



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

HELD AT MBABANE

SWMB92/14

In the matter between:-

MANYIKA JOHANE

APPLICANT

And

CASSAY INVESTMENT (PTY) LTD

RESPONDENT

CORAM:

Arbitrator : Commissioner Siphon Nyoni

For Applicant : In person

For Respondent : Mr. Esaw Chirwa

ARBITRATION AWARD

Venue : Asakhe House 1st Floor Mbabane

Dates of Arbitration : 3rd June 2014, 12th June 2014, 18th June
2014, 3rd July & 4th July 2014

Nature of Dispute : Unfair Dismissal

1. Details of Parties and Hearing:

- 1.1 The Applicant is Manyika Johane an adult male Mozambican national residing in Mbabane Swaziland. The Applicant represented himself during the arbitration hearing.
- 1.2 The Respondent is Cassay Investment (PTY) Ltd trading as Canon Swaziland, a company duly incorporated in terms of the law and having its principal place of business at Sidwashini Mbabane.
- 1.3 The arbitration hearing was held at CMAC Mbabane Asakhe Building.

2. Issue for determination:

- 2.1 The issue for determination pertains to whether the dismissal of the Applicant was procedurally and substantively fair.

3. Background to the dispute:

- 3.1 The Applicant is an adult male Mozambican national and alleges to have been employed by the Respondent.
- 3.2 Applicant further alleges to have been dismissed by the Respondent and now therefore challenges the fairness of the dismissal.
- 3.3 The dispute was reported by the Applicant to the Commission, conciliated upon and subsequently certified as unresolved. A certificate of unresolved

dispute issued at the conclusion of the conciliation proceedings.

3.4 The certified issues in dispute which appear ex facie the certificate of unresolved dispute are; notice pay E 1,650.00, additional notice E 3,300.00, severance pay E 8,250.00 and maximum compensation for unfair dismissal E 19,800.00.

3.5 The dispute was referred to arbitration by the consent of both parties who signed the CMAC FORM 8 Request for arbitration and I was appointed to arbitrate over the dispute.

4. Summary of the evidence:

4.1 Applicant was the only witness who testified in support of his case. A summary of the most important aspects of the Applicant's evidence influencing the outcome of this matter are detailed herein below;

Manyika Johane (AW1):

4.2 The Applicant testified that he was employed by Mr Cassim Suleman to work as a Gardner at his home. The Applicant however stated that he could not recall the exact date when he was employed.

4.3 Applicant stated that he never received any written particulars of employment when he was engaged. He testified that he earned a monthly wage of E 1,650.00 (one thousand six hundred and fifty Emalangen) and that he received his salary directly from Mr Cassima. It was the Applicant's evidence that he worked five days a

week and would also work on Saturdays when requested to do so.

4.4 Applicant testified that Mr Cassima would also request him to attend to certain deliveries at his shop which he operated. It was the Applicant's testimony that Mr Cassima first operated the business from his garage at his home and subsequently opened a shop at Sidwashini where he also worked. Applicant stated that he would attend to making deliveries together with the other staff at the shop.

4.5 Applicant testified that sometime in July 2012 he fell ill and had to return back to his home country to treat himself. He stated that Mr Cassima gave him permission to go and attend to his health and further assured him that his job would be safe and waiting for his return.

4.6 Applicant stated that upon his return in July 2013 he found that Mr Cassima was no longer in Swaziland and that when he reported for work at the business Shop he was informed that there was no work for him.

4.7 It was the Applicant's testimony that he considered himself as having been unfairly dismissed because he had been given permission to go on sick leave and further been assured that his employment was safe. Applicant stated that he had not been afforded a disciplinary hearing before being dismissed by the Respondent.

4.8 Under cross-examination the Applicant was asked who had employed him and the Applicant responded by stating that he had been employed by Mr Cassima. Still

under cross examination the Applicant confirmed that he reported directly to Mr Cassima and that he had discussed all issues with Mr Cassima.

- 4.9** The Applicant was further asked as to where he was employed to work and the Applicant stated that he worked from Mr Cassima's home and that after Mr Cassima opened his shop he worked both at Mr Cassima's home and at the shop.

5. Respondent's case:

- 5.1** The Respondent led only one witness in evidence and a summary of the most important aspects of the witness's evidence influencing the outcome of this matter are detailed herein below.

Muzi Maseko (RW 1):

- 5.2** This witness testified that he is a Co- Director of the Respondent. The witness confirmed that he knew the Applicant and that to his knowledge the Applicant had been employed by Mr Cassima as Gardner to work at his home.
- 5.3** The witness testified that the Applicant worked at the home of Mr Cassima and would occasionally assist at the business owned by Mr Cassima being the Respondent.
- 5.4** RW1 stated that Mr Cassima was the sole director of the Respondent at the time when the Applicant occasionally assisted at the Respondent's shop. The witness stated that the Applicant was paid for any work that he did at the shop as such work was over time work for him. The witness stated that the Applicant would also wash the

Respondent's cars on Saturdays and was paid separately for such work.

5.5 The witness stated that on or about November 2012, Mr Cassima sold the Respondent to him and the other employees. The witness submitted a copy of the deed of sale as part of his evidence.

5.6 The Witness reiterated that he was present when the Applicant was employed by Mr Cassima and that the Applicant was not employed by the Respondent but was employed by Mr Cassima personally to work at his home as a Gardner.

5.7 The witness stated that the Applicant had instituted the present proceedings against the Respondent because he could not locate Mr Cassima as he had relocated and had further sold his house in Swaziland.

5.8 Under cross examination the Applicant asked the witness why he had received a bonus from the Respondent if he was not an employee of the Respondent. The witness stated that the receiving of a bonus was not evidence that the Applicant was an employee but was rather done by the Respondent as a token of appreciation for whatever work he had done for the Respondent and had also been given to the Applicant to make him feel that he was part of the company.

6. Analysis of the evidence and arguments:

6.1 I have in this award considered all the evidence and arguments by the parties. In view of the requirements of

Section 17 (5) of The Industrial Relations Act 2000 (as amended), I herein below set out concise reasons to substantiate my award.

- 6.2 In the present case the Applicant seeks relief in the following respect; notice E 3,300.00, severance pay E 8,250.00 and maximum compensation for unfair dismissal E 19,800.00 totalling to E 30,800.00 (thirty thousand eight hundred Emalangeneni).
- 6.3 The Respondent denies that the Applicant was its employee and consequently denies that it dismissed the Applicant.
- 6.4 In view of the defence advanced by the Respondent it is therefore necessary to determine whether the Applicant was an employee of the Respondent before proceeding to determine whether the dismissal was fair or unfair. **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 other arrangement involving control by or sustained dependence for the provision of work upon, another person.*
- 6.5 The Applicant bears the onus of proving that he was an employee of the Respondent see; **Percy Lokotfwako vs. Swaziland Television Broadcasting Corporation Industrial Court Case No. 151/2007**
- 6.6 The evidence before me shows that the Applicant was under the direct control of Mr Cassima. The Applicant received his remuneration directly from Mr Cassima. The

Applicant by his own admission was employed to work as a gardner and was to work from Mr Cassima's home. The Respondent according to the evidence only started operating after the Applicant had been employed. It is also unchallenged evidence that the Applicant continued to work at Mr Cassima's house after the Respondent had set up its shop and that the Applicant would only work at the Shop when requested to do so.

6.7 For the purpose of this case it is necessary to distinguish between the Respondent as a juristic person and Mr Cassima as a natural person. Notwithstanding the fact that Mr Cassima was the sole director of the Respondent, the Respondent is a distinct legal entity having capacity to sue and be sued in its own name. From the evidence presented it is evident that the Applicant was an employee of Mr Cassima in his personal capacity and not an employee of the Respondent.

6.8 It is therefore my finding that the Applicant has failed to set out a case for unfair dismissal as against the Respondent. The Applicant is however not left without remedy as he may still pursue his claim as against Mr Cassima Suleman personally if he is so advised.

7. Award:

7.1 The award that I make is as follows:

7.2 The Applicant's claim for unfair dismissal is dismissed.

7.3 No order for costs is made.

DATED AT MBABANE ON THE __ DAY OF AUGUST 2014

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SIPHO M NYONI
CMAC ARBITRATOR