



**CONCILIATION                      MEDIATION                      AND  
ARBITRATION                      COMMISSION**

**HELD AT MBABANE**  
**103/14**

**REF      NO:      SWMB**

In the matter between:

**SIPHO FORTUNE SHABALALA**

**APPLICANT**

**AND**

**WAKHI PLANT HIRE (PTY) LTD**

**RESPONDENT**

**Coram**

**ARBITRATOR**

**:**

**VELAPHI Z. DLAMINI**

**FOR APPLICANT**

**:**

**DUMSANI MABUZA**

**FOR RESPONDENT**

**:**

**NO APPEARANCE**

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**ARBITRATION AWARD  
EX PARTE**

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## **1. DETAILS OF HEARING AND PARTIES**

- 1.1 The arbitration hearing was held on the 23<sup>rd</sup> October, 2014 at the offices of the Conciliation, Mediation and Arbitration Commission (CMAC) at the first floor Asakhe House in Mbabane, Swaziland.
- 1.2 The Applicant is Sipho Fortune Shabalala, an adult Swazi male of Ngwenya in the Hhohho region. The Applicant was represented by Dumsani Mabuza from the firm of Labour law consultants, DSM and Associates based in Mbabane.
- 1.3 The Respondent is Wakhi Plant Hire (Proprietary) Limited, a company duly incorporated in terms of the company laws of Swaziland with its principal place of business at Ngwenya. During pre-arbitration stage the Respondent was represented by lawyer Mr. Sikelela Zwane from Manzini, however he withdrew before the arbitration hearing was held.

## **2. ISSUES TO BE DECIDED**

- 2.1 The first issue for determination is whether or not the Applicant was dismissed by the Respondent.
- 2.2 In the event it is found that he was dismissed, a finding has to be made whether or not the termination of his services was substantively and procedurally fair.
- 2.3 The third issue to be decided is whether or not the Respondent owed the Applicant overtime in respect of Sundays and normal working days.

2.4 Lastly, a finding has to be made whether or not the Applicant is entitled to leave pay.

### **3. BACKGROUND FACTS**

3.1 The Applicant was employed by the Respondent on the 3<sup>rd</sup> May, 2013 as a Front Loader Operator. He was in continuous service with the Respondent until the 13<sup>th</sup> January, 2014 when he stopped rendering services to the company allegedly after his foreman asked him to stay at home while the front loader he was using was being repaired. When he left employment he was earning the sum of E2 400.00 per month.

3.2 The Applicant reported a dispute for unfair dismissal which was conciliated, however it remained unresolved, hence a Certificate of Unresolved Dispute no. 215/14 was issued by the Commission. The dispute was referred to arbitration by an order of the Industrial Court in terms of Section 85 (2) of the Industrial Relations Act 2000 (as amended). I was then appointed to decide same.

3.3 The Applicant claims the following: Notice pay - E2 400.00; leave pay - E92.30; overtime for Sunday - E505.60; overtime for normal days - E6 067.00 and compensation for unfair dismissal - E28 800.00.

### **4. SURVEY OF EVIDENCE AND ARGUMENTS**

4.1 The Applicant was the only witness who gave evidence to substantiate his case. The Respondent was not represented during arbitration, consequently no evidence was led in support of its case.

- 4.2 It was the Applicant's evidence that his duties were to load iron ore dust on the trucks that transported the ore from the Salgaocar Ngwenya Mine to Mpaka.
- 4.3 According to the Applicant, he worked twelve (12) hour shifts from 6am to 6pm, seven (7) days per week. He stated that in terms of the government gazette, he was supposed to work eight (8) hours per shift, six days per week. It was the Applicant's evidence that despite working overtime since he was employed until he was told to stop working, the Respondent never paid him for the overtime worked.
- 4.4 The Applicant testified that on the 13<sup>th</sup> January, 2014 when he was about to start his shift, he was approached by his foreman a certain Mr. Madonsela who informed him that, the manager had ordered that he should stop working. According to the Applicant, he asked his foreman the reason for the manager's decision, however Madonsela failed to give him any.
- 4.5 The Applicant's evidence was that, after a month waiting at home, he wrote a letter to the Respondent on the 13<sup>th</sup> February, 2014, enquiring about his position. However there was no response until he decided to write another letter on the 10<sup>th</sup> March 2014, again his employer never bothered to reply. He then reported a dispute to the Commission.
- 4.6 According to the Applicant, because the Respondent did not have a valid reason for dismissing him and no disciplinary hearing was held, he viewed the termination of his services as substantively and procedurally unfair.

- 4.7 It was the Applicant's evidence that he was currently unemployed. He stated that he was married and had three children who were dependent on him.

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

- 5.1 The arbitration was set down for hearing on the 23<sup>rd</sup> October, 2014 at 10:00am. When the parties were called at 10:38am, only the Applicant and his representative, Mr. Dumsani Mabuza were in attendance. The Respondent was not represented. Mr. Mabuza applied for the matter to be heard ex parte (in the absence of the Respondent).
- 5.2 According to CMAC Form 20 (Proof of Service - Hand Delivery), the invitation to arbitration was served on the Respondent through Ms. Khanyisile Msibi, who was a co-director of the company..
- 5.3 **CMAC Rule 27(1)** reads as follows:

***“If a party to a dispute fails to attend an arbitration hearing or is not represented at an arbitration, and the commissioner is satisfied that the party not in attendance or not represented was properly notified of the arbitration hearing and that there is no just and reasonable explanation for that party's failure to attend or non-representation, the commissioner may-***

**(a) dismiss the matter, if the party who referred the dispute to the Commission fails to attend the hearing or is not represented.**

**(b) proceed to arbitrate the dispute in the absence of that party, if the party against whom relief is sought fails to attend the hearing or is not represented”.**

5.4 There was no explanation given by the Respondent for its failure to attend the arbitration hearing. Bearing in mind that even on the 15<sup>th</sup> October, 2014 the Respondent failed to attend or was not represented, yet there was proof that the company was served through Ms. Khanyisile Msibi the co-director, it would be unfair to keep on postponing the arbitration in the absence of a reasonable explaining from the company for its default of appearance. I then ordered the matter to proceed in the absence of the Respondent.

5.5 **Section 42(1) of the Employment Act, 1980** states that where an employee claims that his or her dismissal was unfair and sues the employer as a consequence thereof, he or she should first prove that, he or she was an employee to whom **Section 35 of the Employment Act** applied.

5.6 Essentially, the Applicant had to prove that: he had completed probation; he was not a casual employee; he was not a member of the immediate family of the employer; and lastly; that he was not engaged for a fixed term whose term of engagement had expired.

- 5.7 The Applicant stated under oath that he had worked continuously for the Respondent for eight (8) months. **Section 32 of the Employment Act** provides that the probationary period of an employee who is not engaged on supervisory, confidential and technical work, shall be three (3) months.
- 5.8 Although the Respondent, by default of appearance, failed to challenge the Applicant's evidence, at pre-arbitration both parties filed the pleadings that had been used in Court and urged me to incorporate them as part of these proceedings. In its replies the Respondent did not dispute the fact that the Applicant was an employee to whom **Section 35 of the Employment Act** applied. I find that the Applicant has discharged his onus and as such is entitled to sue the Respondent for the alleged termination of his services.
- 5.9 The Applicant having discharged his onus, the burden then shifted to the Respondent to prove that the termination of the Applicant's services was one permitted by **Section 36 of the Employment Act**, and that taking into account all the circumstances, it was reasonable to dismiss him.

See **Section 42(2) of the Employment Act 1980**.

- 5.10 I have alluded to the fact that despite its failure to attend the arbitration, the Respondent's case is encapsulated in its reply to the Applicant's statement of claim.
- 5.11 A reading of the set of pleadings reveals the following facts: it is common cause that the Applicant was instructed to stop working; the reason for the instruction was that his front loader was broken and had to be repaired. According to the Respondent, the

Applicant was told that he should return after a month when it was anticipated that the front loader would be in working condition.

5.12 In its reply the Respondent further averred that the Applicant failed to turn up after a month had lapsed. The company denied that it dismissed the Applicant, however it was its case that, he deserted.

5.13 In his statement of claim the Applicant stated that since the Respondent had ordered him to stop working he was never instructed to return to work until he wrote the letters and eventually reported a dispute to the Commission.

5.14 In the case of **Alpheus Thobela Dlamini v Dalcrue Agricultural Holdings (Pty) Ltd (IC case no. 382/04)**, the Court stated that desertion is an unauthorised absence with the intention never to return and such conduct amounts to a repudiation of the contract of employment. The Court also observed that it was not the employee's act of desertion which terminated the contract of employment, but the act of the employer who elects to terminate the employment by accepting the employee's repudiation.

5.15 It was held by the Court in the **Alpheus Thobela Dlamini's** case that, where it is unclear whether or not the employee has deserted, it is safer for the employer to adopt a cautious approach and convene a disciplinary hearing before it terminates the services of the employee. The reason for doing so is that, if the employee returns and gives a plausible explanation for his absence, but finds that the employer has already terminated his services without holding a disciplinary hearing, the failure to hold a hearing may render the dismissal procedurally unfair.



5.16 The Applicant's letter to the Respondent dated the 13<sup>th</sup> February, 2014 reads thus:

“

**Wakhi Plant Hire  
P.O. Box  
Ngwenya  
Swaziland**

**13 February  
2014**

**Mpatsi**

***Ngekutitfoba ngitawutsandza kucolisa kukuphatamisa esikhatsini sakho lomatasatasa ngaso. Kunetintfo letimbili lengifuna kutiva ngawe.***

***(1) Jengoba (sic) ngema emsebentini ngekutsi umshini lengiwusebentisako ufile, manje sengivile kutsi uyaphila futsi sewucashe lomunye lowusebentisako. Ngicela kuva kutsi ngimephi emsebentini.***

**(2) NgaDecember 2013 angizange ngilove. Ngasebenta nangemaholide kodvwa imali ngangayitfoli yonkhe, kwentiwe yini. Nga January 2014 ngisebente ngamiswa mhlaka 13 imali yalawo malanga angikayitfoli.**

**Nguloko lengifuna kukuva mphatsi.**

**Ngimi lotitfobako  
Sipho F. Shabalala”**

5.17 Translated to English the Applicant’s letter reads thus:

“

**Wakhi Plant Hire  
P.O. Box  
Ngwenya  
Swaziland  
13 February  
2014**

**Director**

**I would like to sincerely apologise for disturbing you in your busy schedule. There are two issues to which I request your response.**

**(1) Following my temporary layoff because the front loader was broken, I am advised that it has been repaired and you have engaged another employee to**

**operate it. May I know what's the status of my job?**

**(2) In December 2013 I never absented myself from work, I was at work even during holidays, but I was not paid my wages in full. What was the reason for the short payment? Then in January 2014 I worked until the lay-off on the 13<sup>th</sup>; however I was not paid for the days I worked.**

**That is what I request to know Sir.**

**Yours faithfully  
Signed  
Sipho F. Shabalala"**

5.18 After he did not get a response, the Applicant wrote another letter on the 10<sup>th</sup> March, 2014, it reads as follows:

**" Wakhi Plant Hire  
P.O. Box  
Ngwenya  
Swaziland**

**13 March 2013 (sic)**

**Director**

**Ngiyakuvusela Mphatsi.**

**Emva kwekutsi ngibhale ngiletse incwadzi  
mhlaka 13 February mayelana:**

**1 Kungaholi**

## **2 Kutsi ngimephi emsebentini**

**Ngenca yekungatfoli imphendvulo, sengitsi angibhale lena yekuvalelisa kuze ngiyendlulisele embili kumuntfu wemtsetfo (CMAC).**

**Bengingjabula kutfola imphendvulo angakapheli emalanga lasikhombisa (7).**

**Ngimi lotitfobako  
Signed  
Sipho Fortune Shabalala”**

5.19 I again translate the second letter to English and it reads:

“ **Wakhi Plant Hire  
P.O. Box  
Ngwenya  
Swaziland**

**13 March 2013 Sic)**

**Director**

**I greet you sir.**

**Following the fact that I wrote a letter and delivered it to you on the 13 February regarding the following:**

**(1) Unpaid wages**

**(2) The status of my job**

***On account of the fact that you have not responded to that letter, I am writing this letter to notify you that I will refer my grievances to a third party (CMAC).***

***I would appreciate receiving your response within seven (7) days.***

***Yours sincerely  
Signed  
Sipho Fortune Shabalala”***

5.20 In its replies (plea), the Respondent denied receiving the two letters. The Respondent having failed to attend the arbitration to contest the Applicant’s version, the latter’s evidence given under oath confirms the allegations made in his statement of claim, which carries more weight than the company’s bare denial made on the reply.

5.21 Even assuming that the Respondent was correct that, it never received the Applicant’s letters, its version that the Applicant simply disappeared was not probable. When the parties appeared at CMAC for the first time for conciliation, the Respondent should have instructed the Applicant to return to work and face a disciplinary hearing for absenteeism.

5.22 Furthermore, in its replies the Respondent did not allege that it looked for the Applicant at his home, since the latter claimed that his employer knew where he stayed. The company simply averred that when it layed him off, it advised him to return after a month. When he did not turn up after a month, it concluded that he had deserted, thus terminated his employment.

5.23 Even though the Applicant's letters do not show that the Respondent acknowledged receipt of same, I find the Applicant's version more plausible than the Respondent. Firstly for the reasons I have stated above. Secondly, he wrote his first letter immediately after the month had lapsed. Thirdly, after seven (7) days of writing the second letter, he reported a dispute to the Commission, as he promised to do if the Respondent did not reply his final letter.

5.24 The Applicant's conduct throughout the events that started in January, 2014 do not prove that he had deserted work, on the contrary he was concerned about the security of his job after being informed that his front loader was fixed and someone was employed to replace him.

5.25 I find that the Applicant never deserted his job. I also find that the conduct of the Respondent demonstrated that it no longer wanted the Applicant's services. Consequently, the Respondent terminated the Applicant's services.

5.26 It is my finding that the Respondent did not have a fair reason for terminating the Applicant's services. It is common cause that no disciplinary hearing was held. I find that the Applicant's dismissal was substantively and procedurally unfair. He is entitled to notice pay and compensation for unfair dismissal.

## **6. OVERTIME**

6.1 The Applicant has claimed the sum of E6067.00 as overtime worked for 32 Sundays.

6.2 According to the Applicant his rate of pay per hour was E7.90. In terms of the Regulation of Wages

(Mining and Quarrying Industry Order), 2014, the basic working week shall be forty five hours spread over a maximum period of six days. It was the Applicant's evidence that his normal hours per shift was eight (8) hours. This is consistent with the provisions of Regulation 5 of the Wages Order, 2014.

6.3 The Applicant's daily rate of pay was E7.90/h by 8 hours which equals E63.20. According to Regulation 10 of the Wages Order, 2014, for the time worked in excess of 15 minutes after the specified hours per shift, the overtime shall be paid at 1.5 times the hourly rate, but for Sundays it will be double the hourly rate.

6.4 Now the Applicant worked twelve hours for 32 Sundays at the rate of E7.90. He is entitled to the claim calculated as follows;  $E7.90 \times 2 \times 12\text{hrs} \times 32$  days which equals E6 067.20.

6.5 The Applicant also claimed overtime for the normal shifts he worked for eight months. He is entitled to the following claim:  $E7.90 \times 1.5 \times 4\text{hrs} \times 210$  normal days he worked for 8 months which equals E9 954.00.

## **7. LEAVE PAY**

7.1 **Section 123 of the Employment Act 1980** provides that where an employee's services are terminated after he has served more than three months but less than twelve (12) months the employer shall, on or before such termination pay to the employee a sum equal to not less than one day's wages for each completed month of service.

7.2 The Applicant is therefore entitled to  $E7.90 \times 8\text{hrs} \times 8$  months which equals E505. 60.

7.3 In awarding compensation for unfair dismissal to the Applicant, I have considered the following factors:

7.3.1 He worked for a relatively short period.

7.3.2 He was married and had three (3) children who were dependent on him.

7.4 I find that an award of five months compensation to the Applicant would be fair and equitable in all the circumstances.

7.5 I make the following order.

## **8. AWARD**

8.1 I find that the Applicant's services were terminated by the Respondent when it failed to call him to return to work to resume his duties.

8.2 I also find that the Applicant's dismissal was substantively and procedurally unfair.

8.3 The Respondent is directed to pay the Applicant the following monies:

8.3.1	Notice pay	=	E2 400.00
8.3.2	Leave pay	=	E505.60
8.3.3	Overtime on normal shift	=	E9 954.00
8.3.4	Overtime on Sunday	=	E6 067.20
8.3.5	Compensation for unfair dismissal (5 x 2400.00)	=	E12 000.00
	<b>TOTAL</b>		<b><u>E30 926.80</u></b>



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8.4 The Respondent is ordered to pay the Applicant the sum of **E30 926.80** at the CMAC offices at Asakhe House in Mbabane not later than the 8<sup>th</sup> December, 2014.

8.5 There is no order for costs.

DATED AT MBABANE THIS \_\_\_ DAY OF NOVEMBER, 2014

\_\_\_\_\_  
VELAPHI Z. DLAMINI  
CMAC ARBITRATOR