



**CONCILIATION, MEDIATION & ARBITRATION
COMMISSION (CMAC)**

HELD AT MANZINI

SWMZ 655/16

In the matter between:-

Bongani Sibanyoni & 2 Others

APPLICANT

And

C.M Concrete (Pty) Ltd

RESPONDENT

CORAM:

Arbitrator : Ms K. Manzini

For Applicant : Mr. B. Sibanyoni

For Respondent : Ms. V. Ngozo

ARBITRATION AWARD

(17.07.17)

1. PARTIES AND REPRESENTATION

1.1 The Applicants herein are Mr Bongani Sibanyoni, Mr Joseph Maziya and Simile Nkhambule. The three gentlemen are all former employees of the Respondent. Mr Bongani Sibanyoni is Swazi male adult and resident of Mhlaleni, Matsapha,Manzini Region. Mr Joseph Maziya is a Swazi male adult who resides in Eteni Matsapha. Mr Simile Nkhambule is a Swazi male adult, whose full and further details are unknown. Mr Bongani Sibanyoni appeared on behalf of the Applicants.

1.2 The Respondent is C.M Concrete (Pty) Ltd, a company duly registered in terms of the laws of Swaziland, and situated at the Matsapha Industrial Site, Manzini Region. Ms Vamsile Ngozo, the Human Resources Officer represented the Company.

2. ISSUES IN DISPUTE

2.1 According to the Certificate of Unresolved Dispute filed herein (No.010\17) this is a matter of alleged unfair dismissal. The Applicants argue herein that their services were unfairly terminated because their employer cited

unavailability of work as the reason for termination of their services, which thing they vehemently deny. They made a claim for compensation for the alleged unfair dismissal.

2.2 The Respondent on the other hand maintained its position that the Applicants' services were terminated in a fair manner, and insisted that there was indeed a work shrinkage that necessitated such termination.

3. SUMMARY OF EVIDENCE

The parties herein relied on the oral testimonies of witnesses as well as documentary evidence. The Applicants' representative relied on the testimonies of two witnesses (himself and Mr. Joseph Maziya), and he also stated as part of his opening statement that Mr. Simile Nkhambule was not present to give his own testimony. He explained that he has lost contact with the said Mr. Nkhambule, and has no instructions whatsoever from him regarding how to proceed with the matter in as far as it pertains to these Applicants' claims.

Ms. Vamsile Ngozo gave testimony in support of the Respondent's case.

3.1 THE APPLICANTS' CASE

THE TESTIMONY OF MR. BONGANI SIBANYONI

3.1.1 The Applicant testified under oath that he was employed as a General Labourer on the 7th of July, 2016. He explained that he was employed by the Respondent on the basis of a fixed term contract. He stated that he had not kept a copy of the said contract, but he did recall that it was of a month's (one month) duration. He also stated that he did not really recall the terms and conditions of his employment.

3.1.2 The Applicant stated that he had worked for the Respondent for three months, and after this he expected to become a permanent employee of the company. He stated that to his dismay, at the end of the fourth month the employer wrote him a letter (dated 31st October, 2016) which informed him of the termination of his services. The Applicant testified that on the 1st of November, 2016 he and his co-applicants had gone to the workplace to ask about their salaries for the previous month, they had been given more work by the company director, Mr. Mark. Carmichael; however they were not given another written contract. He explained that since the employer's Human

Resources Officer failed to issue new contracts to them, they had been loathe to perform the duties assigned, for fear of not being paid for the service that they would have rendered.

3.1.3 He explained that since they were paid their salaries for October, 2016, they were not claiming their salaries for that month. He stated however that they considered themselves to have been re-engaged for the month of November, 2016, so they wanted to be paid notice pay for that month, as well as compensation for unfair dismissal.

3.1.4 There was no cross-examination.

THE TESIMONY OF MR.JOSEPH MAZIYA

3.1.5 The Applicant testified under oath that he was employed as a Flagger on the 18th of August, 2016. According to the Applicant he earned a sum of E62.10 per day, and worked 9 hours in a day. He stated that he did not recall signing a written contract when he was initially employed, but on the 31st of October, 2016 he received a letter which terminated his contract as of 1st of November, 2016.

3.1.6 He explained that on that 9th November, 2016 he did receive a call from the Company's Human Resource Officer (Ms Ngozo), which call effectively informed him of the availability of more work for him. He stated that when he approached Ms. Ngozo for formal contract relating to this new engagement, she refused to provide this documentation. He pointed out that he was reluctant to commence working on a job where he had not been given a proper contract of employment.

3.1.7 The Applicant explained that on the 10th of November, 2016 he wrote a letter of demand to the Respondent requiring that he should be paid notice pay , and compensation for unfair dismissal. He stated that the Human Resource Officer, Ms Ngozo told him when he delivered the said letter to her that he had not been unfairly dismissed because his contract had be terminated whilst he was still on probation. He stated that he had not received a contract (written) when he was first employed by the Respondent, and did not understand what Ms Ngozo meant by the term "Probation". He explained also that he is not married, but has a minor child who is currently doing grade 3 at a local primary school.

3.1.8 During cross-examination it was put to him that he had indeed signed a contract of employment when he was employed by that Respondent. The Applicant stated that he could recall that indeed he did sign some documents, and even stated his identification number in the said documents.

3.2 THE RESPONDENT'S CASE

3.2 THE TESTIMONY OF Ms. VAMSILE NGOZO

3.2.1 The Respondent's witness testified under oath that she is the Human Resources Officer of the Respondent Company. She referred to the contracts of employment that pertains to the two Applicants herein. She referred to the contract between the Respondent and Mr. Bongani Sibanyoni (dated 4 October 2016), and pointed out that the document clearly reflected that it was for a duration of exactly one (1) month, so it was so clear that there was no reason in her mind, for the employee to believe that he was being engaged on a permanent basis. The witness argued that there was therefore no valid reason for the Applicant to allege that he had a reason to believe that he was being engaged on a permanent basis. The witness argued

that there was therefore no valid reason for the Applicant to allege that he had a reasonable expectation that he would be employed permanently.

3.2.2 The witness referred also to the Applicant's written particulars of employment. The said document states that the employee in question was employed, subject to a three (3) months probationary period, and that period had not yet elapsed at the time of the Applicant's termination. She stated that according to **Section 32 of the Employment Act, 1980(as amended)**, the employer was entitled to terminate the contract of employment without notice. She explained that this was despite the fact that the particulars of employment reflected that both parties were to give the other a period of notice amounting to one (1 week) prior to termination.

3.2.3 She stated that the reason for terminating the employment contract of Mr Maziya was founded on the financial problems that were faced by the Respondent. The witness explained that the Company had been contracted by the Swaziland Government to perform some road works on the Mbabane – Manzini highway, but they had not received payments from the said

Government. She stated that the cash-strapped company could no longer afford to buy the necessary materials to do the road works, and could not afford to pay the salaries of its employees. She explained that this is the cause of the decision by the Respondent to terminate the services of its employees, including the Applicant in casu.

3.2.4 During cross-examination the witness explained, when it was put to her that despite the presence of the clause that relates to termination of the contract of employment at the end of one month in Mr. Sibanyoni's contract, this did not entitle him to expect renewal of same. The Applicant maintained that this was the case, but the witness continued to refute this. She maintained that all parties were aware that the contract was finite and would end on the 31st of October, 2016.

3.2.5 The witness also maintained that as far as she is concerned the employer had no obligation to give the Applicant notice in the case of Mr. Joseph Maziya because he had still been on probation at the time his services were terminated.

4. ANALYSIS OF EVIDENCE

4.1 The dispute herein calls for a determination on whether or not the two Applicants herein are entitled to the claims that they are making. The Applicants herein according to the Certificate of Unresolved Dispute, as aforementioned, both claim notice pay and Compensation for Unfair Dismissal.

MR. BONGANI SIBANYONI

4.2 The case of the Applicant is that although he acknowledges that his fixed term contract which was for a month, duly expired at the end of October, 2016, but he still entertained a legitimate expectation that it would be renewed. The Respondent's witness stated that **Section 35** of the **Employment Act, 1980 (as amended)** is authority that the Applicant in question is not protected by law in the instance where the contract has expired.

4.3 The issue of whether or not the Applicant had good grounds to expect that the employer would renew his contract is one which has been dealt with by our courts. A way forward has been charted by the clarifying of a rather grey area in our law. This lack of clarification is one which was caused by the

fact that in our neighboring South Africa, the **Labour Relations Act, no. 66 of 1995, at Section 186(b)** expressly provides that where an employee has acquired a reasonable expectation that the contract will be renewed, a dismissal occurs if that that expectation is not fulfilled (**see: John Grogan, "Dismissal" 2012, pages 37-38 also Andreas Dierks vs The University of South Africa (1999) 20 ILJ 1227 (L.C).**

4.4 The position in Swaziland is quite different, as can be seen from a number of our local authorities (**see, Nkosenhle Ben Kunene v. Public Service Pension Fund, Case No. 325 (I.C) Nhlanhla Hlatshwayo v Swaziland Government Case No . 3986 (I.C), Bernadin B Bango v The University of Swaziland, Case No. 342/98 (I.C).** The wealth authority in our jurisdiction is to the effect that Swaziland does not have a provision which is the equivalent of the South African **L.R.A Section 186(b)**. According to Dunseith J.P, (as he then was);-

"To be legitimate an expectation must have some reasonable basis. It must be more than a mere hope or ambition" (**see Nhlanhla Hlatshwayo v Swaziland Government (Supra) at p. 15-16)**").

4.5 Reference is also made to the case of **Ruth Mkhalihi v Muhawu Maziya N.O. and Another Civil Case No. 923/15 [2017] SZHC (73)**, wherein learned Mlangeni J departed from the findings in the **Bernadin Bango Case (Supra)**. The Learned Judge herein however makes very interesting statements at page 8 of the same decision; wherein he states the following:

“... [I] am inclined to think that by treating each case on the basis of its own facts and circumstances, in a given set of facts, there could be a basis for legitimate expectation that a contract would be renewed or extended.”

4.6 The Learned judge in this case does not accept a rule of thumb approach that in our law a fixed term contract employee cannot under any circumstances have a reasonable expectation of renewal. It is my humble opinion that since the learned Judge in this case does recognize that it is the individual circumstances and merits that are determining factors, that is the approach that I will take in the case at hand.

4.6 The Applicant herein was only employed for a very brief period (a mere four months), and he had actually signed a month-long fixed term contract on the 1st of October, 2016.

The Applicant in Casu is a young man who still has prospects of finding alternative employment, and he did state in his evidence in chief that he is currently self employed as a carpenter. In the given circumstances I have no reason to depart from the authorities that are against the existence of legitimate expectations. The Applicant herein has no legal justification for alleging that he was unfairly dismissed and is therefore not entitled to the claims that he is making.

MR JOSEPH MAZIYA

4.7 The case of Respondent was that the Applicant was not protected by **Section 35** of the **Employment Act (Supra)** because he had still been on probation when his services were terminated. The Respondent Witness stated also that according to Section 32 of the same Act, the Respondent is entitled to terminate the Applicant's service without notice in the given circumstances.

4.8 Section 35 of the Employment Act (Supra) reads as follows:-

- (1) "This section shall not apply to;

- a) An employee who has not completed the probationary period or probationary employment as provided for in Section 32".

Section 32 in turn creates a right on behalf of both parties to the probationary employment relationship to terminate the contract without notice to either party.

4.9 The recent decision of **Nomsa Sigudla v Standard Bank Swaziland Limited & Another Case 4050/09 consolidated with Joseph Sibandze & 9 Others v Premier Swaziland Bakeries (PTY) Ltd Case No. (1717) [2016] SZ HC 119 (September, 2016)** provides the Law on this area. The court made its finding that **Section 32(1)** of the Employment Act (Supra) is inconsistent with **Section 20** of the constitution of Swaziland, 2005, where it is stated that "All persons are equal before the law. The reasoning of the court was that **section 32(1)** did not mean that the employee can simply be dismissed without being informed prior. The court interpreted **Section 32 (1)** as meaning that the probationary contract will come to an end on the day it is decided that the employee has failed the assessment for suitability he was being subjected to (**see paragraph 47**).

4.10 In casu the Respondent's witness did not proffer any proof that the Respondent was indeed cash-strapped, and therefore incapable of keeping the Applicant in its employ. No evidence was led to establish that perhaps the Applicant had failed the test for suitability for the job he was performing. It is on these premises that it is found that the Applicant was unfairly dismissed in this case.

5. CONCLUSION

5.1 Having heard the evidence of all the parties herein, it is hereby found that the application for unfair dismissal in the case of the first Applicant (Mr Bongani Maziya) is hereby dismissed. It is further held that in the case of the second Applicant (Mr Joseph Maziya) the Respondent is indeed guilty of unfair dismissal. The brevity of his employment relationship has however been considered in the award for compensation made, since he was only employed for three (3) months.

6. AWARD

The Respondent is hereby ordered to pay the second Applicant (Mr. Joseph Maziya) the following;

1) Notice Pay	:E1,242.00
2) 1 Month Compensation for unfair dismissal	:E1,242.00
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The said amount is to be paid at the Manzini CMAC offices, Lankhosi Building not later than the 31st of August,2017.

**THUS DONE AND SIGNED AT MANZINI ON THIS
.....DAY OF JULY, 2017.**

**KHONTAPHI MANZINI
CMAC ARBITRATOR**