



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

Held in Manzini

CMAC Ref: MNZ 552/07

In the matter between:

Gcina Lukhele

Applicant

AND

St Joseph's Mission

Respondent

CORAM:

Arbitrator
For Applicant
For Respondent

Mr Robert S. Mhlanga
Mr S. Zwane
Mr B. E. Simelane

ARBITRATION AWARD

**VENUE : CMAC OFFICES, ENGULENI BUILDING GROUND
FLOOR**

1. DETAILS OF HEARING AND REPRESENTATION

The Applicant is Gcina Lukhele and he was duly represented by Mr Sandile Zwane in this case.

The Respondent is St Joseph's Mission and it was duly represented by Mr Erick Simelane from Maduduza Zwane Labour Law Consultants and Associates.

2. BACKGROUND OF THE DISPUTE

The Applicant alleged that his services were unfairly terminated by the Respondent.

Pursuant to the alleged dismissal the Applicant reported a dispute of unfair dismissal to the Commission (CMAC).

The dispute was duly conciliated upon, but it was not resolved and as a result the commission issued a Certificate of Unresolved Dispute.

Subsequently, the parties referred the matter to arbitration for determination of the dispute herein.

On the 25th September, 2008 a pre-arbitration meeting was held. The purpose of this meeting inter alia, was to narrow the issues i.e to determine which issues are in dispute and which are not; to discover and or to exchange documents (if any) to be used during the hearing; to determine the number of witnesses each party would call and to set a date of hearing suitable to the parties.

3. ISSUE IN DISPUTE

The main issue to be decided in the present case is whether or not the termination of the Applicant's services was fair and reasonable in the circumstances of the case as per the provisions of section 42 of the Employment Act, 1980, as amended.

Another question to be determined is whether or not the Applicant was an employee to whom section 35 of the Employment Act 1980 as amended applied. This question arises from the fact that the Respondent disputes that the Applicant was an employee to whom the aforesaid section 35 applied, since he was the member of the Respondent's immediate family.

4. SUMMARY OF EVIDENCE

I will only summarize the key aspects of the evidence led herein, which I deem relevant in making my award.

Applicant's case

- 4.1.1 Two witnesses testified in support of the Applicant's case namely; the Applicant (Gcina Lukhele) and Mjozi Jele.

GCINA LUKHELE'S EVIDENCE

- 4.1.2 Gcina Lukhele hereinafter referred to as the Applicant gave his evidence under oath. I will refer to this witness as the Applicant, AW1 and or Mr Lukhele as the case may be.

- 4.1.3 The Applicant's testimony was that he started Grade 1 at St Joseph's Mission Primary School in 1987. He testified that his school fees were paid by his mother with the assistance of other people like Mrs Dlamini and Mrs Simelane who were working as nurses at Nazarene in Manzini. He said that he was staying at the Respondent's hostel, but he used to go home during school vacations.

4.1.4 The Applicant further testified that when he was doing Form 1 at St Joseph's Mission High School his School fees were paid by Save the Children Fund (alias Zondle). Mr Lukhele stated that in 1996, when he was doing Form 3, father Ciccone offered him an accommodation at St Joseph's Mission. In other words in 1996 he resided in the Respondent's Boarding House as a Boarder. Mr Lukhele testified that he completed his O'level in 1998; but he continued to live in the hostel. He said that in 1999, the Respondent through Father Ciccone employed him initially as an assistant Boarding master. In 2002, he was promoted to the position of Boarding Master, a position he held until the date of his alleged dismissal. The Applicant replaced the erstwhile Boarding Master, one Moizen Vilakati.

4.1.5 The Applicant stated that it was agreed between the parties that he would earn a salary of E500- 00 per month. He said that father Ciccone proposed that a sum of E400-00 should be kept by him on behalf of the Applicant until such time the Applicant would decide that he needed it. The Applicant testified that pursuant to this arrangement, the Respondent paid him a sum of E100-00 per month, while the balance of E400-00 was kept by Father Ciccone on his behalf.

4.1.6 The Applicant testified that in or about 2005 he approached father Ciccone and requested him to pay him (Applicant) all his money he (Father Ciccone) had been keeping or saving for him (Applicant) from the date of his employment to date. He said that Father Ciccone kept on promising him that he would give him his money, but unfortunately he failed to do so.

4.1.7 It was the Applicant's testimony that on the 9th September, 2006 his services were unfairly terminated by the Respondent through Father Ciccone. The Applicant alleged that on the said date Father Ciccone sent a certain Mr Shongwe and Willy Dlamini to tell him that his services were summarily terminated, and he was ordered to vacate the house he was occupying with immediate effect. He said that he was told that someone from Hlathikhulu was going to replace him as a Boarding Master.

4.1.8 The Applicant stated that he vacated the Respondent's Boarding House on the same day as per Father Ciccone's directive. The Applicant said that after about three (3) weeks he tried to meet Father Ciccone with a view to clear the air between the parties or to sort out any differences or misunderstanding between them. But unfortunately Father Ciccone refused to have an audience with him. The Applicant stated that as a result of the strained relationship between him and Father Ciccone, the Father forbade him from attending church at St Joseph's Mission.

CROSS EXAMINATION

4.1.9 During cross examination the Applicant denied the fact that his school fees were paid by the Respondent. The Applicant also reiterated that in terms of the contract of employment the Respondent was supposed to pay him a salary of E500-00 per month.

- 4.1.10 It was put to the Applicant by the Respondent's Representative that the Applicant was not employed, but he volunteered to assist the Respondent in performing the duties of a Boarding Master. But however, the Applicant disputed this; the Applicant maintained that he was employed by the Respondent.
- 4.1.11 It was further put to the Applicant that Father Ciccone talked to the Director of Ekululameni Rehabilitation Center to engage him there because the Respondent did not have money to pay him (Applicant). Again the Applicant denied this allegation.
- 4.1.12 The Applicant reiterated that his services were unfairly terminated by the Respondent.

MAJOZI JELE'S EVIDENCE

- 4.1 13 Majosi Jele was called by the Applicant to testify on his behalf. I will refer to this witness as AW2 or Mr Jele as the case may be.
- 4.1.14 AW2 testified that he is the former student of St Joseph's High School. He testified that in 1999, when he was doing Form 2, the Respondent introduced the Applicant to the students that he was now an assistant Boarding Master. AW2 stated that in 2002 the Applicant became the Boarding Master.
- 4.1.15 AW2 testified that, there were student's who were fostered by Father Ciccone and these students were known as the Father's 'Children' (Bantswana bempfundi). But however AW2 said that to his knowledge the Applicant was not the Father's foster child (umtfwana wempfundi).

CROSS EXAMINATION

- 4.1.16 Under cross examination AW2 testified that before the Applicant's appointment in 1999, Mr Moizen Vilakati was the incumbent Boarding Master. He further stated that the Applicant was initially appointed as Mr Vilakati's Assistant in 1999.
- 4.1.17 It was put to AW2 that the Applicant was the Father's foster child. In response AW2 stated that he did not have an answer to this question, because he did not know the personal relationship between the Applicant and Father Ciccone. On the other hand, it was put to AW2 that the Applicant was never appointed as a Boarding Master. AW2 said that he could not respond to this allegation.

4.2 RESPONDENT'S CASE

- 4.2.1 The Respondent led the evidence of three (3) witnesses in its case namely, Thandi Ginindza, Willy Dlamini and Jabulani Mandlazi.
- 4.2.2 Thandi Ginindza, hereinafter referred to as RW1 gave her testimony under oath. RW1 testified that she is currently employed as the Deputy Principal of St Joseph's Primary School. On the other hand, RW1 testified that she is the coordinator of St Joseph's Boarding House. She said that as a coordinator her duties, inter alia entails, looking after the Welfare of the students residing in the Boarding House or Hostels.
- 4.2.3 RW1 stated that she is so close to Father Ciccone, such that she regards herself as the Father's Right-hand person or assistant. Ms Ginindza testified that the Applicant first came to St Joseph's Mission between 1988 and 1989 and at this time he was

doing grade 1. She said that the Applicant did not do well in Form 5, and as a result he upgraded the subjects in which he did not do well. She said that Father Ciccone personally paid the Applicant's school fees during his upgrading.

- 4.2.4 RW1 also testified that the Respondent assisted the Applicant by securing a sponsor from Germany known as KNH, which was responsible for the payment of the Applicant's schools fees. RW1 stated that upon completion of his O'level the Applicant's name was removed from the list of children who were sponsored by KNH. In other words, the Applicant ceased to be the beneficiary of the KNH sponsor.
- 4.2.5 RW1 disputed the Applicant's allegation that he was employed by the Respondent as a Boarding Master. RW1 stated that upon completion of his O'Level (Form 5), the Applicant continued to reside in the Respondent's Boarding House or hostel. She said that the Applicant rendered his assistance to the Respondent just like all students who were previously assisted financially by the Respondent to complete school. She stated that the Applicant was one of Father Ciccone's foster children, who are commonly referred to the mission as "Bantswana bembundisi".
- 4.2.6 It was RW1's testimony that the Applicant was given a pocket money in the sum of E100-00, and over and above this, he was provided with free meals and accommodation. RW1 testified that Father Ciccone asked Mr Randy Fleming, the then Director of Ekululameni Rehabilitation Centre to employ the Applicant. She said that consequently the Applicant was employed by Ekululameni Rehabilitation Centre and he was in the Optical Department. RW1 said that despite the fact that the Applicant was now working for Ekululameni Rehabilitation Centre, but he

continued to perform his duties as a Boarding Master and he was still residing at the Respondent's hostel. RW1 stated that the Applicant still received the E100-00 per month.

- 4.2.7 Ms Ginindza (RW1) testified that, following his new job, the Applicant was unable to properly execute his duties at the Boarding House, hence the Respondent through Father Ciccone relieved him of his duties to enable him to concentrate on his new job.

CROSS EXAMINATION

- 4.2.8 Under cross examination, RW1 maintained that the Applicant was not employed by the Respondent (St Joseph's Mission). She stated that the Applicant, Gcina Lukhele was asked by Father Ciccone to assist the Respondent in performing the duties of a Boarding Master. She said that Gcina was the Father's 'Child' (umtfwana wemfundisi). She alleged that the Applicant was assisting the mission as the Father's 'child'. RW1 said that even the Respondent's records do not reflect that the Applicant was the Respondent's employee. She testified that the official Boarding Master was employed for the first time in 2007.
- 4.2.9 RW1 further testified, under cross examination, that the Applicant was given E100-00 by the Respondent as a pocket money. She said that the E100-00 was not a salary, but it was meant to help the Applicant to buy toiletries. RW1 alleged that even the Applicant's predecessor, Mr Moizen Vilakati was getting the sum of E100-00 per month, when he was assisting as a Boarding master. She said that Mr Vilakati was also the Father's 'child' (umtfwana wemfundisi) and he was not employed.

- 4.2.10 RW1 testified that the Applicant was employed by Ekululameni Rehabilitation Centre on a full-time basis. She said that, following his new job at Ekululameni, the Applicant was no longer able to properly execute his duties as a Boarding Master. Consequently the Respondent terminated his services to enable him to focus on his new job. RW1 stated that the Applicant was consulted before his services were terminated.
- 4.2.11 During re-examination this witness (RW1) was asked if she knew anything about the purported contract of employment between the Applicant and Father Ciccone, in terms of which the Applicant was employed and was promised a monthly salary of E500-00. In response RW1 stated that she was not aware of such a contract of employment.
- 4.2.12 RW1 admitted that it is possible that the aforesaid agreement between the Applicant and Father Ciccone might have been concluded in a private meeting between the Applicant and the Father (umfundisi) during a one-on-one talk the Father might have had with the Applicant as his 'child'. She said that Father Ciccone would occasionally have a private one-on-one talk with his 'children'.

WILLY DLAMINI'S EVIDENCE

- 4.2.13 Willy Dlamini hereinafter referred to as the second Respondent's witness (RW2) also testified under oath on behalf of the Respondent. Briefly, RW2 testified that he is presently employed as a Teacher at Salesian Primary School. He stated that he still resides at Joseph's Mission (Mzimpofo) as he is the Father's 'child'.
- 4.2.14 RW2 stated that he knows the Applicant, Gcina Lukhele; and that he has known him since their

schooling days, when they were both students at St Joseph's High School in 1997. He alleged that the Applicant was the Father's 'child' (Umtfwana wemfundisi), because he was residing in the mission and he always remained behind in the hostel during school holidays.

4.2.15 RW2 also testified that the Applicant's fees for upgrading lessons were paid by Father Ciccone. RW2 further testified that in or about 2003, the Applicant was employed by Ekululameni Rehabilitation Centre. It was RW2's testimony that, though the Applicant was working at Ekululameni, but he resided at the Boarding house; and he was still getting free meals, just like before.

4.2.16 RW2 further testified that eventually the Respondent employed a certain Mr Maphalala as a Boarding Master. Consequently, the Applicant was relocated to the guest house at Ekululameni. RW2 stated that Father Ciccone sent him together with Peter Shongwe to tell the Applicant to move out of the house he was presently occupying to the guest house provided by Ekululameni.

CROSS EXAMINATION

4.2.17 It was put to RW2 that the Applicant was employed as a Boarding Master. In response, RW2 stated that he was not aware that the Applicant was employed by the Respondent as alleged herein.

4.2.18 Under cross examination, RW2 maintained that the Applicant was the Father's foster child (umtfwana wemfudisi).

JABULANI MANDLAZI'S TESTIMONY

May I point out that this witness was called at the arbitrator's request as there was a dispute of fact regarding the Applicant's employment at Ekululameni. Otherwise the Respondent closed its case after having led the evidence of the two aforementioned witnesses. Therefore, I requested the Respondent's Representative to call someone from Ekululameni's management to give evidence as to how and when was the Applicant engaged by this institution.

- 4.2.19 Jabulani Mandlazi, hereinafter referred to as the third Respondent's witness (RW3), gave his testimony under oath, and he stated that he is presently employed by Ekululameni Rehabilitation Centre, which is situated at the Respondent's compound. RW3 stated that from 2007 to 2008, he was an Acting Director of Ekululameni, following the departure of the erstwhile Director, Mr Randy Fleming.
- 4.2.20 RW3 testified that personally he knows the Applicant. He said that he has known the Applicant since the time when they were students and Boarders at St Joseph's Mission. RW3 and the Applicant both went to St Joseph's High School and they were residing at St Joseph's Hostel.
- 4.2.21 It was RW3's evidence that the Applicant, Gcina Lukhele was employed by Ekululameni in or about 2001. RW3 testified that in or about 2001 the Applicant approached him and he told him that he was looking for a job in order to cater for his sister's educational expenses; his sister was said to be doing Form V. RW3 said that he referred the Applicant to the Director, Mr Fleming, and subsequently the Applicant was employed by Ekululameni, and he was based in the laboratory (optical) section. Mr Mandlazi (RW3) stated that at the time the Applicant

joined Ekululameni he was still working for the Respondent as the Boarding Master.

CROSS EXAMINATION

4.2.22 Under cross examination RW3 maintained that the Applicant was employed by Ekululameni in 2001. He said that the Applicant was employed on a fixed term contract of one year, with an option to renew. RW3 vehemently disputed the allegation that the Applicant was employed by Ekululameni in 2006.

4.2.23 It was RW3's evidence that Ekululameni Rehabilitation Centre, though headed by a Director, is part of St Joseph's Mission as a whole.

5. ANALYSIS OF EVIDENCE AND SUBMISSIONS

In the present case there are two (2) issues which I am called upon to decide namely; whether or not Applicant was employed by the Respondent. Secondly, in the event it is proved that the Applicant was an employee in terms of section 35 of the Employment Act 1980, as amended, then I will be required to determine whether the Applicant's services were terminated in line with section 36 of the Employment Act, 1980 as amended.

In casu, both parties filed their closing arguments or submissions in support of their respective cases.

It is the Applicant's submission that he was employed by the Respondent in 1999, initially as an assistant Boarding Master, and he was later promoted to the position of the Boarding Master in 2002. The Applicant contends that he entered into a verbal contract of employment with the Respondent, which was duly represented by Father Ciccone, in terms of which he was engaged as an assistant Boarding Master. He further asserts that it was agreed between the parties that he would be paid a

salary E500-00 per month, of which E400-00 was by agreement kept by Father Ciccone on his behalf and only E100-00 per month was paid to him.

The Applicant denies the Respondent's allegation to the effect that, he was not an employee to whom section 35 of the Employment Act, 1980 applied, by virtue of the fact that he (Applicant) was a member of the Respondent's immediate family. On the contrary the Applicant argues that the relationship between him and the Respondent is an employer-employee relationship, which emanates from the aforesaid contract of employment herein. In this regard, reference is made to the case of **Meshack Zwane v The Alliance Church In Swaziland (IC case No. 41/99)**, at page 4 wherein the following essential elements of a contract of employment were outlined namely; (a) an agreement (b) In terms of which services are rendered (c) under the authority of the employer (d) for remuneration.

The Applicant further avers that the salary advice slip, which was issued to him by the Respondent is a clear indication that he was the Respondent's employee.

The Applicant maintains that his services were unfairly terminated by the Respondent on the 9th September, 2006. The Applicant argues that his dismissal herein was both procedurally and substantively unfair, and that it was not permitted by Section 36 of the Employment Act 1980 as amended. The Applicant disputes the Respondent's allegation that he was never dismissed, but that he was transferred from St Joseph's Mission to Ekululameni.

In conclusion, the Applicant prays that an Award be issued in his favour for the payment of the terminal benefits set out in paragraph 2 of the Certificate of Unresolved Dispute. The Applicant submits that he should have been paid in accordance with the Government

Gazette regulating the salary of Boarding Masters. He alleges that in 2006, Boarding Masters were on Grade A which is E49000-00 per annum. The terminal benefits being sought herein are as follows; (a) Notice pay (b) Additional notice pay (c) Leave pay (d) Severance pay (e) Underpayments and (f) Maximum compensation for unfair dismissal.

On the contrary, it is submitted on the Respondent's behalf that, the Applicant was not an employee to whom Section 35 of the Employment Act 1980 applied, because the Applicant was the Member of the Respondent's immediate family. Therefore, it is argued that the Applicant can not claim to have been unfairly dismissed by the Respondent. In short the Respondent disputes that the Applicant was unfairly dismissed.

It is further argued on Respondent's behalf that the Applicant, after having completed high School, was requested by Father Ciccone to assist at the Boarding house as a Boarding Master. It is argued that the E100-00 given to him was not a salary, but it was an allowance to enable him to buy toiletry. It is the Respondent's contention that the Applicant was the Father's 'child' (umtfwana wemfundisi) and that he was assigned by the father to assist as per the Respondent's policy. It is argued that the Mission's policy is that the father is entitled to assign any of the mission's 'children' to do any work.

It is the Respondent's argument that the Applicant has failed to show that he was an employee as defined in Section 2 of the Industrial Relations Act 2000 as amended, as well as Section 2 of the Employment Act 1980 as amended. Respondent's submission that the relationship between the parties was not a contractual relationship, but it was "one of honour and obligation". It is argued that the parties were not **ad idem** and as such they never intended to form a legally enforceable contract of employment. In this regard, the Respondent inter alia,

referred to the case of **Church of the Province of Southern Africa Diocese of Cape Town V CCMA and Others [2001] 22 ILJ 2274 (LC)**.

Now turning to my analysis of both the parties' foregoing submissions and the entire evidence led herein; the Applicant is the first to discharge the onus of proof as to whether he was an employee to whom Section 35 of the Employment Act 1980 as amended applied. In the event it is proven that indeed the Applicant was an employee to whom Section 35 applied at the time of his alleged unfair dismissal, then the onus will shift to the Respondent in terms of section 42 (2) of the Employment Act 1980 as amended.

In his evidence-in chief the Applicant testified that in 1999 he entered into a verbal agreement of employment with the Respondent, which was duly represented by Father Ciccone in his capacity as the Head of the Respondent Mission, in terms of which he was appointed initially as an Assistant Boarding Master (The underlined is my emphasis). The Applicant further alleged that in 2002, following Mr Moizen Vilakati's departure he was promoted to be the Boarding Master, a position he held until his dismissal in September, 2006. The Applicant also testified that he was paid E100-00 per month, being the part payment of the agreed salary of E500-00; and the balance of E400-00 was by consent between the parties, retained or kept by the Father (Umfundisi) on his behalf.

It is my considered view that the Applicant has been able to prove that, at the time of his dismissal, he was an employee to whom section 35 of the Employment Act 1980 applied. The Respondent's evidence, in the form of RW1 and RW2 has fallen short and as such it could not rebut the Applicant's evidence in this regard. RW1 and RW2 merely alleged (without proof) that the Applicant was not employed by the Respondent, but he was assisting as

he was Father Ciccone's 'child' (umtfwana wemfundisi). This was based on the fact that the Applicant's educational expenses were paid by the Father (umfundisi); and that the Applicant was residing in the Boarding house or hostel and that he was given free meals and accommodation.

The evidence led herein reveals that none of the Respondent's witnesses (in particular RW1 and RW2) were present when the Applicant and the Respondent concluded the aforesaid contract of employment. RW1 in her evidence-in chief claimed that the Applicant was never employed by the Respondent. But surprisingly, under cross examination she admitted that she did not know whether there was a contract of employment between the Applicant and the Respondent. She admitted that the contract of employment between the parties could have been concluded privately during a meeting the father might have had with the Applicant (as the father would occasionally have a private peptalk with the foster children). On the other hand, RW2 also stated that he did not know anything about the said contract of employment.

I also hold the view that the Respondent has not been able to show that the Applicant was a member of the Respondent's immediate family. It is my considered view that a definition of an immediate family does not include a foster child. The Respondent's argument that the Applicant was a member of the Respondent's family is untenable and as such it ought to be disregarded.

On the other hand the Applicant has proved that he was an employee as defined or stipulated by both Section 2 of the Industrial Relations Act 2000 as amended and Section 2 of the Employment Act 1980, as amended. Section 2 of the Employment Act 1980 defines an employee as "any person to whom wages are paid or are payable under a contract of employment". Section 2 of the Industrial relations Act 2000 as amended defines an

employee as “a person, whether or not the person is an employee at common law, who works for pay or other remuneration under a contract of service or under any arrangement involving control by ...another person”.

The Applicant has been able to prove that he was a person to whom wages were paid under a contract of employment and or that he worked for pay or remuneration. Evidence, in the form of a payslip, was adduced by the Applicant which shows that he was paid a salary of E100-00 per month. A copy of the pay slip for the month ending 31st August, 2005 is filed of record. No documentary evidence was adduced by the Respondent to disprove this evidence.

Since the Applicant has proved that at the time of his alleged dismissal, he was an employee to whom section 35 applied; now the Respondent bears the onus of proof in terms of section 42 (2) (a) and (b) of the Employment Act 1980. In terms of section 42, the Respondent must prove that the Applicant’s services were terminated for a reason permitted by section 36 of the Employment Act 1980 as amended. The Respondent must also establish that, taking into account the circumstances of the case, it was reasonable to terminate the Applicant’s services.

With regard to the issue of the onus of proving the fairness of the Applicant’s dismissal herein; the Respondent led no evidence to specifically justify the Applicant’s dismissal. In fact, the Respondent argues that the Applicant was never employed by the Respondent in the first place. It is the Respondent’s case that the Applicant was only assisting in the Boarding House because he was the father’s foster ‘child’ (umtfwana wemfundisi). It is the Respondent’s argument that since the Applicant was the member of the Respondent’s immediate family, therefore he was not an employee in terms of section 35 of the Employment

Act, hence he could not be said to have been unfairly dismissed.

6. CONCLUSION

In light of the foregoing analysis of evidence herein, and taking into account the circumstances of the case; it is my conclusion that the Applicant was an employee to whom section 35 of the Employment Act 1980 as amended applied (as I have already pointed out above herein).

It is also my conclusion that the Respondent has failed to discharge the onus placed on it by section 42 (2) of the Employment Act, 1980 as amended, in that the Respondent has failed to prove that the Applicant's dismissal was for a reason permitted by Section 36 of the Employment Act 1980, and that the dismissal was fair and reasonable in the circumstances of the case. As I have stated in my foregoing analysis, the Respondent has not endeavored to discharge the onus of proof herein; moreso because the Respondent disputes that the Applicant was an employee as contemplated by Section 35 of the Employment Act.

Therefore, the evidence of RW1 and RW2 was led solely to establish or show that the Applicant was never employed by the Respondent and that he was a member of the Respondent's immediate family (because he was the father's foster child).

Overall, it is my finding that the Applicant was dismissed by the Respondent as alleged by him, and I am convinced that his dismissal was both procedurally and substantively unfair. In casu, it is common cause that no disciplinary hearing was held to afford the Applicant an opportunity to be heard prior to the termination of his services. RW1, Thandi Ginindza was the only witness who testified that, due to the fact that the Applicant was

employed by Ekululameni, he was unable to properly execute his duties at the Boarding House, hence Father Ciccone relieved him of his duties. Seemingly, this is the reason which led to the Applicant's dismissal. The Respondent has failed to prove that this reason was valid and warranted under section 36 of the Employment Act, 1980 as amended.

May I also point out that the Applicant's version pertaining to his contract of employment and unfair dismissal stands uncontroverted or unchallenged because of the fact that the Respondent failed to call its potential key witness, Father Ciccone to dispute or counter the allegations which relate to him in his capacity as the Head of the Respondent. For instance, the Respondent has not been able to effectively dispute the non existence of the contract of employment between the Applicant and the Respondent.

Having held that the termination of the Applicant's services was both procedurally and substantively unfair, I am now required to determine an appropriate award or compensation, which is fair and equitable in the circumstances of the case.

In my view a compensation of five (5) months' wages is fair and equitable. In arriving at this decision, I have taken into account; inter alia, the fact that the Applicant was working or employed by Ekululameni Rehabilitation Centre at the time of his unfair dismissal. With regard to his new employment, I have taken into account that he was permitted by the Respondent to continue to work for the mission whilst at the same time he was working for Ekululameni. The Respondent continued to provide him with free accommodation and meals, which I regard as part of the Applicant's benefits, associated with his job.

May I also mention that, in law an employee, although unusual, may have more than one employer. In this regard

see the case of Gogo v University of KwaZulu-Natal and Others [2007] 28 ILJ. In this case professor Gogo was employed by the University of KwaZulu-Natal, as an orthopaedic Surgeon, while at the same time he was employed by the Department of Health of the KwaZulu-Natal Province, as the Head of the orthopaedic Surgery Section.

The Applicant's compensation will be calculated at the rate of E500-00 per month, multiplied by 5 months. I do not accept the Applicant's contention that he was entitled to be paid on the Government scale applicable to Boarding Masters. The Applicant, was entitled to be paid at the agreed sum of E500-00 per month. As I stated above, I accept the Applicant's version that the parties at the inception of the contract of employment agreed on a monthly salary of E500- 00.

It is also my considered view that the Applicant is entitled to be paid the underpayment, being the outstanding balance of his wages of E400-00 per month. The underpayment will be calculated over the period of eighteen (18) months.

Regarding the leave pay, in my view the Applicant has failed to justify the payment of this claim. The Applicant led no evidence to justify this claim, hence this claim fails.

It is my considered view that the Applicant is entitled to be paid notice pay, additional notice and severance allowance.

7. AWARD

Pursuant to the foregoing conclusion and findings herein, and having taken into account the circumstances of the case, I hereby make the following award;

That the Respondent is ordered to pay to the Applicant within thirty (30) days from date of receipt of this award the following terminal benefits;

(a) Notice pay	-	E500-00	
(b) Additional notice	-	E461-52	
(c) Severance allowance	-	E1, 153-80	
(d) Underpayment	-	E7, 200-	00
(e) Compensation for unfair dismissal	-	E2, 500-	00

32 TOTAL - E11, 815-

DATED AT MANZINI ON THIS..... DAY OF OCTOBER, 2009.

ROBERT S. MHLANGA
CMAC COMMISSIONER