



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

**HELD AT MBABANE**

**SWMB 354/14**

In the matter between:-

**HLOBISILE ZWANE**

APPLICANT

And

**4HIM SECURITY SERVICES**

RESPONDENT

CORAM:

**Arbitrator** : Ms K. Manzini

**For Applicant** : Mr. E. Dlamini

**For Respondent** : Mr. J. Dlamini

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**ARBITRATION AWARD**

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## **1. PARTIES AND REPRESENTATION**

The Applicant herein is Ms. Hlobisile Zwane, a Swazi female adult of P.O. Box 122, Bhunya. The Applicant was represented by Mr. Ephraem Dlamini, a Labour Consultant.

The Respondent is 4Him Security Services, a security establishment, duly registered in terms of the laws of Swaziland, and carrying on business on Siphetfo Road Sidwashini Industrial Site, Mbabane. The Respondent's postal address is P.O. Box 2416 Mbabane. Mr Selby Dlamini, a labour Consultant appeared on behalf of the Respondent.

## **2. ISSUES IN DISPUTE**

According to the Certificate of Unresolved Dispute which is on file (No. 628/14), the nature of the dispute is one of alleged constructive dismissal. The Applicant claims that her dismissal was procedurally and substantively unfair, whilst the Respondent denied the Applicant's claims and alleged that the Applicant had instead, absconded from work. The Applicant's claims stand as follows:-

1) Notice Pay:	E1868.88
2) Compensation for unfair dismissal	E22,426.50

### **3. SUMMARY EVIDENCE**

The Applicant was the only witness who testified at the Arbitration proceedings, whilst the Respondent's representative did not call any witness at all as he stated that he did not have anyone at hand at the Respondent's enterprise who could testify in the circumstances.

#### **3.1. THE APPLICANT'S CASE**

Ms. Hlobisile Zwane testified under oath that she was employed by the Respondent on the 1<sup>st</sup> of August, 2013 as a security guard, and had been posted to work at the Hlathikhulu Hospital. She stated that during her employment she had fallen pregnant, and had suffered from swollen feet, such that she could not wear her work boots, so she had asked for two months leave so that she could seek medical attention and to recuperate.

She stated that the said letter was written on the 5<sup>th</sup> March, 2014, and she duly handed same in as part of her evidence. The Applicant stated that she had duly taken two months unpaid leave, and had reported for duty on the 30<sup>th</sup> April 2014. She stated that her attempts to report for duty were thwarted by her Manager, a Mr Mbuso Mamba who had told her in a very insulting manner to go back home. According to the Applicant he had told her to go home and open her vagina so as to take out the General's head. She explained that the said "General" was the father of her baby.

The Applicant testified that she had duly returned home, and had awaited the birth of her baby in July, 2014. She stated that a week after the birth of her baby she had once again attempted to report back for duty. She stated that she had found a certain Sizakele Dlamini at the office, and she had told her that Mr.Mamba was not in the office would have to await instructions from him. The Applicant testified that she had returned to the office the following day, but Sizakele had told her that Mr Mamba was still not in the office, and had not told her whether or not the Applicant could go back to work.

The Applicant stated that she had opted to approach Mr Mamba directly as she was aware that he was stationed at the Mbabane City Council, however when she spoke to him, he had remained silent and had refused to speak to her at all.

She stated that she had remained out of work and without any means of earning money until October, 2014 when she opted to report a dispute of Constructive dismissal with the Commission. She stated that she would still be in the employ of the Respondent if it had not been for the manner in which Mr Mamba treated her. She testified that she had at all times performed her duties well, but had been forced to ask for sick leave due to her illness. The testimony of the Applicant was that she had not committed a breach of any workplace rule, but had simply taken time off because of ill health, and had attempted in good faith to return to work not only when she felt better during her term of pregnancy, but also after her baby had been born.

He stated that despite her attempts to resume work, her Manager, Mr Mamba had refused to put her back to work.

#### **4. ANALYSIS OF EVIDENCE**

The crisp question that is open for determination in this case is whether the Applicant was constructively dismissed in terms of Section 37 of the Employment act, 1980 (as amended). The provision reads as follows:-

**“37 when the conduct of the employer towards an employee is proved by the 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.”**

It is trite law that the issue of notice is not an essential element where an employer proves that the conduct of the employer towards him was such that he could no longer be expected to continue with his employment (**see: Thomas Lawlor Andrews vs. Bagshaw Harris and Associates, I.C. Case No. 172 (1999)**)

The test for constructive dismissal was formulated in **Pretoria Society For The Case of The Retarded v Ioots (1997) 18 ILJ 981 LAC at 985 A-C.** It was stated in this case that the enquiry is whether the employer conducted itself, without reasonable and proper cause, in a manner calculated or likely to destroy or seriously impair the relationship of trust and confidence between the employer and

employee. The courts function is to determine, once having considered the employer's actions, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

The impact of the enquiry is such as to establish that the employee would have continued to render his or her services to the employer for an indefinite period, but for, the actions of the employer (see page 984 D-F).

The test was duly employed by the learned Judge President P.R. Dunseith (as he then was) in **Nana Mndluli v Conco Swaziland (Pty) Ltd – I.C. Case No. 12/2004.**

In casu it is trite that the applicant was the only witness that testified at the Arbitration proceedings. It is also common cause that the Respondent's representative did not call any witnesses so as to effectively controvert that which had been testified to by the Applicant. It is clear from the Applicant's evidence that she had in good faith applied for sick leave (as is borne out in the letter which she wrote to her employer), and when she sought to resume work, she was told in a very insulting manner to return home so as to give birth to her child.

The evidence is also clear that even after she had given birth, she had attempted to resume her duties, but was not put back to work by the manager, Mr Mamba since he refused to even speak to her when she tried to engage him on the matter.

In the case of ***Simon Nhlabatsi vs V.I.P. Protection Services I.C. Case No. 84/2002***, the Court explored various case law on the issue of constructive dismissal. He cited with approval the English case of ***Woods vs VM Car Services Peterborough Ltd (1982) IRCR 4B (C.A.) at 415*** where Lord Denning stated the following:-

***"The circumstances of constructive dismissal are so infinitely various that there cannot be, and there is no rule of law saying what circumstances satisfy it, and what do not. It is a question of fact for the tribunal of fact".***

In casu, the Applicant was ill-treated by her supervisor, who told her in an extremely insulting and vulgar manner to go home and give birth to her child when she attempted to report for work after her sick leave. She proceeded home and after she had given birth she still went back to work to try and resume her duties only to be snubbed by her supervisor when she sought him out at his post at the Mbabane Municipal Council from the said Sizakele who she found at the office. All of these are clear indications that the Applicant persisted in trying to report for duty, and that she was keen on keeping her job. It is also reflective of her intention to remain in the employ of the Respondent, and this was buttressed by her own testimony at the arbitration proceedings which was been insulted and later on snubbed by her supervisor, she would still be working for the Respondent.

In this case it is clear that the Applicant found herself in the position which is expressed in the case of **Jameson Thwala v Neopac (Swaziland) Ltd IC Case No. 18/98 page 5** where the Court stated that:-

***"The employee has to prove that in his eyes and the eyes of a reasonable employee in his position, the conduct by the employer towards him was such that he could not reasonably be expected to continue the employment relationship".***

The Applicant, in casu, being a lay person, viewed the conduct of the supervisor towards her as not only being unfair, but also as being intolerable. She did not, it is to be understood, appreciate that she could possibly approach anyone else within the management of the Respondent so as to report the supervisors conduct, and to seek redress.

I agree with the view of the author **D. Du Toit & Others in "Labour Relations Law, A Comprehensive Guide"**, that

***"The question is whether taking all the circumstances into account there was objective unfairness which drove the employee to believe there was no way out but to walk away"***  
(3<sup>rd</sup> Edition page 343).



The Applicant in the present case, indeed saw no other alternative but to simply hang her head in dejection and go home after she tried repeatedly to resume her duties, only to be rejected by her supervisor; Mr. Mamba. It is for this reason that I find that the Applicant was constructively dismissed by the Respondent. I have in the awards considered the fact that the Applicant was only employed by the Respondent for less than one year.

**5. AWARD**

Having heard the evidence of both parties, it is my finding that the Applicant was constructively dismissed.

The Respondent is hereby ordered to pay the Applicant the following:-

1) Notice Pay	= E1, 868.88
2) Compensation for unfair dismissal – (2 months)	= E3, 737.76
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	<b>=E5, 606.64</b>
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The said amount is to be paid at the Mbabane CMAC offices, Asakhe House not later than the 31<sup>st</sup> day of March, 2015.

**THUS DONE AND SIGNED AT MBABANE ON THIS .....DAY OF JANUARY, 2015.**

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**KHONTAPHI MANZINI**  
**CMAC ARBITRATOR**