



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

**HELD AT MBABANE**

**SWMB 123/2014**

In the matter between:-

**LINDIWE KHOZA**

**APPLICANT**

And

**PEAK STRIKE FORCE**

**RESPONDENT**

CORAM

**Arbitrator** : Commissioner Siphon Nyoni

**For Applicant** : In person

**For Respondent** : Maqhawe Shiba

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**ARBITRATION AWARD**

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Venue : Asakhe House Mbabane

Dates of Arbitration : 8<sup>th</sup> July 2014, 24<sup>th</sup> July 2014, 5<sup>th</sup> August  
2014, 19<sup>th</sup> August 2014,

Nature of Dispute : Unfair Dismissal

## **1. Details of Parties and Hearing:**

- 1.1 The Applicant is Lindiwe Khoza an adult Swazi female of Nsoko within the Lubombo District. The Applicant represented herself during the arbitration hearing.
- 1.2 The Respondent is Peak Strike Force (PTY) Limited a company duly incorporated in terms of the law and having the capacity to sue and be sued in its own name. The Respondent has its principal place of business located at Pigg's Peak within the district of Hhohho Swaziland. The Respondent was represented by its Human Resources Manager Mr Maqhawe Shiba.
- 1.3 The arbitration hearing was held at the CMAC Offices in Pigg's Peak civic centre.

## **2. Issue for determination:**

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

## **3. Background to the dispute:**

- 3.1 The Applicant is an ex-employee of the Respondent having been engaged on the 29<sup>th</sup> of February 2012 in the position of a general labourer.
- 3.2 The Applicant's employment was terminated on the 12<sup>th</sup> of March 2014.
- 3.3 Applicant challenges the fairness of the dismissal on the grounds of both procedural and substantive unfairness.

- 3.4** The Applicant reported a dispute with the Commission, the dispute was conciliated upon and a certificate of unresolved dispute subsequently issued.
- 3.5** The parties consented to have the matter referred to arbitration and CMAC FORM 8 - consent to arbitration signed by both parties.
- 3.6** The certified issues in dispute as appear from the certificate of unresolved dispute include the following; notice pay E 840.00, additional notice E 168.00, leave pay E 756.00, remainder of contract E 50,400.00, severance pay E 420.00 and funeral policy E 960.00.

#### **4. Issues not in dispute:**

- 4.1** A pre-arbitration meeting was held for the purpose of narrowing down the issues in dispute. The parties agreed on the following as being common cause and therefore not in dispute
- a) That the Applicant's daily rate was E 42,00 (forty two Emalangi)
  - b) That the Applicant worked a five day week
  - c) That the Applicant started working for the Respondent on the 29<sup>th</sup> of February 2012 and her employment terminated on the 12<sup>th</sup> of March 2014.

#### **5. Summary of evidence**

**5.1** Applicant had two (2) witnesses being one Menzie Manana and herself. The Respondent had four witnesses. A summary of the most important aspects of the witnesses evidence influencing the outcome of these proceedings

**Menzi Velebantfu Manana (AW1)**

**5.2** He testified that he was also a former employee of the Respondent and had been employed at the same time as the Applicant. The witness stated that the Respondent had a five year contract with its principal and that when he and the Applicant were engaged they were told that they would be engaged for the remainder of the period which the Respondent had with its principle (Swaziland Plantations).

**5.3** The witness testified that he also never went on leave whilst he was employed by the Respondent. He stated that when he was employed he was informed that he was entitled to one leave day a month.

**5.4** Under cross examination the witness was asked if he was aware whether or not the Applicant was paid her leave days for the year ending December 2013. The witness stated that he was not aware. It was then put to the witness that the Applicant had been paid all her leave days that were due as at end of 2013.

**Lindiwe Khoza (AW2)**

**5.5** She testified that she considered her dismissal as being unfair because she never committed the offence she had been dismissed for. The Applicant further stated that she had not been given sufficient notice to enable her to prepare for her disciplinary hearing.

- 5.6** She further testified that she had been charged for altering a doctor's sick note. She stated that on the 13<sup>th</sup> of February 2014 she was not well and had requested from her supervisor to go to the hospital. It was the witnesses' evidence that her doctor gave her one day off work. Applicant stated that on the 14<sup>th</sup> of February 2014 she did not report for work as she was still not well. It was the Applicant's evidence that she reported her absence to her immediate supervisor and further informed the supervisor that she would only return back for work on the 17<sup>th</sup> of February 2014 which was a Monday.
- 5.7** Applicant testified that she reported for work on the 17<sup>th</sup> of February and on the 18<sup>th</sup> of February the Human Resources Manager approached her and enquired about the sick sheet she had submitted and sought clarification on the dates mentioned on the sick sheet.
- 5.8** Applicant testified that she was subsequently given a notice to attend a disciplinary hearing as she had been charged with fraud in that she had altered the dates of her sick sheet.
- 5.9** It was the Applicant's evidence that she had tried to explain during the disciplinary hearing that she attended to the hospital on the 13<sup>th</sup> of February and was given one day off by her doctor. She stated that she could not return to work on the 14<sup>th</sup> of February because she was still not well and duly reported to work on the 17<sup>th</sup> of February 2014. The Applicant stated that the 15<sup>th</sup> and 16<sup>th</sup> of February 2014 were Saturday and Sunday respectively and that she did not work on weekends.
- 5.10** The Applicant stated that notwithstanding her explanation she was dismissed by the Respondent. The Applicant denied altering the dates on the sick sheet to read that she was due

to return to work on the 17<sup>th</sup> instead of the 14<sup>th</sup> of February 2014.

**5.11** Regarding her leave claim, the Applicant testified that she had never gone on leave ever since she was employed by the Respondent. In regard to the funeral policy claim, the Applicant stated that deductions were effected upon her salary by the Respondent but no policy was ever given to her as proof of the insurance.

**5.12** Applicant testified that when she was employed she had signed a five year contract of employment and that she therefore wanted to be compensated for the unfair termination of her contract of employment by being paid the outstanding months on contract.

**5.13** Under cross examination the Applicant was asked if she knew the contract she had signed and the Applicant responded by stating that she did not have a copy of it as it was never given to her to keep. The Applicant was further asked if the five year duration she mentioned was stated in the contract. The Applicant responded by stating that she had been verbally notified of the five years.

## **6. Respondent's case/version:**

**6.1** The Respondent led four witnesses in support of its case. A summary of the most important and relevant aspects of the witnesses evidence influencing the outcome of these proceedings is detailed herein below.

**Fikile Mtambo (RW1)**

- 6.2** She testified that she knew the Applicant and that before becoming the Applicant's supervisor she worked alongside the Applicant.
- 6.3** The witness stated that on the 13<sup>th</sup> of February 2014, the Applicant requested to go to the hospital as she was not feeling well. The witness stated that the Applicant had refused to take her tools in the morning when same were being issued out to all workers and had stated that she was certain that her doctor would give her the rest of the day off and therefore it would be pointless to take the tools. RW1 stated that in the evening of the 13<sup>th</sup> of February 2014 the Applicant came to her house and found her in the bath and handed over a sick sheet.
- 6.4** RW1 testified that later on in the evening of the 13<sup>th</sup> she met the Applicant and enquired from her if she would be at work on the 14<sup>th</sup>. RW1 stated that the Applicant responded by stating that she was only going to return on the 17<sup>th</sup> as her doctor had given her up to the 17<sup>th</sup> to return to work. The witness submitted as part of her evidence a copy of the sick sheet which she had received from the Applicant.
- 6.5** RW1 stated that she was troubled by the Applicant's response that she would return to work on the 17<sup>th</sup> because when she read the doctors note she thought that the doctor had written the 14<sup>th</sup> as the date upon which Applicant was to return to work.
- 6.6** RW1 stated that she took the sick sheet to the Human Resources manager as she could tell that the dates on the sick sheet had been tempered with as the 14<sup>th</sup> had been altered to read 17<sup>th</sup>.

**6.7** Under cross examination the Applicant put it to the witness that she had reported to her that she would not be fit to return to work on the 14<sup>th</sup> but would only return on the 17<sup>th</sup> of February. The witness denied the applicant's statement and stated that the Applicant had stated that she would return on the 17<sup>th</sup> because the doctor had given her to that date.

**6.8** The witness was further asked why she had signed the time sheet as absent on the 14<sup>th</sup> if the doctor had stated that she was only to return to work on the 17<sup>th</sup>. The witness stated that the Applicant had signed the register as being absent on the 14<sup>th</sup> because she acknowledged that the sick sheet required her to return on the 14<sup>th</sup>. RW1 further stated that the time sheet had only been signed on the 16<sup>th</sup> which was a Sunday and not on the 14<sup>th</sup>.

**Justin Chirwa (RW2):**

**6.9** RW2 testified that he was the chairman at the Applicant's disciplinary hearing. He stated that the charge which the Applicant faced at the hearing related to fraud. RW2 stated that at the beginning of the hearing he had explained the rights which the Applicant had.

**6.10** RW2 stated that during the hearing he directed that hearing proceed to the hospital where the doctor worked. He stated that the evidence of the doctor was to the effect that he had not given the Applicant up to the 17<sup>th</sup> of February to return to work. RW2 stated that the doctor confirmed that his handwriting on the sick sheet had been altered.

**6.11** RW2 stated that it was on the basis of the doctor's evidence that he had found the Applicant guilty and recommended that



the Applicant be dismissed. RW2 stated that he was guided by the Respondent's disciplinary code. RW2 denied that he was the person who also presided over the Applicant's appeal and stated that he had merely advised the Applicant of her right to appeal.

### **Londiwe Mathunjwa (RW3)**

**6.12** RW3 testified that she presided over the Applicant's appeal hearing. She stated that the Applicant had complained about the short notice that she had been given in preparation of her disciplinary hearing. The witness stated that after having considered the entire Applicant's submission she found that the disciplinary hearing had been procedurally and substantively fair.

**6.13** RW3 was not questioned by the Applicant.

### **Sarah Ginindza (RW4)**

**6.14** She testified that she also worked with the Applicant. She stated that on the 14<sup>th</sup> of February 2014, their supervisor had called them and showed them the Applicant's sick sheet and cautioned them against tempering with sick sheets. RW4 stated that when the sick sheet was showed to them she also personally noticed that the dates on the sick sheet had been tempered with.

## **7. Analysis of the evidence and arguments:**

**7.1** I have in this award considered all the evidence and arguments of 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 findings.

**7.2 Section 42 (2) of The Employment Act 1980** places the onus upon the employer to show that the termination of the Applicant's employment was one permitted by **Section 36 of the Employment Act**.

**7.3** It is not in dispute that the Applicant was employed by the Respondent. Neither is it alleged by the Respondent that the Applicant was employed in terms of a fixed term contract whose duration had since lapsed. Consequently therefore I find that the Applicant has also discharged the burden placed by **Section 42 (1) of the Employment Act** of showing that at the time her services were terminated she was an employee to whom **Section 35 supra** applied.

**7.4** The crux of the Respondent's case against the Applicant is that she altered her doctor's sick sheet to read that she was due to return to work on the 17<sup>th</sup> of February as opposed to the 14<sup>th</sup> of February 2014.

**7.5** The Respondent led four witnesses in evidence in an effort to prove the offence. RW1 testified that she was the Applicant's supervisor and that she had received the sick sheet from the Applicant. RW1 further testified that the Applicant had informed her on the 13<sup>th</sup> of February after submitting the sick sheet that she would only return to work on the 17<sup>th</sup> as the doctor had given her till the 17<sup>th</sup>. RW2 testified that he was the chairperson of the disciplinary hearing. RW2 stated in his evidence that the doctor who had written the sick sheet had confirmed that he had not given the Applicant up till the 17<sup>th</sup> of February 2014 to return to work.

- 7.6 The Applicant in her defence states that her sick note mentions the 14<sup>th</sup> of February as the date upon which she was due to return to work. The Applicant testified that she never reported to work on the 14<sup>th</sup> because she was not well and not because her sick sheet mentioned the 17<sup>th</sup> of February as her return date to work. In essence the Applicant's case is that she denies altering the dates on her sick sheet.
- 7.7 Having considered the evidence of both the Applicant and the Respondent's witnesses, I find that the Respondent's version of events is more probable than that of the Applicant.
- 7.8 The Applicant did not challenge or dispute the evidence of RW2 who testified that the doctor had confirmed during the disciplinary hearing that his handwriting on the sick note had been tempered with. The evidence of RW1 to the effect that Applicant reported on the 13<sup>th</sup> that she would only return to work on the 17<sup>th</sup> was not disputed by the Applicant. The Applicant's version of events is clearly an afterthought formulated upon discovery that the sick sheet had been found to be a forgery.
- 7.9 The Respondent submitted that the offence was a dismissible one in terms of **Section 36 (b) and (i) of the Employment Act 1980 (as amended)**.
- 7.10 **Section 36 (b) of the Employment Act** permits an employer to terminate the services of an employee because that employee is guilty of a dishonest act. **Section 36 (i)** is however irrelevant to the present case as it relates to instances when an employer is unable to continue employing a person without contravening the Act or other law.

7.11 Tempering with a sick sheet is undoubtedly a dishonest act and affects the element of trust in the employer and employee relationship. I therefore find that the dismissal of the Applicant was substantively fair.

7.12 The Applicant also claimed that her dismissal was procedurally unfair. The Applicant however led no evidence to substantiate this aspect of her case against the Respondent. The Respondent however led the evidence of RW2 who testified that he was the chairperson at the hearing. RW2 testified that he explained all the rights that the Applicant had at the hearing and that he followed all the procedures stipulated in terms of the Respondent's disciplinary code. The evidence of RW3 who was the chairperson of the appeal hearing was also to the effect that Applicant had not made any complaint about short notice during the disciplinary hearing and that the Applicant had not noted any objections during the hearing. From the evidence placed before me it is evident that the applicant was served with a notice to attend a disciplinary hearing, she was at the hearing advised of her rights and she was further afforded an opportunity to appeal the decision of the disciplinary hearing.

7.13 I therefore find that the dismissal was procedurally fair.

**Leave claim:**

7.14 The Applicant testified that she never went on leave and therefore sought payment of leave in the total amount of E 756.00 (seven hundred and fifty six Emalangeni). The Applicant in her evidence did not state how many leave days she had accumulated. The Respondent did not dispute the Applicant's entitlement to payment in lieu of leave days due. The Respondent however submitted a copy of the Applicant's salary advice for the month of December 2013 and stated that

the Applicant had been paid E 420.00 (four hundred and twenty Emalangeni) in lieu of leave days due as at December 2013. The Respondent in its submission conceded to only three leave days that were due to the Applicant being for the months of January 2014 to March 2014 when the Applicant was eventually dismissed.

7.15 Having considered both submissions of Applicant and Respondent with regards the leave claim, I find that the Applicant has not made out case to substantiate her claim for E 756.00 (seven hundred and fifty six Emalangeni). However in view of the Respondent's concession to the three leave days due, it is my finding that the Respondent pays to Applicant the amount of E126.00 (one hundred and twenty six Emalangeni) in lieu of the three leave days calculated at the Applicant's daily rate of E 42.00 (forty two Emalangeni).

**Funeral policy:**

7.16 The Applicant seeks a refund of her monthly premiums which were deducted against her salary by the Respondent. The Applicant's evidence was to the effect that she never received a policy from the Respondent as proof that she had joined a funeral policy scheme. The Respondent however submitted that all premiums were forwarded to the broker on a monthly basis and that the funeral policy was a prerequisite for all its employees.

7.17 Upon a perusal of the contract of employment which was submitted as part of the Respondent's bundle of documents it is evident that the Applicant was required to join and be a

member of a funeral policy scheme and that such monthly premium would be deducted from the Applicant's salary.

7.18 In the absence of proof that the monthly premiums were not remitted by the Respondent to the broker I find no legal basis to order for the repayment to Applicant of all its monthly premiums.

7.19 The claim for payment of the sum of E960.00 (nine hundred and sixty Emalangeni) is accordingly dismissed.

## **8. Award:**

8.1 The award that I make is as follows:

8.2 The dismissal is held to be procedurally and substantively fair

8.3 The Respondent is ordered and directed to pay to Applicant compensation in the amount of E146.00 (one hundred and forty six Emalangeni) in lieu of three leave days.

8.4 The Applicant's claim for payment E 960.00 ( nine hundred and sixty Emalangeni) in respect of a funeral policy scheme is dismissed

8.5 No order for costs is made.

8.6 The Respondent shall pay the total amount of E146.00 (one hundred and forty six Emalangeni) at CMAC Offices- Pigg's Peak on or before the 11<sup>TH</sup> OF November of 2014.

**DATED AT MBABANE ON THE \_\_ DAY OF OCTOBER 2014**



**SIPHO M NYONI**  
**CMAC ARBITRATOR**