why this audit which was undertaken by an employer is viewed as a sign of mistrust. One of the commonly accepted norms of evaluating the adequacy of financial controls and reviewing issues of revenue assurance is the use of financial or operational audits. Again, Applicant does not justify why he reached that conclusion and in the absence of this, I have no alternative but to conclude that this specific reason is invalid to justify intolerability. In any event and as was argued by Van Niekerk, *"It is not the employee's say so or perception of events that establishes intolerability, or even the employer's state of mind. What is relevant is the conduct of the employer in an objective sense"*. Viewed objectively, there is no evidence to prove particularly in the absence of corroborating evidence that indeed Respondent's actions were unfair or that they were without merit especially because Applicant also failed to challenge Mr. Samuel's submissions that the performance of the Filling Station was not satisfactory.
- e) That Respondent requested him on the 8<sup>th</sup> February 2007 to write a time sheet on his work activities (refer to APP 17 and an example of the time sheet submitted as APP 15). Applicant indicated that the request for him to complete a time sheet on

his daily activities was designed by Respondent to make his working environment unbearable and that this request was not “normal”. Viewed in the context of Mrs. Samuels largely unchallenged testimony and Mr. Samuels submissions in respect to performance issues as demonstrated by at least the three formal letters he wrote to Applicant, it is not inconceivable that Respondent would have sought to bring Applicant under control. One way of achieving this was the request that he completes time sheets so that he was able to “*properly evaluate and supervise his work*”. It must also be noted that one of the concerns Respondent had with Applicant’s performance, was his failure to submit proper monthly reports so that he could evaluate the progress of the business venture. It therefore boggles the mind as to why Applicant would have viewed this request that he submits time sheets as ‘unreasonable’ particularly in light of his performance record;

- f) That Respondent gave him a Final Warning on the 27<sup>th</sup> March 2007, without affording the right to be heard through a disciplinary hearing and following formal charges being put to him (APP 5 or RES 7). Mr. Samuels confirmed that he indeed gave Applicant a Final Warning on the 26<sup>th</sup> March 2007 in the context of previous verbal warnings of vehicle abuse and that his intention was to formally note that serious action would be taken by the company in the event this continued.

It is trite law that warnings must be given after due process or after the employee has been given an opportunity to be heard. From the evidence submitted, this does not seem to have been the case. However, the extent to which this incident could be considered to have given rise to ‘intolerable working conditions’ that resulted in Applicant having no choice but to resign, falls to

be questioned. Applicant had a number of remedies in law to pursue this obvious procedural flaw in the handling of this incident but he opted not to pursue any of them. These include, formally taking up the matter of the procedural flaw direct with Respondent and if this was not addressed, engaging CMAC to assist resolve this matter. None of these two options were pursued.

- g) That Respondent was unable to appreciate his commitment to the company through other initiatives that he implemented i.e. he introduced new cash handling procedures and also clearly defined the duties and responsibilities of Petrol Attendants (refer to APP 10 and 11). Respondent's response to this question, was to indicate that whilst indeed Applicant made some suggestions, these were in line with his responsibilities and that in the majority of instances e.g. RD cheques and safe drops, he failed to ensure compliance to the very guidelines he drew up. What is more Respondent's failure to fully appreciate and complement Applicants work (if indeed this was the case), could certainly not be used as an objective basis for him to claim 'intolerability'. Once again and as clearly indicated by Van Niekerk, *"the nature and extent of the right to claim unfair dismissal in these circumstances is often misunderstood and that law reports are littered with cases in which employees, having resigned in arduous but not intolerable working conditions, seek vengeance on their erstwhile employers. The courts have been less than generous in extending assistance to employees in these circumstances..."*. Applicant may have been genuinely aggrieved that his work was not being appreciated, but this is neither sufficient to claim that by doing so, Respondent had created 'intolerable' working conditions nor were the guidelines he recommended necessarily strenuous. To the contrary, it can be

argued that the 'innovations' were well within his scope of work and to which he was duly paid in the form of his monthly salary. For purposes of motivation, I do however concede that it would have been ideal if his efforts were appreciated but that this is purely for sentimental purposes and the absence of the 'appreciation' can hardly qualify to be a ground for constructive dismissal.

- h) That despite indicating the key reasons that forced him out of the company (APP 6) Respondent had neither bothered to engage him on his reasons nor did grievance procedures exist internally within the company which he could have utilized to pursue his concerns especially as he was the first and last level of authority within the company. It is trite law that when employees submit their resignation letter, they are considered to have voluntarily terminated their contract of employment and therefore ceases to be employees. Applicant resigned without notice and did not even indicate in his letter that he sought to discuss his concerns with Respondent. Under the circumstances, Respondent therefore had no choice but to accept his resignation which he duly did (APP 7). If Applicant genuinely intended to engage Respondent on his concerns, he would have done so prior to submitting his resignation letter. The question of absence of grievance procedures is according to my analysis, 'catching of straws' as by that time, Applicant had made up his mind to exit the company as indicative of his telephone call to Respondent prior to submitting his resignation letter. Applicant failed to provide evidence of Respondent "*exerting undue influence on him to resign*". It would seem to me very likely that Applicant resigned because he could no longer work for Respondent for whatever reason. As was noted by Zondo JP, "*there is also no constructive dismissal if the employee*

*terminates the contract of employment because he cannot stand working in a particular workplace or for a certain company and that is not due to any conduct on the part of the employer”.*

In conclusion, I find that Applicant has failed to prove objectively the requirements of constructive dismissal in so far as the Act is concerned. Even if one may subject the dispute to Zondo JP’s three-pronged test, his claim does not stand the test of scrutiny i.e.

***“The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment intolerable. All these three requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent, constructive dismissal is not established. Thus, there is no constructive dismissal if an employee terminates the contract of employment without the two other requirements present”.***

Whilst Applicant certainly proved that he terminated his employment, he failed to prove the critical question of intolerability and that the employer’s actions left him with no alternative but to resign. Save for the question of a formal warning being given without a prior disciplinary hearing, he has failed to provide objective grounds that prove that his employers actions were unreasonable and unfair and that they collectively caused him intolerable working conditions leaving him with no option but to resign. The issue of the warning

alone cannot stand the test of intolerability particularly because he had clear avenues to challenge the unfairness of this warning but opted not to. His feelings were too subjective to warrant any consideration under. More specifically and in respect to the test suggested by Van Niekerk, he failed to show that:

- a) The employers conduct resulted in the repudiation of his contract,
- b) As noted above, he failed to objectively establish which of the employer's actions were unreasonable or unbearable that he could not be expected to work any longer.
- c) That he showed that he was prepared to work indefinitely, but for the employer creating the unbearable circumstances.
- d) That he exhausted all possible remedies before resigning.

## **8. AWARD**

It is my finding that Applicant's claim for constructive dismissal was unwarranted and that as a result thereof, his dispute on unfair dismissal by Respondent is therefore dismissed.

**DATED AT MANZINI ON THIS 18<sup>TH</sup> DAY OF FEBRUARY 2009.**

---

**MAX B. MKHONTA**  
**CMAC ARBITRATOR**



