IN THE CONCILIATION, MEDIATION & ARBITRATION COMMISSION (CMAC)

HELD AT NHLANGANO **NHO 109/10**

In the matter between:-

GLADNESS MAZIBUKO APPLICANT

And

SIYASPAR (PTY) LTD T/A NHLANGANO SPAR RESPONDENT

CORAM:

Arbitrator	:	Fanile Ginindza
For Applicant	:	Mr. Buyisizwe Dlamini
For Respondent	:	Mr. Sabelo Dube
Nature of Dispute	:	Constructive Dismissal
Date of Hearing	:	31/03/15, 2/04/15, 19/05/15, 16/06/15, 17/08/15

EX PARTE ARBITRATION AWARD

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1. DETAILS OF HEARING AND REPRESENTATION

1.1 The Applicant is Gladness Mazibuko and was duly represented during these proceedings by Mr. Buyisizwe Dlamini, an Attorney from Magongo Dlamini Attorneys.

1.2 The Respondent is Siyaspar (PTY) LTD t/a Nhlangano Spar a company incorporated in terms of the Company laws of Swaziland and was duly represented during these proceedings by Mr. Sabelo Dube from B.S. Dlamini and Associates.

1.3 The arbitration hearing was held at CMAC-Nhlangano Office situate at Old Supreme Building, on the above mentioned dates.

2. ISSUE TO BE DECIDED

2.1 The issue for determination is whether the Applicant was constructively dismissed in the employment of the Respondent.

3. BACKGROUND TO THE ISSUE

3.1 The Applicant is an ex-employee of the Respondent, having been employed as a Cash Officer on the 22nd June, 2000. She resigned on the 23rd July 2010. Her monthly wage was E2, 897-89. She is claiming compensation for constructive dismissal.

3.2 The Respondent admits the former employment relationship between the parties as well as its material terms. It, however, denies the alleged constructive dismissal.

3.3 The dispute was conciliated on various dates during the months of September and November 2010 and a certificate of unresolved dispute was issued onthe 24th November 2010.

3.4 The matter then went to the Industrial Court under case number 187/12, and was on the 25th February 2015 referred to arbitration by the said Court.

3.5 I was appointed the arbitrator on the 18th March 2015 and the pre-arbitration meeting was scheduled for the 31st March 2015. On this date the Respondent through

its representative requested a postponement and the reason given was that the company file was with their Attorney. The matter was duly postponed to the 21st April 2015.

3.6 The pre-arbitration hearing proceeded on the 21st April 2015 and it was agreed thereafter that both Parties shall exchange the bundle of documents to be used in the arbitration on the 19th May 2015 and the matter was also postponed to the same date.

3.7 On the 19th May 2015 the arbitration commenced with both Parties in attendance, and it was thereafter postponed to the 16th June 2015. The Applicant herein had finished presenting its evidence.

3.8 On the 16th June 2015 no one representing the Respondent attended and after waiting for more than thirty (30) minutes the Applicant's representative applied that we proceed in the absence of the Respondent.

4. APPLICABLE LAW

4.1 Rule 27(1) of The CMAC's Rules says that if there is no just and reasonable explanation for the none representation, the matter must proceed, presupposing that an attempt would have been made by the absent party to file some reasons there for. In the present instance, it is not a case of assessing the reason for the absence as none was presented. It was therefore my considered view that there was no basis at all for not proceeding.

4.2 Rule 27 (1) (b) of the Conciliation Mediation and Arbitration Commission Rules provides as follows:

"If a party to a dispute fails to attend an arbitration hearing or is not represented at an arbitration, and the Commissioner is satisfied that the party not in attendance or represented was properly notified of the arbitration hearing, and that there is no just and reasonable explanation for that party's failure to attend or non-representation, the Commissioner may:

(b) If the party against whom relief is sought fails to attend the hearing or is not represented proceed to arbitrate the dispute in the absence of that party."

4.3 In the present case it is common cause that the Respondent was aware of the hearing date of the 16th June 2015 as the Respondent was represented on the 19th May 2015.

4.4 No reasonable explanation was advanced for the default in attendance by the Respondent.

4.5 When faced with the application by the Applicant that the matter proceeds in terms of Rule 27 (1) (b) of the CMAC Rules, there was no lawful or equitable ground or basis for a refusal thereof.

4.6 It is for the above mentioned reasons that the application for the arbitration to proceed in terms of Rule 27 (1) (b) was granted.

4.7 It must however be noted that default in appearance by the other party does not guarantee automatic success for the party in attendance. I am still duty bound to evaluate and examine the facts tendered by the party in attendance, before determining if a case has been made in support of his claims. See **Ex Parte Bennet 1978 (2) SA 380 9 (W).**

5. SUMMARY OF THE EVIDENCE AND ARGUMENTS

The Applicant's Version;

5.1 The only witness paraded by the Applicant was the Applicant herself and for the purposes of this award I shall refer to her as such.

5.2 The Applicant testified that on the 3rd May 2010 she was charged for poor work performance for failure to order enough change since on the 1st May it was a holiday and the change had been depleted. It was her testimony that she was given a document inviting her to a disciplinary hearing on the 7th May 2010 and it is at page 1 of the submitted bundle of documents.

5.3 On the day of the hearing (7th May 2010), the Applicant testified that the matter did not proceed and was postponed to the 12th May 2010 and no reasons were furnished for same.

5.4 It was the Applicant's testimony that on the 12th May 2010 the hearing did not proceed and nothing happened. At all material times herein the Applicant was still at work.

5.5 After the 12th May 2010 the Applicant testified that she took ill and was admitted to hospital and was given a sick leave for 15 days, and she duly submitted a sick note to the Respondent.

5.6 The Applicant testified that she resumed her duties at the beginning of June 2010 and continued working at her work station (Cash Office). It was the Applicant's testimony that on the 24th June 2010 she was again charged with gross negligence and was invited to a hearing on the 29th June 2010.

5.7 It was the Applicant's testimony that on the day of the hearing, the matter was postponed to the 5th July 2010. At all material time herein the Applicant was still stationed at the Cash Office.

5.8 On the 5th July 2010 the Applicant testified that the hearing proceeded and was concluded, and the chairman adjourned the meeting and told them he would come back with his verdict. It was the Applicant's testimony that when she returned to the Cash Office the Assistant Manager (Ms. Xaba) instructed her to go and work at the parcel counter, and this was on the 5th July 2010.

5.9 It was the Applicant's testimony that she obliged and went to work at the parcel counter but wrote a letter of complaint on the 6th July 2010 about here movement from the Cash Office to the parcel counter because she took that as a demotion. The said letter is at page 4 of the bundle of documents. The Respondent responded by letter on the 7th July 2010 which is at page 5 of the bundle of documents.

5.10 The Applicant testified that she felt demoted because the Cash Office is inside the shop and it has air conditioners while the parcel counter is outside the shop and there are no air conditioners. It was the Applicant's testimony that in the Cash Office you do paper work while sitting on a chair while in the parcel counter you do manual work. Further when you work in the parcel counter you report to Supervisors while in the Cash Office you report to the Assistant Manager.

5.11 It was the Applicant's further testimony that the post of Parcel counter is of lower grade than that of Cash Officer. She testified that when you are at the parcel counter you report to the Front end Supervisor who in turn reports to the Cash Officer if the Cashiers encounter any problems.

5.12 On the 9th July 2010 the Applicant testified that the verdict was issued and the Chairman recommended a written warning. It was her further testimony that her Manager a certain Mr. Philemon Tsabedze uttered words to the effect that she was a "rotten potato" and this made her think the recommendations did not go down well with him. The Applicant testified that the said Manager promised to "dig" until the Applicant found herself in jail, and that she would be charged again.

5.13 It was the testimony of the Applicant that she was on the 21st July 2010 charged with gross negligence while she was still at the Parcel counter. The Charge sheet is on page 3 of the bundle of documents. Her testimony was that the date of the hearing was slated for the 26th July 2010 but it was postponed on this day to the 29th July 2010, and no reasons were forthcoming.

5.14 The Applicant testified that as a result of the threats from the Manager she resigned from her employment on the 23rd July 2010. It was her testimony that the letter was delivered on the 26th July 2010 to the Assistant Manager Ms Xaba. It was her further testimony that her employer responded and rejected

her resignation. The response is at page 8 of the bundle of documents. The Applicant responded by letter on page 10 of the bundle of documents and there was no response.

5.15 On the 29th July 2010 the Applicant testified that she attended the hearing but it did not proceed and she waited for three (3) hours. Thereafter she testified that the Assistant Manager came and told her that there would be no hearing as the chairperson was reportedly away and exhausted. The Applicant then left.

6 ANALYSIS OF THE EVIDENCE AND ARGUMENTS

6.1 In this award I have considered all the evidence adduced and argument advanced by the Applicant. In view of the requirements of **Section 17 (5) of the Industrial Relations Act 2000**, (as amended) I herein below set out concise reasons to substantiate my findings.

6.2 **Section 37 of The Employment Act 1980** as amended states 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."

6.3 The Applicant herein testified that she resigned as a consequence of threats she was subjected to at the hands of the Manager of the Respondent who uttered words to the effect that he would "dig" until the Applicant found herself in jail.

6.4 There was no evidence of any internal grievance procedures that were followed by the Applicant as a result of the threats. It should be mentioned that in cases of constructive dismissal the burden of proof lies with the Applicant. The Applicant must prove on a balance of probabilities that she was constructively dismissed by the Respondent.

6.5 It has been held that an employee can only claim terminal benefits upon resigning only when such resignation was at the instance of the employer, but it was not at the instance of the employer in the present

case. See the case of **Bongani Mashwama v Swaziland Electricity Board** Industrial Court Case no. **134/13**.

6.6 See the case of **Neopac Swazilandd v Jameson Thwala Industrial Court case no. 18/1998.** In that case an employee had an alternative to resignation but did not utilize it in the form of grievance or other procedures, it was held that the employee could not have been taken to have been constructively dismissed.

6.7 It is the view of the Commission therefore that the Applicant has failed to demonstrate that she utilized internal grievance procedures before she tendered her resignation with the Respondent.

7 AWARD

7.1 The Applicant's claim is hereby dismissed.

DATED AT MANZINI ON THE 15th DAY OF JANUARY, 2016.

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FANILE GININDZA

CMAC COMMISSIONER