



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

HELD AT SIMUNYE

SIM055/11

In the matter between:-

KENNETH DLAMINI

Applicant

And

KENSS ENGINEERING (PTY) LTD

Respondent

Coram:

Arbitrator : Ms N. Shongwe

For Applicant : Mr. Tom. Simelane

For Respondent : Mr. Mfanasibili Mabuza and Mr.
Smanga Shongwe

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

1. This matter was heard on the 18th January 2012 and 8th February 2012 at CMAC Offices in Simunye, Simunye Plaza in the district of Lubombo.
2. The Applicant herein is Kenneth Dlamini, an adult Swazi male of Mpaka, in the district of Lubombo. He was represented by Mr. Tom Masuku a union official from SPRAWU.

3. The Respondent is Kenns Engineering (Pty) LTD, a legal entity incorporated in terms of the company laws of Swaziland with its principal place of business at Simunye in the Lubombo district. Mr. Mfanasibili Mamba and Mr. Smanga Shongwe, the Respondent's Construction Manager and Project manager respectively, duly represented the Respondent.

ISSUES TO BE DECIDED

4. The Respondent denies that the Applicant was dismissed and states that he was suspended. The Applicant on the other hand alleges that he was procedurally unfairly dismissed. The first issue for decision therefore is whether the Applicant's indefinite suspension amounted to a dismissal. Only if this question is decided in the affirmative, will it be necessary to consider the second issue, *viz*, whether the procedural aspect of his dismissal was unfair.

BACKGROUND TO THE ISSUE

5. On the 18th January 2012 the parties were invited to a pre-arbitration hearing where issues that are common cause were identified and subsequently confirmed on record.
6. It is common cause that the Applicant was employed by the Respondent on the 1st May, 2011 as Artisan Assistant, earning **E12 p/hr**, on average the sum of **E3057.60** per month. His last salary was paid on the 30th August 2011.
7. It is common cause also that, the Applicant was engaged for a particular project power house upgrade,

which had commenced in January 2011 and was completed around the end of November 2011.

8. The parties further agreed that they would file written closing submissions for my consideration on or before the 29th February 2012 failing which I will still proceed and issue my award.

SURVEY OF EVIDENCE AND ARGUMENTS

APPLICANT'S CASE

9. Apart from the issues that are common cause Applicant testified under oath that on or about the 17th August 2011, Mr. Mabuza called him to his office to ask him about an incident that had occurred earlier on that day and then told him to go home and come back after a week. This was after he was found working with his safety belt on but without a harness.
10. Applicant testified that he returned the following week as instructed and was again told to return the following week. The reason advanced was that they were still waiting for Tony the managing Director of the main contractor, who was away at the time, to advise him that he has served his suspension punishment.
11. On or about the 3rd September Mr. Mabuza told the Applicant that he was still waiting for Tony to contact him. This went on until the 15th wherein Applicant pleaded with Mr. Mabuza that he be advised if his position had been filled.
12. On the 27th September he received a phone call from Shongwe, the Construction Manager advising him to vacate the company house but promised him that he will talk to Mr. Mabuza about him returning to work.

Later he was advised that his request had not been successful, as Mr. Mabuza had said that he would rather leave the company than have the Applicant back at work.

13. Applicant viewed the Respondents actions and the indefinite suspension to imply a dismissal and therefore wants to be compensated for the unfair dismissal.
14. During cross-examination, Mr. Mabuza asked the Applicant to state the person he was with when he saw him with the unfastened safety belt. Applicant stated that only Tony saw him and he did not see Mr. Mabuza. Applicant did however admit that they were constantly reminded about the dangers of the environment they were working on and the importance of adhering to the safety measures.
15. When quizzed about the issue of being evicted from the company house, he denied that he was given any reason thereof but later admitted that he was told that the were new tenants coming in.
16. Applicant was asked if he knew as to when the project he was engaged for was finalized. He stated that he was not sure but between November and December 2011.

RESPONDENT'S CASE

TESTIMONY OF MFANASIBILI MABUZA

17. Mfanasibili Mabuza is the Construction Manager of the Respondent Company. He testified that on the 17th

August 2011, whilst working on a project at Simunye for a powerhouse upgrade, he spotted Kenneth fitting pipes at a height of about 10m above ground without a harness.

18. At that time, he was doing rounds with the main Contractors manager Tony and they both saw Kenneth. The Respondent is a sub-contractor and they report to the main contractor on progress made.
19. Tony made his intentions known that he was disturbed by what he saw and therefore wanted the Respondent to address him on the issue during their safety awareness meetings. He said he did not wish to see the Applicant and that disciplinary measures should be taken against the recalcitrant employee as he did not take kindly to employees who fail and or ignore to adhere to the safety measures.
20. Mr. Mabuza testified that he summoned Kenneth to his office after lunch on the very same day and asked him about the incident. The Applicant is said to have made an excuse to the effect that he could not harness the safety belt from where he was.
21. The Applicant was well aware that he could not be compelled to do something that compromised the safety requirements, for instance to work at certain heights above 2m where he could not fasten his safety belt. He had even signed an induction form, that morning to the effect that he was to report should he be unable to execute orders.
22. In trying to prove Kenneth otherwise, Mr. Mabuza took Kenneth and a Safety Officer back to the scene of the incident, simulated the position, and was able harness the safety belt.

23. Despite proof thereof, the Applicant is said to have been non-apologetic and did not show any sign of remorse. Kenneth was then suspended for a week and told to come back when he was ready to work.
24. According to Mr. Mabuza, by the time Kenneth was due to returned to work, Tony was away and they could not reinstate him until they have consulted with Tony. The fate of the company was at stake and it was imperative to consult Tony, to ascertain the stance of his company towards the Respondent concerning the incident before Kenneth could be reinstated.
25. Mr. Mabuza eventually asked Tony when he saw him about the issue, even by then he still insisted that he did not wish to see the Applicant on the premises until he was disciplined for the transgression. Unfortunately, the safety panel meeting did not take place as anticipated. He then advised the Applicant that the matter was beyond his hands as they were waiting for Tony to decide on the matter.
26. The Applicant is said to have on his third visit told Mr. Mabuza that he was taking the matter further and Mr. Mabuza told him that he was not going to stop him as long as he was exercising his right.
27. Mr. Mabuza emphasized in his evidence that due to the nature of the job, the period of work cannot be predetermined but depends on the completion of that particular project.
28. Mr. Mabuza in addressing the issue of the Applicant's eviction from the company house, revealed that this was done after they received numerous complaints from Kenneth's co-workers about his behavior. It is said that the Applicant would at times come back drunk and

harass the other workers. Applicant was warned several times but he failed and or ignored the warnings and the Respondent decided that he be move out of the company house.

29. The Respondent then transferred some of its employees who were staying elsewhere to the house the Applicant was residing. No new tenants were brought in but other employees.
30. It was the testimony of Mr. Mabuza that after Tony left Applicant was offered his job back to which he refused and said that he had already found alternative employment.
31. When cross examined Mr. Mabuza revealed that the decision to reinstate the Applicant was only taken after the committee met at the beginning of November.
32. When asked about the expulsion of the Applicant from the company house, he responded that it was due to the harassment he was subjecting to his co-workers and even if the Applicant accepted the reinstatement, he was still going to find his own accommodation.
33. Mr. Mabuza admitted that in as much as he was not well versed with the laws on suspension; the Applicant was never dismissed but suspended. This was meant to protect the Applicant because Tony did not want to see him. He conceded though that he was not well versed with the country's labour laws on suspension.
34. According to Mr. Mabuza the Respondent being the sub-contractor is duty bound by the procedures laid down by the main contractor.

CLOSING ARGUMENTS

35. The parties undertook to file their closing submissions on or before the 29th February 2012, only the Respondent owned up to the undertaking. I am inclined to proceed and decide the matter in the absence of the Applicants closing submissions as parties were duly warned and or advised of the consequences of their failure to do so.

ANALYSIS OF EVIDENCE AND ARGUMENTS

36. It is common cause that the Applicant was engaged on the 1st May 2011 for a fixed -term period, a powerhouse upgrade project and was to terminate upon completion of that particular project. In the case of **The Principal Secretary Ministry of Works and Construction and others, Appeal case No. 06/1997**, the court held that there was nothing in the Employment Act or in any other law which makes it illegal for a person to be employed on a temporary basis in order for a specific job to be undertaken.
37. The Applicant is challenging only the procedural aspect of his dismissal. The enquiry into the procedural fairness of the dismissal should proceed from the premise that the parties had entered into a valid fixed - term contract of employment which was intended to endure until December 2011 but was prematurely terminated in August 2011 by the Respondent, allegedly under the guise of a suspension.
38. Grogan in his book **Workplace Law (8th Edition) at page 102** says that suspension may occur in two accepted forms, namely,

10.1 as a 'holding operation' pending further enquiry,
or

10.2 as a form of punitive disciplinary sanction.

39. According to the Applicant, on the day of the incident he was summoned to Mr. Mabuza's office wherein after discussing the incident he was suspended for a week. He admitted that he was aware that the sanction imposed for being found guilty of working at a height above two meters without a harness was suspension. He was not aware however of the duration of the suspension. The Respondent averred in this regard that the suspension was intended to be for a week.
40. From the evidence of the parties, it is apparent that the suspension was the outcome of the meeting of the 15th August 2011 as some form of punishment. It goes without saying that where this form of punishment is used where the employee must have committed an offence serious enough to warrant dismissal. The Labour Court in **Wahl v. AECI Ltd (1983) 4 ILJ 393 (IC)**, deemed the one month's suspension rather than outright dismissal appropriated for the offence of fighting. This is a clear indication that punitive suspension without pay as an appropriate penalty in certain circumstances but it must be for a specific and or pre-determined period.
41. The Applicant was initially suspended for one week from the 15th August 2011 to the 24th August 2011, unfortunately his suspension ended up being for an indefinite period. The question whether an employer can suspend an employee for an indefinite period was adequately dealt with by the Industrial court in the case of **Nkosingphile Simelane v. Spectrum (PTY) Ltd t/a Master Hardware case no. 681/2006 IC**.

The court held that, the suspension was unlawful because it purported to suspend the Applicant without pay for an indefinite period.

42. The next question that arises in the present matter is whether the Respondent terminated the employment contract when it suspended the Applicant indefinitely without pay. The **Industrial Relations Act 2000** as amended and case law has amended the common law in certain respects. However, it has not amended the general principles that a fixed term contract may not be cancelled unilaterally during its currency in the absence of a material breach of such contract. There is no doubt that at common law a party to a fixed – term contract has no right to terminate such contract in the absence of a repudiation or a material breach of the contract by the other party. In other words there is no right to terminate such contract even on notice unless its terms provide for such termination.
43. In terms of the common law, punitive suspension does not relieve the employer of the duty to pay the employee. In the case of **FOOD & ALLIED WORKERS UNION v SA BREWERIES LTD (1992) 1 LCD 35 (IC)**, the court said,
'In terms of the common law, an employer is entitled to suspend an employee unilaterally provided that he continues to pay wages for so long as the employee's services remain available. Failure to pay wages would be a repudiation of the employment contract. [My emphasis]
44. Respondent conceded that Applicant was suspended for an indefinite period, but tried to justify its actions by blaming it all on Tony, who is neither an employee of the Respondent nor a party to this matter. Based on these averments I conclude that the Respondent's

action repudiated the employment contract. Accordingly, the termination of such contract before the end of its term was unfair and constituted an unfair dismissal.

45. This proposition is consistent with the approach adopted in **Meyers v Abrahamsom 1952(3) SA 121(C)**. In that case **Van Winsen J** laid down the correct approach for computing damages for a premature dismissal in the following terms at 127E:

“The measure of damages accorded such employee is, both in our law and in the English law, the actual loss suffered by him represented by the sum due to him of the unexpired period of the contract less any sum he earned or could reasonably have earned during such latter period in similar employment.”

46. I therefore find that that the appropriate compensation to redress the procedural unfairness is an amount equivalent to the remuneration the Applicant would have been paid for the balance of the contract period less the amount he obtained from other employment. Such amount is equivalent to two months' pay based on the uncontroverted evidence of the Respondent that Applicant was offered reinstatement on or about the beginning of November, which offer he refused alleging that he has found alternative employment. The Applicant confirmed that he was last paid on the 30th August 2011, which means he will only be compensated for the months of September and October 2011.

AWARD

43. The following order is made;

43.1 The respondent is ordered to pay to the Applicant an amount equivalent to two months' salary calculated at the rate of his pay at the time of his dismissal.

43.2 The Respondent is further ordered to pay the Applicant within 30 calendar days upon receipt of this award

43.3 There is no order as to costs.

**THUS DONE AND SIGNED AT MANZINI ON
THIS.....DAY OF APRIL, 2012**

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NONHLANHLA SHONGWE
CMAC COMMISSIONER