



CONCILIATION MEDIATION AND ARBITRATION COMMISSION

HELD AT MBABANE

REF NO: SWMB 228/21

In the matter between:

MEFIKA SIMELANE

APPLICANT

AND

**V.I.P PROTECTION SERVICES (PTY)
LTD**

RESPONDENT

Coram

ARBITRATOR

: MR BONGANI S. DLAMINI

FOR APPLICANT

: MR. SELBY DLAMINI

FOR RESPONDENT

: MR. SIMON FAKUDZE

ARBITRATION AWARD-13/07/2022

1. DETAILS OF HEARING AND PARTIES

1.1 The Arbitration hearing involving the parties herein was held on several dates commencing from the 14th

December 2021 and, after several meetings, was finally concluded on the 25th January 2022. The hearing was held at the offices of the Conciliation, Mediation, and Arbitration Commission (CMAC) at Mbabane Inner City Offices in the Hhohho region. The parties agreed to file and serve their written submissions on or before the 1st February 2022.

- 1.2 The Applicant is Mefika Simelane, an adult Liswati male and former employee of the Respondent. During the Arbitration hearing, the Applicant was represented by Mr. Selby Dlamini, a Labour Consultant based in the Mbabane, District of Hhohho.
- 1.3 The Respondent is V.I.P Security Services (Pty) Ltd a company duly registered and incorporated as such in accordance with the company laws of the Kingdom of Eswatini, based in Matsapha, District of Manzini. In the Arbitration hearing, the Respondent was represented by Mr. Simon Fakudze, an employee in HR Manager of the Respondent, District of Hhohho.

2. ISSUES TO BE DECIDED

2.1 The issue for determination is whether the Applicant was unfairly dismissed as per his report of dispute to the Commission (“CMAC”). The Applicant’s cause of action is founded on a claim of constructive dismissal. The main issue to be decided in these proceedings is whether or not a case of constructive dismissal was proven by the Applicant, given that the Respondent disputes any assertion that it constructively terminated Applicant’s contract of employment.

3. BACKGROUND FACTS

3.1 The Applicant reported a dispute of constructive dismissal to the Commission (“CMAC”) on the 27th September 2021. After Conciliation, the dispute was certified as unresolved and a Certificate of Unresolved Dispute issued by CMAC on the 11th November 2021.

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 9th November 2021.

3.3 I was appointed as an Arbitrator on the 30th November 2021 to hear and determine the dispute between the parties in accordance with the law.

3.4 The Applicant has applied to CMAC to be compensated the following sums of money: Notice Pay (E 2,395.64), Severance Pay (E 10,135.40), Additional Notice Pay (E 4,054.16), and 12 months' maximum compensation for constrictive dismissal (E 28,747.68), Annual leave (E 1,383.10), Underpayments (E 969.79) and May salary (E 2,395.64). The Respondent is opposing the relief claimed by the Applicant.

4. **NATURE OF EVIDENCE**

4.1 Both the Applicant and the Respondent relied on witness testimony in support of their respective cases and also both relied on documentary evidence.

4.2 **APPLICANT'S TESTIMONY**

4.2.1 The Applicant's testimony was that he was employed by the Respondent on the 9th June 2009. The Applicant stated that he was earning the sum of E 2,396.16 per month prior to his dismissal.

- 4.2.2 The Applicant stated that he was accused of misconduct at his work station at Montigny Springs on the 25th August 2020. The testimony by the Applicant was that he was working on shifts with other security guards at this station. When the Applicant commenced his shift on this day, he noticed that one cow was missing and he enquired from the other security guards about the missing cow and they responded by saying they did not know about the whereabouts of this cow.
- 4.2.3 In his evidence in-chief, the Applicant submitted that he remained with one security guard in his shift and it was recorded that one cow was missing.
- 4.2.4 The evidence by the Applicant was that on the 28th August 2020, he received a mobile call from his Manager, one Mr. Msibi who informed the Applicant that he must take 4 days leave and come back on the 2nd September 2020. When the Applicant was preparing to return to work after his 4 days leave, he received another call from Mr. Msibi telling him not to come back at work.
- 4.2.5 The Applicant's evidence was that his Manager (Mr. Msibi) told him (Applicant) that he had received a call from one Mr. Gina to the effect that one cow was missing and that the Applicant was responsible for

the missing cow according to a report received by the said Mr. Gina from Mrs. Gina.

4.2.6 According to the Applicant, he was called to report back to work by his manager on the 3rd September 2020. On reporting to work, the Applicant was told that he was being transferred to work in Mbabane. On his being transferred to Mbabane, the Applicant stated that the Respondent failed to address the issue of the accusations of theft leveled against him by the Gina family. The Applicant stated that the community where he was residing still considered him to be responsible for stock theft in the area.

4.2.7 The Applicant's testimony was that on the 20th April 2021, he requested to have a meeting with his former work colleagues at Montigny and his manager because of the unfounded allegations against him and how it was putting his life in danger. The HR Manager of the Respondent informed the Applicant that he would convene the meeting at a future date. The HR Manager came back and informed the Applicant that he had a meeting with his manager, Mr. Msibi and supervisor Mr. Ndzabandzaba. The HR Manager informed the Applicant that his verdict on Applicant's complaint was that no one should ever be heard discussing the issue of the cow as it was now with the

police for investigation. The Applicant stated that he was unhappy with the communication from the HR Manager because he was being accused by the community and there were threats against his life.

4.2.8 The Applicant stated that the following day, he went to the police to request a meeting with the Manager of the Respondent and his colleagues who had accused him of theft. The police in turn called the Applicant's manager but the latter told the police that this was an internal matter that should be dealt with by the Respondent. The Applicant informed the police that the Respondent had failed to address his complaints which were brought by the false accusations against him. The police informed the Applicant to go back to the Respondent to have his complaint dealt with internally by the company.

4.2.9 The Applicant's evidence was that on the 27th April 2020 he was informed to go to the Matsapha office and, upon arrival, was given a form which required that he attends a disciplinary hearing for going to the police to report about his complaints. On the 11th May 2020, the disciplinary hearing commenced against the Applicant and he was subsequently found guilty and had his services terminated by the company.

4.2.10 It was the Applicant's testimony that he appealed against the finding of guilty and the sentence of termination imposed against him. On appeal, the termination was set aside and substituted with a warning. The Applicant was thus reinstated to his position. The warning, according to the Applicant, was to last for a period of 12 months.

4.2.11 It was the Applicant's further evidence that after the disciplinary hearing he was given a new manager to work under. The Applicant was told that he would now be stationed in Piggs Peak and that he was to start working there on the 10th June 2021.

4.2.12 The Applicant stated that he went to Piggs Peak to start working on the day shift. This, however, was after he was assaulted by some people at Siphocosini and he had to go to Piggs Peak with some injuries. The Applicant stated that he reported the assault to the police but the police wanted more information before they could arrest anyone.

4.2.13 The Applicant stated that he worked at the Piggs Peak station from the 10th June 2021 to 13th July 2021 when he decided to resign. The Applicant stated that he wanted to be paid his May 2021 salary which was withheld on account of him being found guilty for going to police.

4.2.14 The Applicant stated that he was not being protected against the false allegations of theft perpetrated against him. The evidence by the Applicant was that he discovered that he was being moved to Piggs Peak allegedly because he had discovered a certain senior V.I.P employee at night and was instructed not to inform or report about the incident to the management of the Respondent. The Applicant stated that he nonetheless made a report about the incident to the Operations Manager of the Respondent and that by so doing, made enemies for himself. The Applicant prayed that he be paid his May salary and that he is also compensated for the acts of constructive dismissal perpetrated against him by the Respondent.

4.2.15 On personal circumstances, the Applicant stated that he has two (2) young children and that his wife is unemployed. The Applicant's testimony was that in July 2021, he was employed by Swaziland Plantations as a Labourer and that at the time of the Arbitration hearing, he was earning the sum of E 2,200.00 per month.

4.2.16 At the close of the examination in chief, the witness was cross-examined by Mr. Fakudze for the Respondent. The cross-examination was aimed at

establishing that the Applicant was never at any stage constructively dismissed by the Respondent but that he left at his own will after securing a job with Eswatini Plantation.

4.3 **RESPONDENT'S VERSION**

4.3.1 The one and only witness to give testimony on behalf of the Respondent was one Mr. Mlungisi Cyril Dlamini. This witness is employed as an Area Manager by the Respondent, in charge of the Piggs' Peak, Buhleni areas.

4.3.2 The testimony by Mr. Dlamini was that he had a good working relationship with the Applicant and treated him as a friend. According to the evidence of Mr. Dlamini, at some point the Applicant had not been paid his salary and he came in and assisted the Applicant with some food stuff. The witness also assisted the Applicant by providing him with a handigas stove. The witness stated that even when the Applicant wanted to go to the police on his personal problems, he allowed him to attend to his personal errands.

4.3.3 It was Mr. Dlamini's evidence that he advised the Applicant to love his job and do all that is required by his employer as, by so doing, he would be opening himself up to many employment opportunities. The

witness stated that through his own assistance, the Applicant was able to secure a job with the Respondent's client at Eswatini Plantations.

4.3.4 The witness stated that upon securing his new job with Eswatini Plantations, the Applicant came to thank him and informed him that he was bidding farewell to the Respondent. The witness advised the Applicant to resign properly through a letter, which he did.

4.3.5 The evidence of this witness was that the Applicant later called him to enquire about his unpaid leave days. The witness made enquiries about the Applicant's claims and the information he got was that Applicant had no outstanding leave which was unpaid. Mr. Dlamini's evidence was that whilst at Piggs Peak, the Applicant took all off-days which would either be on the 22nd or 23rd day of each month.

5. ANALYSIS OF EVIDENCE AND SUBMISSIONS

5.1 The Applicant has made a claim of constructive dismissal against his former employer, the Respondent herein. A claim of constructive dismissal in the context of Eswatini is founded on both statute and under the common law.

5.2 The statutory basis for a claim of constructive dismissal in Eswatini is Section 37 of the Employment, 1980 (as amended). In this section of our law, it is provided that;

“When the conduct of an employer towards an employee is proved by that employee to have been such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves his employment, whether with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by his employer.”

5.3 In South Africa, the equivalent to our Section 37 of the Employment Act is Section 186 (1) (e) of the Labour Relations Act, 1995. It is provided in this section that ‘dismissal’ means;

“an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.”

5.4 In **Bosch v JDG Group (Pty) Ltd and Others (JR578/14) [2021] ZALCJHB 171 (21 July 2021)**, the Labour Court stated the law as follows as regards the remedy of constructive dismissal;

“[88] In *Western Cape Education Department v General Public Service Sectoral Bargaining Council & Others*, the LAC pertinently stated that;

“In terms of s 186(1)(e) of the LRA, dismissal means that ‘an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee’. It is clear from the provisions of this section that in any proceedings concerning any unfair dismissal dispute, the employee must establish the existence of the dismissal if this is placed in dispute...

[91] Put differently, as held by the LAC in *National Health Laboratory Service v Yona & Others*,

‘...a constructive dismissal occurs when an employee resigns from employment under circumstances where he or she would not have resigned but for the unfair conduct on the part of the employer towards the employee, which rendered continued employment intolerable for the employee...The test for proving a constructive dismissal is an objective one. The conduct of the employer toward the employee and the cumulative impact thereof must be such that, viewed objectively, the employee could not

reasonably be expected to cope with. Resignation must have been a reasonable step for the employee to take in the circumstances.'

- 5.5 In our jurisdiction, there is a myriad of cases on constructive dismissal issued by CMAC, the Industrial Court, Industrial Court of Appeal and other forums exercising jurisdiction on employment disputes. One such case is **Motsa v Ok Bazaars (Pty) Ltd t/a Shoprite (55/2020) [2015] SZIC 6 (05 March 2015)**, wherein it was held by the Court as follows;

“18. The test for determining whether or not an employee was constructively dismissed as set out in authorities is; whether the Employer without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relations of confidence and trust between the parties (Employer and Employee). It has been held that it is not necessary to show that the Employer intended any repudiation of the contract. Instead, the function of the Court is to look at the Employer’s conduct as a whole and determine whether, when judged reasonably

and sensibly, it is such that the Employee cannot be expected to put up with it. (See in this regard the case of Pretoria Society for the Care of the Retarded v Loots (1997) 18 ILJ 981 (LAC) at page 985).”

5.6 The Applicant’s complaint in the present matter arises from what the Applicant terms as false accusations against him by members of the community and some of his work colleagues. The Applicant says that he felt he was not being protected by the Respondent and thus the claim for constructive dismissal.

5.7 The Applicant further alleges that before he relocated to Piggs Peak at the directive of his employer, he was assaulted by members of the community at Siphocosini based on such false allegations perpetrated against him by some people. The Applicant was hauled before a disciplinary hearing for seeking attempting to seek the intervention of the police on the false rumors against him which are that he is involved in the syndicate of stock theft. The Applicant also alleges that he was transferred to Piggs Peak because, in his view, he

had intercepted an employee of the Respondent at night, presumably to commit some offences within the area.

5.8 In my view, the Applicant had a genuine case for reporting a case of constructive dismissal against the Respondent. The only hurdle standing in Applicant's way in that regard is the manner of approach adopted by the Applicant. The Applicant accepted his transfer to Piggs Peak, worked there for some time and ended up getting another job with one of the Respondent's client. It was only after securing new employment did the Applicant spring into action and sought to enforce his rights based on constructive dismissal.

5.9 In the circumstances, the resignation may not have been due to intolerable working conditions but rather due to Applicant securing new employment. This is the only reasonable inference to draw from the facts of the matter. I fully align myself with the statement of law referred to in the *Ok Bazzars matter* (supra) wherein the held that;

“Lord Denning in the Western Excavating case (1978 1 All ER 713 at 717 D-F) authoritatively stated that ; ‘where the Employer exhibits conduct which is in breach of the contract of employment or which shows that such employer no longer intends to be bound by such contract, the employee is bound to there and then treat himself as constructively dismissed.’ At page 717 paragraph E Lord Denning stated thus; ‘*But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged.*”

- 5.10 The above statement of law applies with equal force to Applicant’s claim. The Applicant’s claim for constructive dismissal against the Respondent must fail in this regard. The Applicant’s claim for payment of the sum of E 2,395.16 in respect of the withheld salary is valid. The Respondent was by law, required to refund the Applicant his salary for

May 2021 when his appeal against termination was successful.

6. AWARD

6.1 The Applicant's claim for constructive dismissal is hereby dismissed.

6.2 The Respondent is ordered to pay the Applicant the sum of **E 2,396.16** in respect of the withheld salary for May 2021.

6.3 The Respondent is to pay the sum of **E 2,396.16** to the Applicant through CMAC offices in Mbabane on or before the 30th August 2022.

DATED AT MBABANE THIS ____ DAY OF JULY, 2022.

BONGANI S. DLAMINI
CMAC ARBITRATOR