



CONCILIATION MEDIATION AND ARBITRATION COMMISSION
(CMAC)

HELD AT MBABANE

SWMB 030/20

In the matter between:

MAWETHU MKHATSHWA

APPLICANT

And

UZZA TRANSPORT

RESPONDENT

Coram

**ARBITRATOR
FOR APPLICANT
FOR RESPONDENT**

**: MR BONGANI S. DLAMINI
: MR ERNEST TSABEDZE
: MR PHINDA MHLABANE**

ARBITRATION AWARD-20/09/2022

1. DETAILS OF HEARING AND PARTIES

1.1 The Applicant in this hearing is Mawethu Mkhathshwa, an adult Liswati male residing at Gobholo area, Mbabane, District of Hhohho. During the Arbitration

hearing, the Applicant was represented by Mr Ernest Tsabedze, a Labour Consultant based in Mbabane, District of Hhohho.

1.2 The Respondent is described as Uzza Transport, a transport business trading style of one Mr Clinton Nxumalo, based in Mbabane, District of Hhohho. During the Arbitration hearing, the Respondent was represented by Mr Phinda Mhlabane from MLK Ndlangamandla Attorneys in Mbabane, District of Hhohho.

1.3 The Arbitration hearing in respect of the parties hereto commenced on the 25th January 2022 and thereafter proceeded on several dates namely 03 February 2022; 15 February 2022; 08 March 2022; 23 August 2022 and 24 August 2022.

2. ISSUES TO BE DECIDED

2.1 The issue for determination is whether the Applicant is entitled to the various monetary claims made by him against his former employer, namely the Respondent herein. The claims by the Applicant are in respect of:

(a) Overtime	(E30, 770.92);
(b) Unpaid public holidays	(E 1, 702.87);
(c) Underpayments	(E 7, 276.57);
(d) Allowance	(E 672.00)
(e) Unpaid off days	(E 4, 923.84).

3. **BACKGROUND FACTS**

- 3.1 The Applicant reported a dispute of unfair dismissal to the Commission (“CMAC”) on the 29th January 2020. After conciliation, the dispute was certified as unresolved and a Certificate of Unresolved Dispute issued by CMAC on the 12th March 2020.
- 3.2 The Dispute between the parties was, by agreement, referred to Arbitration under the auspices of CMAC and such agreement was endorsed by the parties on the 12th March 2020.
- 3.3 I was appointed as an Arbitrator on the 17th December 2020 to hear and determine the dispute between the parties in accordance with the law.
- 3.4 The Arbitration hearing was convened to determine the dispute pursuant to an order issued by the Judge

President of the Industrial Court on 18th November 2021.

4. **NATURE OF EVIDENCE**

4.1 The Applicant relied on witness testimony in support of his case and also relied on documentary evidence.

4.2 **APPLICANT'S TESTIMONY**

4.2.1 The Applicant's testimony was that the Respondent employed him on the 01 August 2018 as a Driver. The Applicant stated that he was earning the sum of E 2,000.00 per month prior to leaving the Respondent's employ.

4.2.2 The Applicant stated that during the month of September 2019, he had a personal problem relating to his stolen cellphone. The Applicant stated that during the month of September 2019, he decided to go to the police station in Mbabane to make enquiries about his stolen cellphone.

4.2.3 In his evidence in-chief, the Applicant submitted that when he got to the police station, he was

informed by the police that he was wanted in relation to the gender-based violence case which had been reported to the police by his girlfriend. The Applicant was then detained by the police. The Applicant's testimony was that since he was on duty on the day of the arrest, he decided to call the overseer or supervisor of the kombi he was driving to send someone so that the kombi can be collected from the police station.

4.2.4 The Applicant stated that another driver was sent to collect the kombi from the police station after he was placed in custody. The Applicant was taken to Court the following day and was fined for the assault on his girlfriend.

4.2.7 The Applicant further testified that after his release from custody, he went back to work to resume his duties only to find that he had been replaced by a certain Mhlonishwa who was the same guy who had been sent to collect the kombi from the police station. The Applicant was informed by the supervisor of the Respondent that there was no position available for him within the Respondent's business.

4.2.8 According to the Applicant, he then decided to approach the owner of the business, a certain Mr. Nxumalo who in turn informed the Applicant to write a report about the incident involving the police. The Applicant wrote the report on the 7th October 2019 and submitted it to Mr. Nxumalo. The Applicant then waited for a response from Mr. Nxumalo but no such response was availed to him.

4.2.10 The Applicant's testimony was that on the 3rd November 2019, he wrote to Mr. Nxumalo to enquire about his status as an employee but there was still no response from the Respondent's director or owner. The Applicant came to the conclusion that his services had been terminated and thus on the 6th November 2019 decided to write a letter of demand requesting to be paid the claims which are the subject of the present dispute. Mr. Nxumalo did not reply to Applicant's request to be paid the sums of money claimed.

4.2.11 The Applicant stated that he then decided to report a dispute with the Commission.

UNDERPAYMENTS

4.2.12 The Applicant's evidence on the issue of underpayments was that he was paid a monthly sum of E 2,000.00 as a Driver for the Respondent. It was the Applicant's evidence that the gazetted salary that he ought to have been paid is the sum of E 2,549.00. The total amount of underpayments from August 2018 to September 2019 is the sum of E 6,598.80. The Applicant's evidence was that he did not work for the full month in September 2019 but the number of days worked by him on this month meant he was to be paid the sum of E677.77. The total amount of underpayments and the unpaid days in September therefore totals the sum of E 7,276.57.

OFF DAYS

4.2.13 It was the Applicant's testimony that he was supposed to be off from work for 4 days in a month but was allowed only 2 days off in a month. The total number of days he was at work when he was not supposed to from August 2018 to September 2019 is 48 days. These days translate to an outstanding payment of E 4,923.84.

PUBLIC HOLIDAYS

4.2.14 It was the Applicant's evidence that he worked on all public holidays from the time he was employed in 2018 contrary to the Regulation of Wages (Road Transportation Industry) Order, 2017. The Applicant stated that he worked on Good Friday and Easter Monday, National Flag day, Ascension day, Umhlanga Reed Dance Holiday, Independence day, Incwala Holiday, Christmas Day, Boxing day and Elections Day. It was the Applicant's evidence that his pay per day was E 98.83 and that according to the applicable gazette, working on a public holiday entitled him to a double pay which meant he was supposed to be paid the sum of E 197.60 for each public holiday worked. The total sum for all the public holidays worked by him is the sum of E 2,569.58.

ALLOWANCES

4.2.15 The Applicant stated that when working outside his work station or normal daily route, he was supposed to be paid the sum of E 92.00 per day but was instead paid the sum of E 50.00. The evidence by the Applicant was that he worked for 16 days during the year 2019 with the result that the

shortfall of E 42.00 (from the E 92.00) multiplied by 16 days totals the sum of E 672.00 which is the amount owed to him by the Respondent under this category.

OVERTIME

4.2.16 The Applicant's evidence on this claim is that in terms of the gazette regulating the industry he was working at, he was supposed to work 8 hours per day but instead he was working 13 hours on each day as he had to start working at 6:00 am and knock off at 7:00 pm on each day. According to the Applicant, in order to get an hourly rate requires that he divides the daily pay of E 98.93 with 8 hours which gives an hourly rate of E 12.35. On each day, the Applicant stated that he worked for an extra or overtime of 5 hours. The total hours worked by him from August 2018 to September 2019 is 1564 hours. The total amount overtime claimed is the sum of E 43,643.333

4.2.17 The Applicant accordingly prayed that he be paid all these sums of money due and owed to him by the Respondent.

5. **ANALYSIS OF EVIDENCE AND SUBMISSIONS**

5.1.1 It is to be noted and placed on record that the Respondent's representative showed up during the hearing and, on both occasions applied for a postponement of the matter. The postponement was allowed on the first occasion, namely on the 23rd August 2022 but was rejected on the 24th August 2022.

5.1.2 On the 23rd August 2022, the Respondent's representative, Mr. Mhlabane applied for a postponement of the matter on the basis that the Attorney handling the matter was busy with another trial at the High Court. This was a strange twist of events because when the matter was adjourned on the 3rd March 2022, one Mr. Sibusiso Mande had come forth and proclaimed that he was the attorney representing the Respondent. This was after MLK Ndlangamandla Attorneys failed to show up on the 15th February 2022 when the matter was supposed to proceed.

5.1.3 When Mr. Mhlabane from MLK Ndlangamandla Attorneys showed up on the 23rd August 2022, it

was surprising because these attorneys had been replaced by Mr. Sibusiso Mande. Nonetheless, on this day, a postponement was granted to the following day seeing that Mr. MLK Ndlangamandla was said to be engaged at the High Court.

5.1.4 On the 24th August 2022, Mr. Mhlabane informed the Commission that none of the Respondent's witnesses were available. The Respondent's director was said to have travelled to his home area and the supervisor or manager was also not available. The application for postponement was declined as no reasonable grounds had been advanced on behalf of the Respondent for the postponement.

5.1.5 In the case of **Daniel v Prasa (01663/14) [2019] ZAGPJHC 139 (9 May 2019)**, it was held by the Court that;

“[2] Generally, if a *bona fide* reason is furnished for such postponement, and if the defendant will not be unduly prejudiced by a postponement, such an application is granted, provided of course there is a point in the postponement. As will appear, it is

this latter aspect which forms the basis of the opposition to the postponement application.

[3] In *Ersamus, Superior Court Practice, Vol 2, pp D1-552A*, the following is said about postponements (footnotes omitted):

“The legal principles applicable to an application for the grant of a postponement by the court (CMAC) are as follows:

(a)The court has a discretion as to whether an application for a postponement should be granted or refused. Thus, the court has a discretion to refuse a postponement even when wasted costs are tendered or even when the parties have agreed to postpone the matter.

(b)The discretion must be exercised in a judicial manner. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. If it appears that a court has

not exercised its discretion judicially, or that it has been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which could not reasonably have been made a court properly directing itself to all the relevant facts and principles, its decision granting or refusing a postponement may be set aside on appeal.

(c) An Applicant for a postponement seeks an indulgence. The Applicant must show good and strong reasons i.e the applicant must furnish a full and satisfactory explanation of the circumstances that give rise to the application. A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics, and where justice demands that he should have further

time for the purpose of presenting his case.

(d)An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant, If, however, fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement even if the application was not so timeously made.

(e)An application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled.

(f) Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of the

court will be exercised; the court has to consider whether any prejudice caused by a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanism.

(g)The balance of convenience or inconvenience to both parties should be considered; the court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.”

- 5.1.6 The principles outlined by the Court so eloquently and in simple terms in the above case regarding the discretion of a Court to grant or refuse a postponement applies with equal force to Arbitration hearings at CMAA. At CMAA, there is always the desire and expectation to complete the proceedings within the time frame stipulated by legislation. The ever present requirement in CMAA

processes is to effectively and competently deal with the dispute speedily and in an efficient manner.

5.1.7 The Respondent became aware as early as May 2022 that the matter will proceed for hearing on the 23rd and 24th August 2022. Despite this knowledge, the Respondent did nothing and was content to raise the issue of a postponement for the first time on the 23rd August 2022. This was obviously unacceptable and against the principles outlined above. The Commission nonetheless granted the Respondent the indulgence to have the matter postponed to the following day. On the following day, another application for postponement was made which substantively had no merit at all. For these reasons, the application for postponement was declined on the 24th August 2022.

5.1.8 In determining the Applicant's claims, the conclusion I have made is that the claims in respect of unpaid public holidays, underpayments, unpaid off days, unpaid allowance and overtime are proper and valid.

5.1.9 On the issue of “hours of work”, it is provided in the **Regulation of Wages (Road Transportation Industry) Order, 2017** that;

“6 (1) The ordinary hours of work, subject to the provisions of Regulation 8 shall not exceed forty eight hours per week, spread over 6 days.”

5.1.10 Forty Eight hours divided by six working days gives a total of 8 hours per day. The Applicant was correct in his evidence that he was required to work 8 hours a day. The Applicant’s evidence to the effect that from the first day of his employment up to the last day, he worked 13 hours a day was not disputed and I have no reason to reject same.

5.1.11 The Applicant stated that his calculation of the overtime hours he worked on each day produced a total of 1564 hours. These extra hours however do not give a total of E 43,643.33 as stated by the Applicant in his evidence. If the hourly rate was E 12.35, then 1564 multiplied by E 12.35 gives a total of E 19,315.40.

5.1.12 On the issue of working on public holidays, it is provided in the same instrument (Regulation of Wages for the Transport Industry) that;

“13 (1) The following shall be public holidays with full pay;

(a) New Years’ day

(b) Good Friday

(c) Easter Monday

(d) National Flag Day

(e) Ascension Day

(f) May Workers Day

(g) King’s Birthday

(h) Umhlanga day

(i) Somhlolo Day

(j) Incwala Day

(k) Christmas Day

(l) Boxing Day

(m) National Election’s Day

5.1.13 All the public holidays listed by the Applicant in his evidence as days in which he rendered service to the Respondent were therefore paid public holidays. What these means is that the Applicant was supposed to be off work on these days but because he was required to work, the Respondent

was required to pay these holidays outside of the normal working days. The Applicant is therefore entitled to be paid for working on these public holidays.

5.1.14 With regard to the issue of underpayments, it is stipulated in the First Schedule that the Driver of a public transport that carries between 1 to 16 passengers is to be paid a sum of E 593.00 per week. This translates to E 2,372.00 per month and not E 2,549.00 per month as stated by Applicant. The Applicant worked for a total of 13 months for the Respondent namely from August 2018 to September 2019. This gives a total of E 372.00 multiplied by 12 and thus totaling E 4464.00. The Applicant stated that he worked for days totaling E677.77 in September 2019. E 677.77 added to E 4,464.00 equals to E 5, 141.77.

5.1.15 The Applicant stated that he was off-work only on 2 days per month and yet he was required to be off-work for 4 days in a month. The relevant Regulation stipulates that the Applicant was required to work 6 days in a week. There are four weeks in a month, which means the Applicant was indeed required to

be off work four (4) days in a month. The Applicant calculated the total number of days on which he was made to work when he was supposed to be off to be equal to 48 days. Accordingly, 48 days multiplied by E 98.83 totals the sum of E 4,743.84.

5.1.16 I have therefore come to the conclusion that the Applicant has proven his claims with slight variations on some of the claims.

6. RELIEF

6.1 It is therefore ordered that the Respondent should pay to the Applicant the following sums of money;

6.3.1 Working on public holidays (12 days at E 98.83 each day) E 1,284.79.

6.3.2 Underpayments plus unpaid days in September 2019 (E 372 x 12 plus E 677.77) E 5, 141.77.

6.3.3 Overtime worked from August 2018 to September 2019 (1564 hours x E 12.35) E 19,315.40.

6.3.4 Out of duty station allowance E 672.00.

6.3.5 Working on off days (48 days) E 4,743.84.

6.4 I find that the Respondent is liable to pay to the Applicant the total sum of E 31,157.80 in respect of all the claims filed by the latter.

7. AWARD

7.1 The Respondent is ordered to pay the Applicant the sum of **E 31,157.80 (Thirty One Thousand One Hundred and Fifty Seven Emalangeneni and Eighty Cents)** at CMAC offices in Mbabane on or before the 30th October 2022.

DATED AT MBABANE THIS____DAY OF SEPTEMBER, 2022.

BONGANI S. DLAMINI
CMAC ARBITRATOR