



**CONCILIATION, MEDIATION AND ARBITRATION
COMMISSION**

HELD AT SITEKI

REF NO: STK 039/12

In the matter between:

GUGU KHUMALO

APPLICANT

AND

NDOBANDOBA FARMERS CO-OPERATIVES

RESPONDENT

Coram

ARBITRATOR : VELAPHI Z. DLAMINI

FOR APPLICANT : DAVID MSIBI

FOR RESPONDENT : MANDLA MDLULI

ARBITRATION AWARD -01/02/2017

1. DETAILS OF HEARING AND PARTIES

- 1.1 The arbitration hearing was held at the offices of the Conciliation, Mediation and Arbitration Commission (CMAC) at the SNPF Building in Siteki in the Lubombo region on the 4th and 27th June 2013, 11th February and 10th March 2016. Then on the 23rd March 2016, 8th and 27th April 2016, the arbitration hearing was held at the Commission's offices based in Manzini at KaLaNkhosi Building.
- 1.2 The Applicant is Gugu Khumalo, an adult Swazi female of Big Bend in the Lubombo region. Mr. David Msibi, a Labour law consultant from Manzini represented the Applicant.
- 1.3 The Respondent is Ndobandoba Farmers' Co-operative, a *universitas* (voluntary organisation) registered in terms of the Co-operatives laws of Swaziland and having its principal place of business at Mndobandoba area in Big Bend. Mr. Mandla Mdluli from M.H Mdluli Attorneys based in Manzini represented the Respondent.

2. ISSUES TO BE DECIDED

- 2.1 The first issue for determination is whether or not the Applicant's services were terminated at her instance.
- 2.2 If it is found that the Applicant's services were not terminated by herself, the second issue to decide is whether or not the Respondent terminated the Applicant's services.

2.3 Finally, in the event it is found that the Respondent terminated the Applicant's services, a determination has to be made whether the termination of the Applicant's services was substantively and procedurally fair.

3. BACKGROUND FACTS

3.1 The Respondent operates a retail store at Mndobandoba area in the Lubombo region and employed the Applicant on the 14th January 2007 as a shop assistant. The Applicant was in continuous employment until the 31st March 2012 when she was instructed to stop rendering her services because she had resigned in January 2012. At the time the Applicant was ordered to stop working, she was earning a sum of E1080.00 per month.

3.2 The Applicant reported a dispute for unfair dismissal to the Commission on the 17th April 2012 and following conciliation, the dispute remained unresolved. CMAC subsequently issued a Certificate of Unresolved Dispute no. 247/12 and the parties requested arbitration by signing Form 8 of the CMAC Forms. I was then appointed to determine the dispute through arbitration under the auspices of CMAC.

3.3 During pre-arbitration on the 27th June 2013, the Respondent's attorney raised a point of law by submitting that CMAC did not have jurisdiction to arbitrate because the Respondent never consented to arbitration. I held that I lacked the power to review and set aside the request to arbitration; I then postponed the matter *sine die* (indefinitely) to allow the parties to refer the point of law to the Industrial Court for determination.

- 3.4 On the 17th November 2015, by consent of parties, the Industrial Court referred the dispute to arbitration under the auspices of CMAC and I was re-appointed on the 5th January 2016 to arbitrate.
- 3.5 The Applicant seeks the following relief: notice pay (E1080.00), additional notice pay (E664.64), severance allowance (E1661.60), overtime (unquantified) and Compensation for unfair dismissal (E12, 960.00). The Respondent conceded to the overtime claimed, but disputes the rest of the claims.

4. SURVEY OF EVIDENCE AND ARGUMENTS

- 4.1 The Applicant was the only witness who gave evidence in support of her case and the Respondent led the evidence of its chairperson, Mr. Cleopas Vusi Myeni.

4.2 APPLICANT'S CASE

4.2.1 GUGU KHUMALO'S EVIDENCE IN-CHIEF

- 4.2.1.1 The Applicant testified that in January 2012 she requested to resign as a permanent employee to work part-time because she wanted to further her education at Emlaladini Development Centre at Ezulwini. However, when she approached the Centre after she had resigned, she was advised that the O' level syllabus she wanted to pursue was phased out and replaced with the IGCSE syllabus. She then decided to drop her plans, and consequently she withdrew her resignation letter and asked to continue working part-time.

- 4.2.1.2 Ms. Khumalo stated that the Respondent never acknowledged receipt nor responded to the letter of resignation and that of withdrawal of resignation.
- 4.2.1.3 According to Ms. Khumalo after writing the letter of withdrawal of resignation on the 24th February 2012, the Respondent's Executive Committee eventually called her to a meeting on the 31st March 2012. In that meeting, the chairperson Mr. Vusi Myeni informed her that the Respondent had received her letters, but because she was responsible for a bad report emanating from a stock loss of E10, 000.00 in 2011, her services were terminated, and she would be replaced with someone from CODEC at Ezulwini.
- 4.2.1.4 The Applicant testified that she was given the opportunity to explain the circumstances that led to her resignation and withdrawal of same and the other members of the committee were understanding, however the chairperson vetoed them and maintained that she should go because of the bad report.
- 4.2.1.5 It was the Applicant's evidence that she knew nothing about the bad report. Moreover, she stated that she worked with another employee who relieved her whenever she was on leave or off duty. However, during an audit, the other employee was not questioned and when she

asked why she was the only one called, she (Applicant) was told that it was because she was full-time and the other employee was part-time.

4.2.1.6 According to Ms. Khumalo, after the chairperson had terminated her services on the 31st March 2012, she appealed against the dismissal on the 4th April 2012. Following her letter of appeal, she was called by the Committee to another meeting where they informed her that they would not reinstate her because she had resigned.

4.2.1.7 The Applicant stated that after resigning, she continued to render her services and Respondent paid her wages in February and March 2012; she therefore believed that the Respondent had accepted her withdrawal of resignation.

4.2.1.8 The Applicant testified that she was thirty-four (34) years old, was married and had two children aged 11 and 8 years respectively.

4.2.2 APPLICANT'S CROSS-EXAMINATION

4.2.2.1 The Applicant admitted that she voluntarily wrote the letter of resignation and there was no coercion from the employer. Ms. Khumalo further stated that the letter was given to Ms. Ncamsile Zikalala, the Respondent's secretary.

- 4.2.2.2 It was put to the Applicant that since she had resigned, the employer was not obliged to respond to her letter of resignation. She maintained that the Respondent ought to have replied timeously so that she would stop working immediately if it accepted her resignation.
- 4.2.2.3 The Applicant denied the fact that the Respondent had no right to neither accept nor refuse her resignation.
- 4.2.2.4 Ms. Khumalo confirmed that the employer was not a natural person and transacted business through an executive committee. She further agreed that the committee did not meet every day of the week.
- 4.2.2.5 The Applicant also admitted that the committee first met her on the 23rd March 2012 at 10:00 am to discuss her resignation. It was further put to Ms. Khumalo that in that meeting the committee informed her that it stood by her resignation and was rejecting the withdrawal letter. She stated that only the chairperson insisted that since she made a bad report about loss of the stock, she should go; the other members of the committee wanted her to stay.
- 4.2.2.6 The Applicant denied that the decision not to reinstate her was a collective resolution of the committee.

- 4.2.2.7 It was put to Ms. Khumalo that Mr. Vusi Myeni, the chairperson of the committee would give evidence that the committee collectively decided to reject her withdrawal and stand by the resignation. She stated that his version would not be true.
- 4.2.2.8 It was put to the Applicant that Mr. Myeni would produce minutes of the meeting to substantiate his oral evidence. She denied that the minutes would support the chairperson's version; however, she requested that he should produce the original minutes from the minute book and not a copy.
- 4.2.2.9 The Applicant admitted that the Respondent's committee asked her to work until the 30th March 2012 because her successor would start working at the beginning of April 2012.
- 4.2.2.10 Ms. Khumalo also admitted that the Respondent's committee told her that if she wanted to work for the Respondent, she would have to re-apply for a job. However, she maintained that only the chairperson wanted to let her go.

4.3 **RESPONDENT'S CASE**

4.3.1 **CLEOPAS VUSI MYENI'S EVIDENCE-IN CHIEF**

- 4.3.1.1 Myeni testified that he was the chairperson of the Respondent's executive committee when the Applicant was still employed by the Respondent in 2012. The circumstances that led to her leaving the organization were that, some time in December 2011 a government auditor inspected the organization's books of accounts and reported his findings to the committee. The Applicant was present when he presented his findings. His findings were that sales had drastically dropped
- 4.3.1.2 According to the chairperson, the committee did not discuss the auditor's report with the Applicant, but deliberated other business and she was excused to continue with her duties.
- 4.3.1.3 Mr. Myeni testified that since he was a civil servant, he returned to his fulltime job, however some time later, the secretary (Ncamsile Zikalala) of the committee came to report that the Applicant had resigned. He told the secretary that since he did not have sufficient time to attend to the Respondent's business, she should recruit someone to replace her (Applicant) since the Respondent could not stop the Applicant from resigning.
- 4.3.1.4 According to the chairperson, he then found time to attend to the co-operative's business. He instructed the secretary to issue a notice of a meeting of the executive committee to

discuss the Applicant's resignation. In the meeting which was held on the 23rd March 2012, he reported the Applicant's resignation. Mr. Myeni also stated that he told the committee that the Applicant had written another letter withdrawing her resignation.

- 4.3.1.5 Mr. Myeni testified that the committee considered both letters and stood by the first letter, which was the resignation because it had been submitted first and the Respondent had already found Applicant's replacement.
- 4.3.1.6 It was the chairperson's evidence that the Applicant attended the meeting of the 23rd March 2012. He denied that the other members of the committee wanted the Applicant to continue working for the Respondent. According to Mr. Myeni, it was a unanimous decision of the committee to stand by the Applicant's decision to resign.
- 4.3.1.7 Mr. Myeni also testified that the reason for the delay in discussing the Applicant's resignation was that as chairperson, he could not convene a meeting of the committee because he was busy at his full time job. He denied that the delay nullified the resignation thus rendering Applicant's employment unbroken.
- 4.3.1.8 The chairperson denied that the Respondent dismissed the Applicant; he maintained that she resigned voluntarily.

4.3.2 VUSI MYENI'S CROSS – EXAMINATION

- 4.3.2.1 It was put to Mr. Myeni that the Applicant requested to resign as a permanent employee to become part-time. He stated that he did not recall the contents of the Applicant's resignation letter, but during that time, the Respondent had a part-time employee. When the chairperson was shown the Applicant's resignation letter marked "A1," he confirmed that it was similar to the one that was given to him by the secretary Ms. Ncamsile Zikalala.
- 4.3.2.2 The chairperson asserted that the Respondent's committee accepted the Applicant's letter of resignation, but could not act on her request to work part-time because there was already someone working in that capacity. He maintained that both the resignation as permanent employee and engagement as part-time were discussed by the committee.
- 4.3.2.3 Mr. Myeni stated that the committee could not swap the Applicant with the other employee who was part-time, but had to replace her with a permanent employee because that is the position she held.
- 4.3.2.4 The chairperson confirmed that by the 23rd March 2012, the Respondent had already recruited the Applicant's successor, but she was asked to work until that employee was ready to take over.

- 4.3.2.5 Mr. Myeni admitted that after receiving the Applicant's resignation letter, he personally looked for a replacement even before reporting the issue to the committee. He asserted that nothing prevented the Respondent from looking for a replacement after the Applicant had resigned.
- 4.3.2.6 It was put to Mr. Myeni that the Respondent did not accept the Applicant's letter of resignation; hence, she wrote another letter on the 28th February 2012 withdrawing her letter of resignation. He maintained that he did not have sufficient time to deal with the Respondent's business due to work pressures, but they eventually responded to the Applicant in the meeting of the 23rd March 2012.
- 4.3.2.7 The chairperson admitted that he became aware that the Applicant had resigned in January 2012 and the committee's meeting that discussed the resignation was convened on the 23rd March 2012. It was put to Mr. Myeni that the Applicant gave evidence that the committee met three to four times per month. He asserted that constitutionally, the committee met four times a year, but if there was an urgent business to discuss, the committee did meet three or four times per month.
- 4.3.2.8 The chairperson admitted that following Applicant's resignation in January 2012, he wrote a letter on the 5th April 2012 terminating her services. When Mr. Myeni was asked if one could dismiss an employee who had resigned, he stated that the

Respondent was responding to the Applicant's letter of resignation. He also stated that the letter dated 5th April 2012 confirmed that she was asked to act while the Respondent was waiting for her replacement.

4.3.2.10 Mr. Myeni denied that the Applicant's services were terminated by the Respondent's letter dated 5th April 2012. He maintained that the Applicant's resignation letter dated January 2012 terminated her services.

4.3.2.11 Mr. Myeni stated that the secretary did not give him the Applicant's letter of resignation, but reported to him that she had resigned. He further stated that the committee thought she had resigned in pursuit of job opportunities.

4.4 **SUBMISSIONS**

4.4.1 **APPLICANT'S SUBMISSIONS**

4.4.1.1 Mr. David Msibi, the Applicant's representative submitted that the Applicant's letter of January 2012 was a request to resign as a permanent employee to become part-time. He further argued that in view of the contents of the letter, the Applicant did not unilaterally terminate her services, but expected a reply whether her request was accepted or not. However the Respondent neither acknowledged receipt nor informed her of its decision.

4.4.1.2 The Applicant's representative contended that according to **Black's Law Dictionary 8th**

edition, acceptance of a request should be communicated and must be more than mere mental assent. He also submitted that the **Longman Dictionary of Contemporary English new edition** defines acceptance as officially agreeing to take something that you have been offered, like for example, writing a letter of acceptance.

- 4.4.2.3 Mr. Msibi submitted that when the Applicant discovered that the syllabus had changed from O' Level to IGCSE, her hopes were dashed and she was found wanting such that she retracted the contents of her previous letter. According to Mr. Msibi, the Applicant's circumstances made her to act in the heat of the moment.
- 4.4.1.4 The Applicant's representative further argued that the learned author **Grogan** in his text **Workplace Law 10th edition at page 68** states that where the resignation occurred in the heat of the moment, the Labour Appeal Court held that it might be withdrawn and that the employer's refusal to allow the employee to do so might constitute dismissal.
- 4.4.1.5 Mr. Msibi also argued that despite meeting four times before the Applicant withdrew her letter of resignation, the Respondent neither accepted nor acknowledged her resignation.
- 4.4.1.6 According to the Applicant's representative, the learned author **Grogan (supra) at page 69** remarked that a resignation on notice must be clear and unconditional. He also argued that the Applicant never said she did not intend to fulfill her part of the contract;

she made a request to be a part-time employee.

- 4.4.1.7 Mr. Msibi further contended that by the time the Respondent's committee met on the 31st March 2012, the Applicant's letter of resignation of January 2012 had been overtaken by events since she wrote a letter on the 24th February 2012 withdrawing the resignation letter.
- 4.4.1.8 According to the Applicant's representative, the Applicant was verbally dismissed on the 31st March 2012 for making a bad report about a stock shortage worth E10, 000.00 in December 2011. He further contended that on the 4th April 2012, the Applicant appealed against her dismissal, but the Respondent confirmed her dismissal through a letter dated the 5th April 2012.
- 4.4.1.9 Mr. Msibi submitted that the Respondent committed a blunder in law by not acknowledging receipt of the resignation and by allowing the Applicant to continue working for the whole of February 2012 and for three weeks in March 2012. According to the Applicant's representative, a reasonable employer would have changed the positions of the permanent employee (Applicant) and the other part-time employee.
- 4.4.1.10 According to Mr. Msibi, the fact that the Respondent's chairperson admitted that prior to the committee's meeting of 31st March 2012, he knew about the Applicant's letter of withdrawal of resignation dated 24th February 2012, confirmed the Applicant's

version that the executive committee met four times per month.

- 4.4.1.11 Moreover, Mr. Msibi argued that the meeting confirmed that the 31st March 2012 meeting was a sham because the decision about the Applicant's employment status had already been taken when the chairperson instructed the secretary to recruit someone to replace her.

4.4.2 RESPONDENT'S SUBMISSIONS

- 4.4.2.1 Mr. Mandla Mdluli, the Respondent's attorney submitted that the Applicant on her own free will and without any undue influence submitted a letter of resignation from her job as shop assistant. According to Mr. Mdluli, despite the subsequent letter purportedly withdrawing the Applicant's resignation, the initial letter of resignation remained in force.
- 4.4.2.2 The Respondent's counsel argued that on the 23rd March 2012 as opposed to the 31st March 2012, the Respondent informed the Applicant that she must pursue her other plans since it accepted her letter of resignation and rejected the letter of withdrawal. He further submitted that the Respondent denied terminating the Applicant's services, but maintained that she resigned from her employment, but having realized that things were not working according to her plans, sought to pull the initial letter of resignation by its tail.

4.4.2.3 Mr. Mdluli also contended that the Applicant having confirmed that she resigned voluntarily, could not even claim constructive dismissal.

4.4.2.4 The Respondent's representative submitted that in the case of **Nana Mdluli v Conco Swaziland Limited IC case no: 12/2002**, the Applicant had written to her employer resigning from her job and in the letter, she had stated the following:

".....due to continuous pressure that I am subjected to that has resulted to two (2) warnings from you, a formal verbal warning and a 1st written warning (both given to me on the same day 11/09/2003, I still await to sign the two (2) warnings as per our meeting this morning) I hereby tender my resignation effective today 1st September 2003. This is despite the fact that I have on several occasions voiced out that I am under pressure because of workload and that there was inadequate training given to me when I took over Australia, New Zealand and Kenya customers. I am forced to tender my resignation."

4.4.2.5 Mr. Mdluli argued that in the **Nana Mdluli case (supra)**, the Industrial Court found that the Applicant's services were unfairly terminated on the grounds of constructive dismissal and further remarked as follows:

"The Applicant could not reasonably have been expected to continue in her employment, having regard to all the

circumstances of the Respondent's conduct".

- 4.4.2.6 The Respondent's counsel further submitted that the facts of the present case were distinguishable from the facts of the **Nana Mdluli case (supra)** because in her resignation letter, the Applicant in the present case stated as follows:

"I kindly greet all the committee members of Ndobandoba Farmers. Its been a great pleasure working together. I write this letter of inform you that I resigning (sic) due to some commitment somewhere. I can afford if you can employ me as a part time employee. Hoping my request would be accepted."

- 4.4.2.7 Mr. Mdluli submitted that clearly the contents of letter of resignation showed that the Applicant voluntarily resigned without undue pressure from the employer, but due to her personal commitments somewhere outside her employment.

- 4.4.2.8 According to Mr. Mdluli, the Applicant's letter of withdrawal of the resignation dated 24th February 2012 stated as follows:

"I kindly apologise to the committee concerning my resignation letter dated 14th February 2012. I am very sorry. I have decided to stay. I hope my apology reaches your highest consideration."

4.4.2.9 The Respondent's attorney further argued the facts of the **Nana Mdluli case (supra)** and of the present case were similar in one respect. Despite stating that she was resigning with immediate effect, Ms. Mdluli continued to report to work. Nevertheless, the Industrial Court referred to her conduct as:

“the erroneous impression that she had to serve out a period of notice”.

4.4.2.10 Mr. Mdluli contended that on the other hand **Conco** (the employer) rejected Ms. Mdluli's resignation, thus acting under what the Industrial court called:

“the erroneous belief that its acceptance was required”.

4.4.2.11 According to Mr. Mdluli, in the **Nana Mdluli case (supra)** and the case of **Simon Dlodlu v Emalangen Foods IC case no 17/2002**), the Industrial Court held that resignation is a unilateral act that does not require the employer's acceptance in order to end the employment contract.

4.4.2.12 The Respondent's representative submitted that similarly, in the present case, the Applicant laboured under an erroneous impression that she had to wait for the approval or acceptance of her letter of resignation by the Respondent before such resignation could be effective. He contended that the Respondent itself could not stop the Applicant from leaving.

4.4.2.13 Mr. Mdluli also submitted that in the South Africa case of **Sihleli Mafika v South Africa Broadcasting Corporation Ltd, LAC case no:1700/2008, Van Niekerk J at pages 7 and 8** stated as follows:

“A resignation is a unilateral termination of a contract of employment by the employee. The Courts have held that the employee must evince a clear and unambiguous intention not to go on with the contract of employment by words or conduct that will lead a reasonable person to believe that the employee harboured such an intention. Notice of termination of employment given by an employee is a final unilateral act which once given cannot be withdrawn without the employer’s consent. In other words, it is not necessary for the employer to accept any resignation that is tendered by an employee or to concur in it, nor is the employer party entitled to refuse to accept a resignation or decline to act on it.”

4.4.2.14 Mr. Mdluli also argued that the fact that the Applicant continued to work after tendering her resignation did not in any way imply at law that she was re-employed or that her withdrawal had been accepted. She was acting under an erroneous belief that she was still an employee.

4.4.2.15 According to the Respondent’s attorney, the Applicant was not at liberty to withdraw her resignation without the express consent of

the Respondent and the latter was under no legal obligation to consent to the withdrawal.

- 4.4.2.16 The Respondent's counsel contended that in the case of **Sanele Cele and 2 others v the University of Swaziland and another High Court case no: 3749/2002**, the Court quoted with approval **His Lordship Murray J** in the case of **Rustenburg Town Council v Minister of Labour and other 1942 TPD 220 at 224**, who opined as follows:

“The giving of notice is a unilateral act, it requires no acceptance thereof or concurrence by the party receiving notice nor is such party entitled to refuse to accept such notice and to decline to act upon it. If so, it seems to me to follow that notice once given is final and cannot be withdrawn except obviously by consent during the time in excess of the minimum period of notice.”

- 4.4.2.17 Mr. Mdluli consequently submitted that, the Applicant's notice of resignation of January 2012 was final and needed no action by the Respondent whether of accepting or rejecting it. In the circumstances, the Respondent did not terminate the Applicant's services, but the Applicant herself terminated her own services. Mr. Mdluli argued that in the premises, the Applicant's claims ought to be dismissed with costs.

5. ANALYSIS OF EVIDENCE AND ARGUMENTS

- 5.1 The dispute centres on the question whether the Applicant's letter of resignation dated January 2012 terminated her services.
- 5.2 On the one hand, the Applicant alleged that the Respondent terminated her services at a meeting of the executive committee on the 31st March 2012. Conversely, the Respondent contended that the Applicant's services were terminated by her letter of resignation and the latter's withdrawal of resignation on the 24th February 2012 was inconsequential.
- 5.3 It is common cause that the Applicant voluntarily wrote a letter of resignation in January 2012. Although she does not mention it in the letter, her reason for resigning was to further her studies.
- 5.4 The Applicant's representative belatedly suggested that the Applicant's letter of resignation was in fact a request for variation of her position from permanent to part-time. This suggestion is rejected outright. The Applicant's choice of words in her letters of resignation and withdrawal of resignation clearly demonstrate that she was resigning from her job and not requesting a variation.
- 5.5 The importance of these letters to the resolution of the dispute demands that they be reproduced *verbatim* below. In January 2012, the Applicant wrote as follows:

“

Box 25
Matata

Jan 2012

The Chairperson
Ndobandoba Farmers
P. O. Box 25
Matata

RESIGNATION LETTER

I kindly greet all the committee members of Ndobandoba farmers. Its been a great pleasure, working together.

I write this letter to inform you that I resigning (sic) due to some commitment somewhere. I can afford if you can employ me as a part time employee.

Hoping my request would be accepted.

Yours faithfully

Gugu Khumalo”
(Emphasis added)

- 5.6 The Applicant wrote that she was ‘resigning due to some commitment somewhere’. At the very onset after salutation, she informs the committee of her resignation; then subsequently, she wrote that she ‘can afford’ if the committee can employ me as a part-time employee. According to the Oxford School Thesaurus, the synonyms of the verb ‘resign’ are “leave, stand down, step down, give in your notice, quit, and give up.” Then the synonyms for the noun ‘resignation’ are

“departure, notice, standing down, retirement, and relinquishment.”

- 5.7 In **Sihlali v South Africa Broadcasting Corporation Ltd (2010) 31ILJ 1477 (LC)** at page 1483 paragraph 11, the court described the term ‘resignation’ in the context of employment thus:

“A resignation is a unilateral termination of a contract of employment by the employee. The courts have held that the employee must evince a clear and unambiguous intention not to go on with the contract of employment, by words or conduct that would lead a reasonable person to believe that the employee harboured such an intention.” (Emphasis added).

- 5.8 There is no dispute that the Applicant was permanently employed, consequently her status of employment could not be unilaterally varied by either party. The Learned author **Grogan** in his text **Workplace Law (10th ed)** at page 41 states thus:

“Once the parties have agreed on the essential terms of the contract, its terms are fixed in the sense that neither party may unilaterally vary them unless the original contract provides for variation...Notice of a unilateral variation is regarded under the common law as a notice of dismissal.”

- 5.9 If the Applicant requested a variation of her employment from permanent to part-time, she should have expressly stated so and not use words such as “resignation letter” and “I am resigning due to some commitment somewhere.” Her choice of words evinces a clear and unambiguous intention to terminate her employment contract.

5.10 In any event, if there is any doubt about the Applicant's intention to terminate her contract, that is removed by her letter of withdrawal dated 24th February 2012. That letter reads thus:

“

*P. O. Box 25
Matata*

24th Feb 2012

Dear Sir

Re: Apology

I kindly apologise to the committee concerning my resignation letter dated 14th February 2012.

I am very sorry. I have decided to stay.

I hope my apology reaches your highest consideration.

*Yours faithfully
(signed)
Gugu Khumalo”
(Emphasis Added)*

5.11 In her letter of withdrawal of resignation, the Applicant states plainly that she has decided to stay. If she had not previously terminated her services by resigning, she would not have used the words “*I have decided to stay.*” Moreover, there is no hesitation that had the school syllabus not changed, the Applicant would not have withdrawn her letter of resignation. All the above facts prove that she evinced a clear and unambiguous

intention not to continue with her contract of employment.

5.12 Now, the Applicant's representative submitted that her resignation was rendered ineffective by the Respondent's failure to respond to her letters of resignation. Furthermore, Mr. Msibi argued that her resignation rendered ineffective by the fact she continued to work for two months after her employer became aware that she had resigned. In essence, the Applicant's representative contended that the Respondent accepted her withdrawal of resignation.

5.13 In the **Sihlali case (supra) at page 1483, paragraph 11**, the Court continued to opine as follows:

“Notice of termination of employment given by an employee is a final unilateral act which once given cannot be withdrawn without the employer's consent.... In other words, it is not necessary for the employer to accept any resignation that is tendered by an employee or to concur in it, nor is the employer party entitled to refuse to accept a resignation or decline to act on it... if a resignation were to be valid only once it is accepted by an employer, the latter would in effect be entitled, by a simple stratagem of refusing to accept to tendered resignation, to require an employee to remain in employment against his or her will. This cannot be it would reduce the employment relationship to a form of indentured labour.” (Emphasis Added).

See: **Simon Dlodlu v Emalangen Foods (IC case no: 47/2004)** and **Nana Mdluli v Conco Swaziland Limited (IC case no: 12/2004)**.

- 5.14 Legally speaking, after the Applicant had notified the competent authority within the Respondent's undertaking that she was resigning, the latter had no obligation to approve or reject the resignation; consequently, there was no need for the Respondent to respond to the Applicant's letter of resignation.
- 5.15 Once the Applicant had served her notice of termination of employment, there was no duty on the Respondent to keep her in employment. The Respondent was therefore at liberty to look her replacement without consulting her.
- 5.16 The Applicant's representative also argued that the Applicant submitted her letter of resignation in the heat of the moment and as such was entitled to withdraw it. Mr. Msibi quoted the Learned author **Grogan's Workplace Law (10th ed) page 68 paragraph 4**, who remarked that where a resignation occurred in the heat of the moment, the Labour Appeal Court held that it may be withdrawn and that the employer's refusal to allow the employee to withdraw it under those circumstances may constitute dismissal.
- 5.17 **Grogan Workplace Law 11th ed at pages 73-4** states as follows:

“Where notice must be in writing, a resignation will not be effective until it is actually read by the employer or someone authorised to accept the resignation on the employer's behalf. Resignation brings the contract to an end from the moment it is accepted by the employer or, if the employee gives notice, or from the end of the notice period...once the employer has accepted an employee's resignation, the employee may not revoke it. However, where the resignation occurred in the heat to the moment, the Labour Appeal Court had

held that it may be withdrawn, and that the employer's refusal to allow the employee to do so may constitute a dismissal. This applies also to the employer, once the employee's resignation has been accepted the employer's acceptance cannot be unilaterally withdrawn." (Emphasis Added).

5.18 In making the above statement, the Learned author **Grogan (supra)** relied on the case of **Chemical Energy Paper Printing Wood and Allied Workers Unions and Another v Glass and Aluminium 2000cc (2002) 23 ILJ 695 (LAC)**. This case has been criticized for being inconsistent with a line of authorities that established the principle that for a resignation to be effective, the employer need not accept it.

5.19 In the **Sihlali case (supra)** at page 1485 paragraph 19, the Court stated the following:

"In support of the second leg of his argument, Mr. Hardie contended that I am bound by the judgment of the Labour Appeal Court in CEPPWAWU & Another v Glass & Aluminium 2000cc, and the principle established in that judgement to the effect that a resignation tendered by an employee requires acceptance by the employer party. In his judgement, Nicholson JA dealt with a claim of constructive dismissal, i.e. a claim by an employee that he resigned because the employer had made continued employment intolerable. The employee concerned, a shop steward, had left his employment in the heat of the moment; in the course of his judgment, and in the context of a discussion on resignation generally and how ambiguous statements and conduct should be interpreted, Nicholson JA stated that 'Resignation brings the contract to an end if it is accepted by the employer' (at paragraph 33 of the judgment). There

is no authority cited for this statement, which has been criticized as an incorrect reflection of the law. (See for example, Grogan Dismissal, Discrimination and Unfair Labour Practice at 145; PAK Le Roux Current Labour law 2002 at 4). (Emphasis added).

5.20 The learned **Van Niekerk J** in **Sihlali supra at page 1486 paragraph 19- 20** continued to state thus:

“Mr. Hardie found support for his submission in Uthingo Management (Pty) LTD v Shear NO & Others (2009) 30 ILJ 2152 (LC), where this Court, referring to Glass and Aluminium, appears to have accepted that the intention of an employee must be ‘clear and unconditional’ (at 2155J). The statement made in Glass & Aluminium and Uthingo to the effect that it is necessary for a resignation to be accepted by an employer are obiter. Glass & Aluminium concerned a statutory claim of unfair dismissal and the interpretation of S 186 (1) of the LRA rather than a contractual claim such as the present; Uthingo was a review of an arbitration award in an unfair dismissal dispute, an element of which concerned the application of a notice clause in an employment contract and the definition of dismissal in 186. I see no reason to depart from the long line of authorities referred to in para 11 above, all of which directly concern themselves, as does this case, with contractual disputes. The effect of the authorities is that a resignation is a unilateral act by an employee that does not require acceptance by the employer”. (Emphasis added).

5.21 The long line of authorities that his Lordship Van Niekerk J referred to in **Sihlali case (supra) at paragraph 11** are the following cases : **Rustenburg Town Council v Minister of Labour & Others 1942 TPD 220; Potgietersrus Hospital Board v Simons**

1943 TPD 269. Du Toit v Sasko (Pty) Ltd (1999) 20 ILJ 1253 (LC); Rosebank Television & Appliance Co (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd 1969 (1) SA 300 (T); and African National Congress v Municipal Manager, George & Others (2010) 31 ILJ 69 (SCA).

5.22 The above line of authorities were endorsed by the Industrial Court of Swaziland in **Simon Dlodlu case supra at paragraph 15** where the court stated thus:

“Resignation is a unilateral act which brings about termination of the employment relationship without requiring acceptance by the other party- see Rustenburg Town Council v Minister of Labour & Others (1942) TPD 221, Du Toit v Sasko (Pty) Ltd (1999) 20 ILJ (LC)’ Van Jaarsveld & Van Leck: Principles of labour law para 214; John Grogan’s Workplace Law, seventh edition at 108.”

5.23 I had an occasion to read the judgment of **His Lordship Nicholas JA** in the **Glass & Aluminium case (supra)** and find the criticism and distinction made by **His Lordship Van Niekert J** in **Sihlali** is unassailable. With respect at paragraph 33 of his judgment, **His Lordship Nicholson JA** simply makes an audacious statement without citing any authorities. His Lordship’s statement finds no support from South African case law. In any event, I am bound by Swazi case law- **Simon Dlodlu case (supra)** and **Nana Mdluli case (supra)**. These cases laid down the principle that, resignation is a unilateral act that ends the employment contract and requires no consent on the part of the employer.

5.24 Moreover, the facts in the present case are distinguishable from the facts of the **Glass and**

Aluminium case (supra). Mr. Msibi argued that the Applicant resigned in the heat of the moment because she was desirous of pursuing her studies, but discovered that the syllabus had changed, hence her withdrawal of her resignation.

5.25 The expression “*in the heat of the moment*” was quoted with approval by His **Lordship Nicholson JA** (supra) from the English cases of **Barclay v City of Glasgow District Council (1983) IRLR 313; Sothern v Franks Charlesly & Co(1981) IRLP 278 and Sovereign House Security Services Ltd v Savage (1989) IRLR 115 (CA).**

5.26 The words “*in the heat of the moment*” are synonymous with terms such as ‘*coercion*’ ‘*duress*’ and ‘*emotional stress*’. In other words, where an employee is forced to resign due to duress and emotional stress related to the work environment, but later regrets and withdraws the resignation, he or she is deemed to have resigned in the heat of the moment. Indeed, in the **Glass and Aluminium case (supra)**, the Applicant resigned after being victimized by a manager because he was a union shop steward. The Labour Appeal Court found that he had resigned ‘in the heat of the moment’ and the employer’s refusal to accept his withdrawal of the resignation constituted unfair dismissal.

5.27 It is common cause in the present case that, the employer did not put the Applicant under pressure to resign, she saw an opportunity to further her studies. Certainly, in her letter of resignation, she states that she was resigning due to some commitment somewhere. It can hardly be argued that these circumstances were ‘in the heat of the moment’. Evidently, the Applicant resigned prematurely before she could acquire sufficient information regarding her studies. Nevertheless, the Respondent should not bear

the responsibility for the Applicant's error of judgement.

5.28 The Applicant's resignation could only be withdrawn with the consent of the Respondent. See: **Sihlali (supra); Rustenburg) Town Council (supra); Potgietersrus Hospital (supra); Du Toit (supra); and African National Congress (supra).**

5.29 In the case of **Smit and Rawlplug SA (PTY) Ltd (2014) 35 ILJ 814 (CCMA), at page 828**, the Learned Commissioner remarked thus:

“In argument, the respondent's representative referred to the judgement of Van Niekerk J in the matter Sihlali v SA Broadcasting Corporation Ltd (2010) 31 ILJ 1477 (LC) in which the court held that when an employee resigns (a unilateral act) in circumstances where he does not claim he was incapable of appreciating what he was doing or the consequences of his actions when he made the decision to resign, and later regrets that decision, an attempt to resuscitate the employment contract cannot succeed as in law the termination of the contract was brought about by the employee's voluntary and deliberate conduct. A resignation also cannot be withdrawn without the employer's consent. In this matter it was clear that the withdrawal of the resignation was subject to and conditional upon satisfactory terms being agreed upon in negotiations.” (Emphasis added).

5.30 The learned Commissioner in **Smit (supra)** at page **828-9** continued to state thus:

“The Applicant seemed to believe that there was an obligation on the respondent to retain him in service for as long as negotiations continued – even beyond the date when his resignation took effect. He seemed to believe because in previous years, negotiations about changes to terms and conditions in his contract sometimes took longer to finalise than the end of March, on this occasion the employer was obliged also to extend negotiations beyond end (sic) March. The cardinal difference, which the applicant seemed unable to comprehend, was that the parties were not, this time around negotiating a change to an existing contract of employment which had not been terminated, but they were in fact negotiating new contracts in the light of his resignation – a unilateral termination of the contract on notice by the applicant himself. As he stated, his staying on was subject to and conditional upon agreement being reached. It never was.”

5.31 The Applicant’s letter of resignation never mentioned the notice period. Nevertheless, having worked continuously for five years before she resigned, in terms of **Section 33 of the Employment Act 1980**, the period of notice she was obligated to give was one month and an additional four days for each completed year minus the first year. Consequently, the two months (February and March) that the Applicant worked after she resigned in January 2012 constituted notice. The contention that the two months she worked signified that the Respondent either rejected the resignation or consented to its withdrawal therefore stands rejected.

5.32 The Applicant conceded that in the executive committee meeting at the end of March 2012, she was asked to continue working until her successor arrived. Conversely, she alleged that some members of the executive committee accepted her withdrawal, but she never called any of the committee members to corroborate her version; she also did not produce any documentation to support her story.

5.33 In the absence of evidence that the executive committee accepted her withdrawal of resignation, the voluntary termination of the Applicant's services by herself remained valid. Based on all the above reasons, I find that the Respondent did not dismiss the Applicant, but she terminated her services by resigning voluntarily in January 2012. Consequently, the claims for terminal benefits and compensation for unfair dismissal ought to be dismissed.

6. OVERTIME CLAIM

6.1 The Applicant's claim for overtime was not quantified in both the Report of Dispute and Certificate of Unresolved Dispute. Moreover, the Applicant did not lead evidence to quantify and prove her overtime, presumably because from the onset, the Respondent's counsel conceded the Respondent's liability to the overtime claim.

6.2 Nevertheless, the Respondent accepted liability, I will therefore order the Respondent to pay the Applicant's overtime claim albeit unquantified. Should there be a dispute as to the amount due, the parties may approach CMAC for direction.

6.3 I accordingly make the following order:

7. AWARD

- 7.1 I find that the Applicant was not dismissed by the Respondent, but resigned voluntarily.
- 7.2 The Applicant's claims for notice pay, additional notice, severance allowance, and compensation for unfair dismissal are dismissed.
- 7.3 The Respondent is ordered to pay the Applicant her overtime claim albeit unquantified. Should there be a dispute as to the amount due, the parties may approach CMAC for direction.
- 7.4 There is no order for costs.

DATED AT SITEKI THIS _____ DAY OF FEBRUARY, 2017

VELAPHI Z. DLAMINI
CMAC ARBITRATOR