



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

**HELD AT MANZINI**

**MNZ 707/07**

In the matter between:

**Philile Mbingo**

Applicant

And

**Price Busters Store (PTY) LTD**

Respondent

CORAM:

**ARBITRATOR**

: Khanyakwezwe Khumalo

**FOR APPLICANT**

: **Bongani Mkoko**

**FOR RESPONDENT**

: **David Msibi**

**NATURE OF DISPUTE**

: Overtime and short  
payment

**DATE OF ARBITRATION: 24<sup>th</sup> July 2008**

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***ARBITRATION AWARD***

**1. DETAILS OF HEARING AND REPRESENTATION**

- 1.1 This arbitration hearing was held at the Conciliation, Mediation and Arbitration Commission (CMAC) offices, situated at Manzini. The pre arbitration and substantive arbitration hearings were held on the 20<sup>th</sup> June 2008 and 24<sup>th</sup> July 2008 respectively.
- 1.2 Ms. Philile Mbingo of P. O. Box 4055, Manzini is the Applicant in this matter and is represented by Mr. Bongani Mkoko of M. B. Labour Consultants. In this arbitration hearing, Ms. Phile Mbingo shall be referred to as the Applicant or simply Ms. Mbingo. Mr. Bongani Mkoko shall Mr. Bongani Mkoko shall be referred to as Mr. Mkoko or the Applicant representative.
- 1.3 The Respondent in this matter is Price Busters Store, a juristic person, and is represented by Mr. David Msibi of David Msibi & Associates. Mr. David Msibi shall be addressed as the Respondent's Representative or simply Mr. Msibi.
- 1.4 In this dispute, the Applicant alleged that the Respondent owes her overtime payment in respect of hours worked during the week as well as hours worked on Sundays. Subsequently, the Applicant reported a dispute to the Commission on the 29<sup>th</sup> October 2007. The dispute was subsequently conciliated upon under the auspices of the Commission but the parties did not reach any resolution and hence a Certificate of Unresolved Dispute was issued on the 25<sup>th</sup> February 2008. The parties voluntarily elected to refer their dispute to arbitration and the Commission appointed me to arbitrate this matter.
- 1.5 The arbitration hearing was preceded by a pre-arbitration conference on the 3<sup>rd</sup> June 2008 and the main purpose of the conference was to:

- Enable parties to be familiar with the arbitration process.
- Remind parties to exercise their right to representation.
- Establish if an interpreter shall be needed.
- Agree on the exchange of documents.
- Establish if witnesses were to be called, including the number of witnesses
- Confirm the participation of the parties in this arbitration hearing.

1.6 At the commencement of the pre-arbitration and arbitration proceedings respectively, the parties did not object to my appointment by the CMAC to be an arbitrator in this matter. Most importantly, the arbitration hearing went on smoothly.

## **2. BACKGROUND TO THE DISPUTE**

**2.1** The Applicant stated that she was employed by the Respondent on the 18<sup>th</sup> May 2007 and employment between the parties was terminated on the 26<sup>th</sup> July 2007. The Applicant continued to state that as a Trainee cashier, she earned E700.00 per month. The Applicant stated that the Respondent failed to pay her overtime for hours worked during the weekday and Sundays. The Applicant also averred that the Respondent also failed to pay her July 2007 salary.

**2.2** In her particulars of claim, the Applicant stated that the Respondent owes her the followings amounts of money:

- |                               |   |        |
|-------------------------------|---|--------|
| • Overtime payment (weekdays) | E | 596.00 |
| • Overtime Payment (Sundays)  | E | 401.70 |
| • July 2007 wage              | E | 385.82 |

**Total** **E1384.12**

**2.3** The Respondent's representative, on the other hand,

argued that the Applicant was paid all her dues while employed by the Respondent's undertaking and therefore was of the view that her application must be dismissed in its entirety.

### **3. ISSUES TO BE DETERMINED**

I am required to decide on whether or not, on a balance of preponderance, the Applicant is owed by the Respondent in respect of overtime For Sundays worked, overtime worked during weekdays and July 2007 salary.

### **4. SUMMARY OF EVIDENCE AND ARGUMENT**

#### **4.1 THE APPLICANT'S CASE**

**4.1.1** The Applicant stated that she started working for the Respondent on the 18<sup>th</sup> May 2007. The Applicant further averred that the Respondent employed her as a Trainee Cashier; earning a monthly salary of E700.00 only. It was the submission of the Applicant that the employment relationship ended on the 26<sup>th</sup> July 2007.

**4.1.2** The Applicant argued that the Respondent owes her money in respect of overtime payment as follows, effective from the 18<sup>th</sup> May 2007 to 25<sup>th</sup> July 2007:

#### **TABLE 1: OVERTIME (MON-SAT FOR 10 WEEKS)**

<b>Days of the week</b>	<b>N0. of hrs</b>	<b>Normal hours required per day</b>	<b>Overtime worked (Hrs)</b>	<b>Rate/hr (E)</b>	<b>Overtime due/day (E)</b>
Monday	9.5	8	1.5	7.02	10.53
Tuesday	9.5	8	1.5	7.02	10.53
Wednesday	9.5	8	1.5	7.02	10.53
Thursday	9.5	8	1.5	7.02	10.53
Friday	9	8	1	7.02	7.02
Saturday	9.5	8	1.5	7.02	10.53
<b>Total</b>	56.5	48	8.5		59.67

4.1.3 Testifying under oath and during cross examination, the Applicant stated that her lunch break at the Respondent's employment used to forty five (45) or thirty (30) minutes sometimes. The Applicant went on to state that her total break per day used to one (1) hour per day. The Applicant also mentioned that there used to be no other break except for the lunch of thirty (30) or forty five (45) minutes per day. At cross examination, the Applicant stated that she worked overtime both during weekdays and Sundays from the 18<sup>th</sup> May 2008 through to 25<sup>th</sup> July 2008.

4.1.4 During cross-examination, the Applicant submitted that she used to work one and a half (1.5) of overtime a day from Monday to Thursdays and one (1) hour on Fridays. On her own admission, the Applicant stated that she was not in a position to remember the exact dates on which she worked overtime.

**TABLE 2: OVERTIME (SUNDAYS)**

<b>Number of</b>	<b>Hours worked</b>	<b>Total number</b>	<b>Rate/hr (E)</b>	<b>Overtime paid (E)</b>	<b>Overtime due (E)</b>
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<b>Sundays</b>		<b>Number of hours worked</b>			
8	7.5	60	9.36	160.00	401.60

4.1.5 On the issue of overtime worked on Sundays the Applicant stated that though she remembered that she worked eight (8) Sundays worth of overtime, she however did not remember the exact days on which she worked this overtime.

4.1.6 The Applicant went on to state that the Respondent failed to pay her July 2008 salary, amounting to E385.82. The Applicant stated that although she had till shortages and loans but they were all deducted from her salary and hence the Respondent had no reason to withhold her July 2007 salary. The Applicant continued to argue that the Respondent did not submit any evidence to the arbitrator, starting her indebtedness to the Respondent in documentation form. In closing, the Applicant submitted that the Respondent must pay her all her claims.

## **4.2 RESPONDENT'S CASE**

**4.2.1** The Respondent was unable to attend this arbitration hearing allegedly on account of ill health. Regrettably, the Respondent's representative never submitted any medical certificate (s) as proof that her absence from the arbitration hearing was justified. The Respondent did not call any witnesses in support of her but instead, she was represented by Mr. Msibi. At any rate, parties agreed that the Arbitration hearing could continue.

**4.2.2** The Respondent's representative stated that the Applicant was always allowed to go on lunch; and

this was facilitated by the fact that the Respondent employed the Applicant and another cashier in order for them to take alternative turns in respect of taking their lunch breaks and any other lawful breaks.

- 4.2.3** The Respondent's representative submitted that the Applicant was allowed forty five (45) minutes of lunch break and a further fifteen (15) minutes was earmarked for a short break.
- 4.2.4** While still employed by the Respondent, business used to be temporarily closed for an hour in accordance with her religious convictions. The Respondent's representative submitted that the Applicant would therefore be free to do her own errands between twelve O'clock midday (12noon) and one o'clock in the morning (1:00am).
- 4.2.5** The Respondent's representative alleged that during Evidence-in-Chief, the Applicant submitted that she normally worked from Mondays to Sundays and never made mention of any off days; yet on cross examination, the Applicant testified that she used to get a day off during the week. The Respondent's Representative was of the view that the Applicant contradicted herself. The Respondent's representative stated that it was grossly unfair that the Applicant was claiming overtime payment for time that she spent at home. The Respondent's representative continued to mention that at any rate, this overtime claim is not contained in the Certificate of Unresolved Dispute number: 063/08. The Respondent's representative argued that the issue of overtime in respect of weekdays cannot therefore be determined by the arbitrator because it is not within his jurisdiction.
- 4.2.6** With regards to overtime worked on Sundays, Mr. Msibi argued that the Applicant failed to specify

those dates on which she worked Sundays of the months of 18<sup>th</sup> May 2007 and 26<sup>th</sup> July 2007 respectively.

- 4.2.7** The Respondent's representative argued that it is common cause that the Applicant had a loan with the Respondent. Mr. Msibi argued that it was precisely this loan amount that was deducted from her July 2007 salary.
- 4.2.8** Mr. Msibi further pointed out that prior to absconding from work on the 25<sup>th</sup> July 2007, the Applicant is alleged to have failed to account for E92.00, an amount of money that was tendered by a customer in payment of goods bought from the Respondent's business.
- 4.2.9** With regard to overtime claimed to have been worked by the Applicant during her duration of employment at the Respondent's undertaking, Mr. Msibi argued that the Applicant, never at any stage, worked seven days per week, particularly in light of her evidence under cross examination.
- 4.2.10** In closing, the Respondent's representative averred that the evidence adduced by the Applicant in this arbitration hearing absolves the Respondent from any wrongful doing and therefore prayed that the Applicant's case be dismissed.

## **5. ANALYSIS OF EVIDENCE AND ARGUMENT**

- 5.1** I would like to state from the outset that in summarizing the evidence of the parties, I have not endeavored to recount the evidence of the parties in its entirety that was brought before me during this arbitration hearing. I have, however, focused on the



evidence of the parties that will directly inform my award in this matter.

**5.2** The following were agreed facts between parties: issues:

- Date on which employment began.
- Job title.
- Rate of monthly salary.
- Date on which the dispute first arose.
- Report of Dispute.
- Certificate of unresolved Dispute.
- Memorandum of Agreement.
- Request for arbitration.

**5.3** Despite the fact that the Respondent was unable to attend the arbitration hearing on account of her ill health, the Respondent's representative, however failed to submit evidence to the effect she was indeed sick. In any event, the parties eventually agreed that the arbitration proceedings must go ahead.

**5.4** The Applicant submitted that the Respondent owes her E596.00 in respect of overtime worked from Mondays to Saturdays, between the 18<sup>th</sup> May 2007 and 25<sup>th</sup> July 2007; see Table 1: Overtime (Mon-Sat for 10 weeks).

**5.5** The Respondent's representative, on the other hand contended that the Applicant is not owed any amount of money by the Respondent because, after all, this particular claim is non-existent as the Certificate of Unresolved Dispute (see certificate No. 063/08. makes no mention of such claim at claim. I am inclined to agree with the Respondent's representative because, indeed, I have no jurisdiction whatsoever to determine a dispute that is not in the Certificate of Unresolved Dispute. Besides, it is also my finding that section 5.1 of the Report of Dispute does not clearly state in

unequivocal terms the nature of overtime the Applicant claims. Worse still, section 6.3 of the Report of Dispute clearly states that the outcome required relates to short payment and underpayments, not overtime payment.

**5.6** On the question of overtime the Applicant worked on Sundays between the 18<sup>th</sup> May 2007 and 25<sup>th</sup> July 2007, the Applicant stated that she worked 8 Sundays without being paid overtime. The Applicant also hastened to mention that she, however, did not remember the dates on which this overtime was worked. At the other end of the spectrum, the Respondent wondered when this overtime was worked in terms of specific dates. I find that between the 18<sup>th</sup> May 2007 and 25<sup>th</sup> July 2007, there were ten (10) Sundays. It is amazing that the Applicant did not know the dates on which she worked eight (8) Sundays without pay. It is my finding that the Applicant has failed to convince me with evidence that she worked eight (8) Sundays without being paid by the Respondent.

**5.7** The Applicant also averred that the Respondent owes her E385.82 in connection with the July 2007 salary. While the Applicant did not deny the fact that she had till shortages and loans with the Respondent, but she stated that she had already paid them off 7. The Applicant continued to state that the Respondent failed to submit evidence, stating that she was indebted to her. The Respondent's representative, on the other hand, argued that the Applicant had an outstanding loan with the Applicant as well as till shortages and all these outstanding amounts of money were used to offset the Applicant's indebtedness to the Respondent.

**5.8** Considering the evidence before me, I realize that the burden of proof lies with the Respondent so as to prove that the Applicant's money was legitimately deducted from her salary. Regrettably, it is my finding that the

Respondent failed to discharge this burden. I find that the Respondent failed to rise to the occasion in terms of adducing evidence to the effect the Applicant was indeed indebted to her. The Respondent failed to attend the arbitration hearing and the Applicant was unable to cross examine her on the issue of the July 2007 salary deduction. On those bases, The Respondent also failed to state the amount of money the Applicant owed her.

**59.** In the circumstances, I find that the Respondent held the Applicant's E385.82 July salary unlawfully.

**5.10** It is my considered view that, by deducting the Applicant's salary, the Respondent contravened section 57 (1) The Employment Act, 1980 (as amended) which read as follows:

**“No employer shall make any deductions from the wages due to an employee, or make any agreement or arrangement for any payment to him by the employee for or in respect of alleged bad or negligent work by the employee”.**

**5.11** Equally, section 57 (2) of The Employment Act, 1980 (as amended) further posits that:

**“An employer may, with the written consent of an employee, make deductions from the wages due to the employee in respect the loss or damage to tool, materials or other property belonging to the employer and issued to the employee where such loss or damage has been caused by default or neglect of th employee concerned”.**

**5.12** It is therefore abundantly clear to me that the Respondent was not only in contravention of section 57 (1) of The Employment Act, 1980 (as amended) but also contravened section 57 (2) of the same act.

## **6. CONCLUSION**

My conclusion is as follows:

- 6.1** On the question of overtime owed to the Applicant by the Respondent, in respect of overtime worked from Mondays to Saturdays, I find that that was not reflected on the Certificate of Unresolved Dispute as an issue in dispute at all. As it turns out, I have no jurisdiction over it.
- 6.2** On the issue of unpaid overtime for working on Sundays, I find that there were 10 Sundays between the 18<sup>th</sup> May 2007 and 25<sup>th</sup> July 2007; yet the Applicant failed to identify the 8 Sundays on which she was not paid overtime.
- 6.3** It is also my conclusion that the Respondent dismally failed to prove in this arbitration hearing that the Applicant owed her in respect of shortages and personal loans. For instance, the Respondent failed to submit any prove of till shortages and outstanding loans. Most of all, the Respondent was not available to testify against such allegation. That the Applicant is owed by the Respondent E385.82 therefore stands unchallenged.

## **7. AWARD**

After having carefully listened and analyzed the evidence of of the parties, I hereby make the following award:

- 7.1** The Applicant's application In respect of Overtime payment for both weekdays and Sundays is dismissed.
- 7.2** I, however, award the Applicant **Three Eight Five Emalangi and Eighty Two Cents only (E385.82).**

**7.3** I also order the Respondent to pay the Applicant on or before the 13<sup>th</sup> February 2009.

**DATED AT MANZINI ON THIS\_\_ DAY OF \_\_\_\_\_ 2009.**

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**KHANYAKWEZWE KHUMALO  
CMAC COMMISSIONER**

