



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

HELD AT MBABANE

SWMB 339/15

In the matter between:-

CELUCOLO TFWALA

APPLICANT

And

LUCKY'S ARK INVESTMENTS (PTY) LTD

RESPONDENT

CORAM:

Arbitrator : Lobenguni Manyatsi

For Applicant : Mr. Ephraim Dlamini

For Respondent : Mr. Sakhele Hlophe

ARBITRATION AWARD

{11/05/2017}

Venue : Asakhe House, 1st Floor Mbabane

Nature of Dispute : Unfair Dismissal

1. Details of Parties and Hearing:

- 1.1 The Applicant is Celucolo Tfwala, an adult male Swazi national and a former employee of the Respondent. During the arbitration hearing, Applicant was represented by Mr. Ephraim Dlamini, a Labour Consultant whose offices are in Mbabane.
- 1.2 The Respondent is Lucky's Ark Investments (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of the Kingdom of Swaziland. During the hearing, the Respondent was represented by Mr. Sakhele Hlophe, a practicing attorney under CJ Littler Attorneys in Mbabane.
- 1.3 The arbitration hearing was held at CMAC Mbabane Asakhe House Building between the 4th May 2016 and the 30th September 2016

2. Issue for determination:

- 2.1 The issue for determination pertains to whether or not the Applicant was unfairly dismissed by the Respondent.

3. Background to the dispute:

- 3.1 Applicant alleges that his dismissal from work was unfair both procedurally and substantively.
- 3.2 Respondent on the other hand denies Applicant's claims and disputes that Applicant was treated unfairly. Respondent contends that Applicant's dismissal was procedurally and substantively fair.

- 3.3 The dispute was reported by the Applicant to the Commission, conciliated upon and subsequently certified as unresolved. A certificate of unresolved dispute was issued at the conclusion of the conciliation proceedings.
- 3.4 The relief sought by the Applicant which appears ex facie the Certificate of Unresolved Dispute is:
- 3.4.1 Reinstatement or
 - 3.4.2 Notice Pay = E2, 700.00
 - 3.4.3 Unpaid Leave = E2, 180.64
 - 3.4.4 Public Holidays = E1, 349.92
 - 3.4.5 Additional Notice = E2, 076.80
 - 3.4.6 Severance Pay = E5, 192.00
 - 3.4.7 Maximum Compensation for Unfair dismissal = E32, 400.00
- 3.5 I was appointed to arbitrate the dispute on the 21st January 2015 pursuant to an Industrial Court referral for the matter to be heard under the auspices of the Commission as provided for by Section 8(8) and Section 85 (2) of the Industrial Relations Act, 2000 (as amended).

SUMMARY OF PARTIES' EVIDENCE AND ARGUMENTS

4. APPLICANT'S CASE:

4.1 In support of Applicant's case, Applicant himself was the only one who came to give evidence. A summary of the most important aspects of the evidence influencing my decision are detailed herein below;

Celucolo Fana Tfwala (AW1):

4.2 Applicant testified that he was employed on the 21st April 2008 as a Supervisor at Luyengo Campus where the Company had a cleaning contract. He worked continuously until September 2014. He was earning a monthly salary of E2, 700.00.

4.3 He stated that he was not given a written employment contract and when he enquired about it, the Director said he would call him into his office to fix that but it eventually did not happen.

4.4 Applicant stated that when he first started working he was posted at Luyengo Campus up to August 2009. When the company got a tender for cleaning at the Kwaluseni Campus he was asked to move there because he had the experience. There he worked as a supervisor until 2010 where a new supervisor was employed. During that period he would also go to the Luyengo Campus to check on the job there as well. After training the new supervisor, he went back to Luyengo full time. Applicant further stated that in 2012 he was told by Ngubane (the Director) that he would move him from the campus because the matron at the University did not want male supervisors. Ngubane said he was going to be opening a Hardware store and he would take him to Sibovu where he would be taught about the hardware

business so that he would take up supervision of the new hardware.

- 4.5 The Applicant stated that he asked the Director what would happen to his employment status and terminal benefits because he was being changed from one sector to another (i.e. from cleaning to hardware). The Director promised to call him so that they would talk about these things. Applicant proceeded to Sibovu to start working at the hardware store. He then went to work at Mgazini up to November 2012 where they were told by the Director that all the stock had been sold to Buy Cash Hardware in Piggs Peak. The Director told the employees that they should not worry, their employment with the company would not be disturbed, the old employees, including the Applicant would go and work at 4Him Security Services, another subsidiary of the company.
- 4.6 The Applicant testified that he continued getting paid while sitting at home until he started working at 4Him on the 16th February 2013. On that morning he went to 4Him to report for duty and he was told by Mavuso the Manager that he had been instructed to train him as a Supervisor because a new department at Mhlume would be opened. In August 2013 he was appointed as a supervisor in the psychiatric hospital after the company had gotten a tender to provide security services for government hospitals.
- 4.7 The Applicant further testified that while they were still training, Mahlalela came with contracts for them to sign. All the other employees including the other supervisors did sign the contracts but he (Applicant) refused to sign it. When questioned why he was refusing to sign the

contract he told Mahlalela that he had been employed a while ago and signing the contract meant that he was being employed afresh. He ended up not signing the contract.

4.8 Applicant stated that in 2014 when the Government hospitals contract was supposed to be renewed it was not renewed. One Skiri and Mbuso Mamba came to them carrying forms which they claimed to be for retrenchment. They read the forms to the employees and made them to sign; he did not sign that paper. His reason for not signing the papers was the same reason he gave for not signing the contract. He wanted the years before he worked at 4Him to be considered when making the calculations for terminal benefits.

4.9 At the end of August 2014 when they were supposed to receive their salaries, Applicant stated that he found that his salary had been cut when he went to check at the ATM. He called the Director to ask about the salary cut and he said that he did not know what had happened, Applicant should go and ask Shiba. The Director advised that the Applicant should go to the Matsapha office to talk to the managers about the issue. The day after that he went to Matsapha together with Mbuso Mamba and they had a meeting with Maseko, Shiba and Skiri. The Director also joined them. The response he got from the Director was that it was the mercy of the company that the supervisors were not dismissed but had their salaries cut to that of the ordinary security guard and also that the contracts for the hospitals were terminated therefore they should be at home. The Director said that if he had problems

Applicant should have come to him, he would not have cut his salary, he would have spoken to Mamba about it.

4.10 Applicant stated that during that meeting he asked the Director why he was only talking about his tenure at 4Him and not taking into account the other places that he had worked. He was told by the Director that he was rushing somewhere, that issue would be discussed in the next meeting. During the second meeting, the Director was not there but the other managers were there. They did not address the issue of the other years he had worked for the company; they continuously stressed the fact that the company was showing them mercy as supervisors for keeping them on instead of retrenching them. The only thing that they acknowledged was that the only challenge they had was the fact that they did not know when the Applicant had started working in the other departments. They called Vusani Dlamini who is the supervisor at the cleaning department to ask him when the Applicant had been employed. Vusani replied that when they were talking of an old employee in the company, they were talking about Tfwala (the Applicant). After that he was told that he should come back on another day to collect his money.

4.11 The Applicant stated that before he left that meeting, Maseko told him that holidays would not be calculated. Applicant told him that that would not happen. They called the Director and informed him that the Applicant was refusing to leave before the issue of the holidays was resolved. The Director called Skiri and Skiri told him that his holiday money would be calculated.

- 4.12 When he got to the office on the day he had to fetch his money, Applicant was told that his money had been calculated. He was given the money to count first before he signed anything. The Applicant asked if the money had been calculated from the 21st April 2008 when he started working for the company. Maseko responded and told him that he did not talk about issues relating to the cleaning department he spoke only about 4Him. He stated that he left after that and when he was in Manzini he got a call from Sigodvweni police station where he was asked if he knew Maseko, to which he responded in the affirmative. The police officer told him that Maseko had reported that he had taken money and did not sign for it and that was a problem according to the company. The Applicant told the officer that the reason he had not signed for the money was that they had written things he did not understand, therefore he could not have been expected to sign.
- 4.13 Applicant further stated that he was never engaged before his salary was cut and was not even told why the salary had been cut. He stated that at the company, employees are never paid for holidays worked, unless you use force. He was also not allowed to take leave, for the whole duration he worked for the company. He was told that he would be paid but that was not to be. The money he was given by Maseko was for the period he was working at the hospital, which is 16 January or 16 February 2013 to August 2014. He is currently unemployed and is married and has 9 dependants.
- 4.14 When coming to the end of his testimony, Applicant stated that he desires to be paid his terminal benefits

from 2008 to 2012 and to be compensated for unfair dismissal. He does not desire to be reinstated back to work.

4.15 Under cross examination, it was put to the Applicant that he has a habit of refusing to sign employment contracts, even in his previous employment that is what he did just as he had done at 4Him. The Applicant denied that and stated that in his previous employment he did not refuse to sign a fixed term contract, they were given a choice of whether to convert from permanent to fixed term employment or to be paid their terminal benefits and leave the company, he opted for the latter as he felt that was what was best for him.

4.16 The Applicant denied that he was employed on a fixed term contract by the Respondent; he insisted that when the Director called him, he told him that the job was permanent. He admitted that he had once worked for the Respondent on a short term contract in 2006 cutting sandanezwe and cleaning but that he did not include in this claim because he knew very well that the project was for a fixed period.

4.17 The Applicant denied that the contract he refused to sign had been brought to him when he started working at the Government hospital, he stated that he had started in February and Mhlalela only brought the contract for him to sign in August. He stated that even if the contract had been brought when he had started working, he would not have signed it for the same reasons he had advanced when it was brought in August.

- 4.18 The Applicant agreed that the reason he was said to have been retrenched was because the contract between 4Him and the hospitals had come to an end. He would however not say that was true because he was not privy to the contract between the two parties.
- 4.19 Applicant denied that other avenues had been explored prior to him being retrenched. It was put to him that he was even given the option of going to work at the Mbabane City Council post, which he denied.
- 4.20 The Applicant again admitted that some money had been paid to him by the Respondent and denied that he had not disclosed that when he reported his dispute. He stated that he had disclosed everything and that the report of dispute had been written for him and he did not give himself time to read it.
- 4.21 Applicant denied that all the claims as per the report of dispute were paid. He stated that what he was claiming was for the period between 2008 and 2012; the payment made by the Respondent was for 2012.
- 4.22 Legal submissions made on behalf of the Applicant were to the effect that the main relief sought by the Applicant was compensation for unfair dismissal. It was submitted that the Applicant was dismissed unfairly both procedurally and substantively.

5. RESPONDENT'S CASE

- 5.1 In support of Respondent's case, two witnesses came to give evidence. A summary of the evidence influencing my decision is detailed herein below;

Lucky Ngubane (RW1)

- 5.2 The first witness to give evidence on behalf of the Respondent was Lucky Ngubane, who is the Director of the Respondent.
- 5.3 He testified that he does know the Applicant; he had worked at Lucky's Ark before working at 4Him. He stated that the Applicant started working at Lucky's Ark in 2008, working on contract. He started working "emahlatsini" and when that contract ended, he went to work on another contract cleaning at the university and when that one ended he went to work at the hardware until 2013 where he was employed permanently at 4Him.
- 5.4 He stated that there was nothing written down between Lucky's Ark and the Applicant in the form of contracts because the Applicant refused to sign anything, he even refused to sign a contract when he was going to start work at 4Him. When the contract ended at the Government hospitals, the Applicant refused to go and work at the Mbabane City Council, he refused to sign a contract,
- 5.5 Mr Ngubane further stated that the Applicant had been consulted regarding the end of the contract and it was explained to him that since he was a permanent employee, he would be redeployed to Mbabane. The Applicant chose to be paid out instead of being redeployed and he was paid what he had asked for.
- 5.6 Ngubane further stated that a document was prepared for the Applicant to sign after receiving his money but as usual, the Applicant refused to sign and just left with the money.

- 5.7 Under cross-examination Ngubane stated that he did try to speak to the Applicant and asked him to sign the contract for working at the City Council, which is where the Applicant opted to take the money and left. It had also been reported to him by his Security Manager at 4Him that the Applicant had refused to sign a contract when starting work at the Government hospital.
- 5.8 Ngubane further stated under cross-examination that the Applicant's salary would not have been cut when he was redeployed. The Applicant just insisted that he wanted his terminal benefits so that he would go and explore other avenues.
- 5.9 The witness denied that the Applicant had ever spoken to him about his numerous transfers and stated that maybe he had spoken to the employees at the office. He further denied that he had paid the Applicant while sitting at home when the hardware closed down, which would prove that he was a permanent employee.

Selby Dlamini (RW2)

- 5.10 The next witness to testify on behalf of the Respondent was Mr Selby Dlamini. He stated that he was the Respondent's HR Officer and he knows the Applicant. When he came to work at 4Him, the Applicant was a supervisor at the City Council in Mbabane and was subsequently transferred to the Psychiatric hospital as a supervisor when the company got a contract there.
- 5.11 He stated that the contract with the government hospitals was for a year. When it came to an end in July

2015, they wrote to the Commissioner of Labour to inform her about the redundancies and then notified each and every security officer in writing that the contract was coming to an end. Further to that, they conducted a consultation with Mbuso Mamba the Operations Manager, and explained to the employees what was happening. They told the supervisors, including the Applicant that they would not be retrenched but they would be redeployed.

- 5.12 The witness stated that the Applicant did come to work in Mbabane after the Psychiatric post was closed down but he did not work for a full month. The conflict started when the Applicant found that his salary had been reduced from E2, 700.00 to E1, 868.88. The Applicant stated that he would not accept that, it was best that they part ways with the Respondent. He admitted that the Applicant stopped work because his terms and conditions of employment had been changed.
- 5.13 On cross-examination, the witness admitted that he had nothing tangible to show that he had informed the Commissioner of Labour about the redundancies but he insisted that he had informed him and the Commissioner had come to do an inspection and found all to be in order.
- 5.14 Dlamini further stated under cross-examination that the employee had been informed that his salary would be cut and he had accepted that, which is why he had started working in Mbabane. It was explained to the Applicant that they would not be working as supervisors but as ordinary security personnel. He stated that he did not understand why the Applicant was surprised when

he received his salary because he knew that it would be reduced. The Applicant should have gone to report the change in his terms and conditions of employment to the Commissioner of Labour but still remained at work.

5.15 The witness still under cross examination stated that there was a voluntary separation between Applicant and 4Him, that is why his terminal benefits were calculated for him. The terminal benefits were calculated from 2013 when the Applicant started working at 4Him, he did not mention that he had started working in 2008, his terminal benefits would have been calculated from there.

5.16 The Respondent did not file any closing submissions in spite of numerous reminders to file same.

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 It was not agreed between the parties that Applicant was an employee of the Respondent, to whom **Section 35 of the Employment Act, 1980 (as amended)** applied.

6.3 **Section 22 of the Employment Act** makes it compulsory for the employer to give the employee written particulars of employment. If the employee

refuses to sign the written particulars, the employer should inform the Commissioner of Labour of such refusal (see **Section 23**).

6.4 In this case the Respondent's Director submitted that the Applicant had been working on fixed term contracts for the company in various sections since 2008 but he had refused to sign any of the contracts given to him. He did not bring the proof of those contracts that had been prepared and signed only by the representative of the company and he did not mention any action taken by the Respondent against the Applicant for his refusal to sign. Instead they kept him on for all these years and did not foresee that the lack of contract would cause a problem for the company at the end when the Applicant insists that he was permanently employed since 2008 whereas according to them he was employed on fixed term contracts.

6.5 I am inclined to believe the Applicant that he had been informed by the Director that he was permanently employed in the company. This is proved by the lack of contracts and the way he was moved around in the various businesses of the Respondent without a problem that he was refusing to sign the fixed term contracts. Therefore it is my finding that Applicant was an employee to whom **Section 35 of the Employment Act** applied.

6.6 The second issue is to establish whether or not Applicant was dismissed and if so, was it for a reason permitted by **Section 36 of the Employment Act, 1980** and whether taking into account the circumstances of the case, it was reasonable to

terminate the services of the employee. **(See Section 42(2) of the Employment Act, 1980).**

- 6.7 The Respondent's witnesses both insisted that the Applicant was not dismissed but he opted to leave the employ of the company because he was not happy with the new working conditions. They gave conflicting evidence when it came to the cutting of the salary of the Applicant. The 1st witness denied that it was even cut and the 2nd witness admitted that it was cut but insisted that the Applicant had been informed prior to him accepting the move to Mbabane that his salary would not be the same.
- 6.8 The Applicant in his evidence stated that he was surprised when at the end of the month he found that his salary had been cut without anyone informing him. When he went to enquire he was told that the company was doing him a favour in keeping him on, he should just accept the new conditions as they are, including the reduction in salary.
- 6.9 **Section 26 of the Employment Act** stipulates that the employer does not have the right to unilaterally change the terms and conditions of employment between him and the employee. By cutting the Applicant's salary and removing him from the post of supervisor to that of an ordinary security guard without his knowledge, the Respondent had unilaterally changed the terms and conditions of employment. This in effect meant that the Respondent in essence severed ties with the Applicant. Therefore it is my finding that the Applicant had in fact been dismissed by the Respondent.

- 6.10 The question to be decided is whether or not the dismissal of the Applicant was fair and reasonable in terms of the standards considered to be acceptable in employment matters. When the assessment is made as to whether a dismissal is fair or unfair, reasonable or unreasonable, attention is paid to two important factors namely, the **procedure** adopted by the Employer in terminating the services of the employee as well as the **substance** or the grounds for the termination of the employee in question.
- 6.11 In the matter at hand, the witnesses of the Respondent gave conflicting evidence on when the employees came to know of the redundancies and were consulted. The Respondent's witness failed to produce a letter written to the employees about the redundancies and a letter written to the Labour Commissioner about same. This would have guided me in determining when the employees came to know of the impending redundancies.
- 6.12 However, Section 40 (2) of the Industrial Relations Act is couched in general terms. In order for a retrenchment to be said to have been fair, there has to be consultations between the employer and the affected employees. This will aid in trying to avert or minimize the redundancy.
- 6.13 Dunseith, JP stated in **Archie Sayed vs Usuthu Pulp Company Limited 432/06** that consultation is *“an opportunity to express opinion and make representations, with a view to taking such opinion or representations into account. It certainly does not mean affording an opportunity to comment about a decision*

already made and which is in the process of being implemented.”

- 6.14 From the evidence led by both Applicant and Respondent’s witnesses, the consultation was based on a decision that had already been taken, following the termination of the Government contract.
- 6.15 If the consultations had been meaningful and conducted properly as envisaged by the law, the Applicant would have made an informed decision on whether or not to accept the redeployment to Mbabane with the accompanying conditions or take his terminal benefits and leave the company. The Applicant in this instance was tricked into accepting the alternative employment without being told all that it entailed.
- 6.16 Consequent to these aforementioned authorities and analysis, I am inclined on a balance of probabilities to find that the dismissal of the employee was substantively and procedurally unfair. The Applicant was employed by the Respondent in 2008 therefore his terminal benefits should have been calculated from then.

7. Award:

- 7.1 The Applicant was able to prove that his dismissal was procedurally and substantively unfair.
- 7.2 In light of the above and the fact that the Applicant does not desire to be reinstated, I order that the employee be paid the following monies:
- (i) Unpaid leave = E2, 180.64
 - (ii) Public Holidays = E1, 349.92

- (iii) Additional Notice = E2, 076.80
- (iv) Severance Pay = E5, 192.00
- (v) 3 months compensation for unfair dismissal = E8, 100.00

7.3 The Respondent is therefore ordered to pay the Applicant the sum of E18, 899.36 (eighteen thousand eight hundred and ninety nine emalangeneni and thirty six cents) by or before the 30th June 2017

DATED AT MBABANE ON THE __ DAY OF MAY 2017

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LOBENGUNI Y. MANYATSI

CMAC ARBITRATOR