IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION

HELD AT MANZINI **CMAC REF NO: SWMZ 282/10**

In the matter between:

KHANYISILE DLAMINI APPLICANT

AND

M.P. FOOD PROCESSORS (PTY) LTD RESPONDENT

Coram

ARBITRATOR : VELAPHI ZAKHELE DLAMINI

FOR APPLICANT: MR. SIMANGA TSABEDZE

FOR RESPONDENT: MR. MAPHEMBA SHONGWE

ARBITRATION AWARD

DATES OF ARBITRATION : 8th and 22nd September 2010.

NATURE OF DISPUTE: UNFAIR DISMISSAL

VENUE: CMAC OFFICE, 4TH FLOOR SNAT BUILDING, MANZINI

1. DETAILS OF PARTIES AND HEARING

1.1 This arbitration hearing was held at the premises of the Conciliation, Mediation and Arbitration Commission's offices (CMAC or Commission) at the Fourth Floor SNAT Co-ops Building, Manzini on the above mentioned dates.

1.2 The Applicant is Khanyisile Dlamini, an adult Swazi female of P. O. Box 1158 Manzini. Khanyisile Dlamini was represented by Mr. Simanga Tsabedze a union official from Swaziland Processing Refining and Allied Workers Union (SPRAWU), Manzini.

1.3 The Respondent is M.P Food Processors Proprietary Limited, a registered company of P. O. Box 88 Matsapha. The company was represented by Mr. Maphemba Shongwe from Madau & Simelane Attorneys, Mbabane.

2. ISSUES TO BE DECIDED

Whether the Applicant's dismissal was substantively and procedurally unfair.

3. BACKGROUND TO THE DISPUTE

3.1 The Respondent operates the business of processing and packing sugar for the local and export markets and is based at Matsapha Industrial Town.

3.2 The Applicant commenced service with the Respondent on the 2nd April 2002 as a General Labourer, a job she held until she was dismissed on the 4th June 2009, on allegations of absconding from work. At the time of her dismissal, the Applicant earned a wage of E1086.80 per month.

3.3 The Applicant reported a dispute for unfair dismissal to the Commission, which was conciliated, however the dispute remained unresolved, and a Certificate of Unresolved Dispute No: 388/10 was issued. By consent the dispute was referred to arbitration by the parties and I was appointed to decide same.

3.4 The Applicant is seeking reinstatement or alternatively, the following terminal benefits, which however she did not quantify; Notice pay, Additional Notice, Severance allowance, Leave pay and Compensation for unfair dismissal (12 months).

4. SURVEY OF EVIDENCE AND ARGUMENT

I have considered all the evidence and arguments raised by the parties, but because Section 17(5) of the IRA 2000(as amended) requires concise reasons, only the evidence and arguments that I consider relevant to substantiate my findings have been referred to.

4.1 APPLICANT'S CASE

4.1.1 The Applicant, Khanyisile Dlamini, was the only witness who gave evidence in support of her case.

4.1.2 Khanyisile Dlamini's testimony was that on the 19th December 2008, during her pregnancy, she was on duty. At the end of her shift she was informed by her supervisor that she would have to work overtime on the 20th December 2008.

4.1.3 The Applicant stated that, however on the 20th December 2008, she could not go to work because she was confined as a result of childbirth. She had given birth to her child at the Raleigh Fitkin Memorial Hospital (Nazarene) Manzini on the same day.

4.1.4 It was Khanyisile Dlamini's evidence that she did not formerly request for maternity leave because, according to her clinic card childbirth was expected during the first week of January 2009. However she reported to her employer about her sudden confinement by sending a text message (sms) to her colleague Nomsa Dlamini, whom she requested to inform her supervisor Delisile Dlamini about her childbirth. She further requested her husband to inform one Phakama Dlamini, who was also a colleague.

4.1.5 The Applicant testified that she was in confinement until the 3rd March 2009, when she returned to work.

4.1.6 The Applicant stated that upon returning to work, the Respondent suspended her without pay and laid charges against her for absconding from work from the 20th December 2008 until the 3rd March 2009 pending a disciplinary hearing.

4.1.7 Khanyisile Dlamini's testimony was that, although she could not remember the dates, a disciplinary hearing was held and the outcome was that she was summarily dismissed.

4.1.8 It was the Applicant's evidence that during the disciplinary hearing she did produce a Child Health Card as proof of childbirth. She also

stated that the Respondent was aware of her pregnancy because as a consequence, her supervisor gave her light work after her Doctor's recommendations.

4.1.9 The Applicant produced the Child Health Card which was marked Exhibit "A1".

4.1.10 Khanyisile Dlamini testified that after her dismissal she appealed, however an appeal hearing was never held.

4.1.11 The Applicant argued that in terms of Employment Act 1980, she was entitled to three (3) months maternity leave and she had not exhausted her leave when she returned to work on the 3rd March 2009.

4.1.12 It was further contended by the Applicant that, it was permissible in terms of the Employment Act to go on maternity leave without having been granted by your employer.

4.1.13 The Applicant argued that the Respondent was not consistent in the application of its rules, because she had gone on maternity leave before, but the Respondent had never demanded for medical certificates and permission upon her return to work.

4.2 **RESPONDENT'S CASE**

4.2.1 The Respondent led the evidence of one witness, Delsile Dlamini.

4.2.2 Delsile Dlamini's testimony was that she was the Applicant's supervisor in December 2008.

4.2.3 It was Delsile Dlamini's evidence that the Applicant disappeared on the 20th December 2008, which was the company's last day of operation for the year, and only returned to work after two (2) months.

4.2.4 The Supervisor stated that neither the Applicant nor anyone reported to her about her whereabouts. However sometime after the company opened for business in January 2009, she read a message from the Applicant sent to a certain Nomsa Dlamini's cellphone.

4.2.5 It was Delsile Dlamini's evidence that the message from the Applicant stated that Nomsa should inform the "Shangaan" that, she (Khanyisile Dlamini) had given birth and was therefore confined. She ignored the message because it was directed to Nomsa Dlamini and she did not know who the 'Shangaan' was.

4.2.6 Delsile Dlamini testified that she was aware that the Applicant was pregnant, because she had given her (Applicant) light duties following her condition.

4.2.7 The Supervisor's evidence was that the Applicant did not request to go on maternity leave from her or any administrative staff.

4.2.8 Delsile Dlamini stated that the company policy was that an employee who was pregnant, had to apply and be granted maternity leave before she could go on leave. Maternity leave was for three (3) months.

4.2.9 The Respondent also handed in the findings and recommendations of the chairperson of the disciplinary hearing.

4.2.10 The Respondent argued that because the Applicant had not requested and was not granted maternity leave, her absence from work was therefore not authorized.

4.2.11 It was further contended by the Respondent that the Applicant did not produce any certificate by a medical practitioner or midwife which authorized her to go on maternity leave and as such her absence was unauthorized.

4.2.12 The Respondent also argued that because it had not granted maternity leave to the Applicant and she did not have the medical certificate authorizing such leave, her conduct fell to be decided under the permissible ground of dismissal in terms of Section 36(f) of the Employment Act.

4.2.13 Finally the Respondent argued that because the Applicant never noted an appeal, there was no basis for convening an appeal hearing.

5. **ANALYSIS OF EVIDENCE AND ARGUMENTS**

5.1 As per the provisions of Section 42(1) of the Employment Act 1980, if an employee challenges the termination of her services she is required to prove that Section 35 of the Employment Act applies to her.

5.2 Although at pre-arbitration, the Respondent initially stated that the Applicant was employed on a fixed term contract, it did not pursue this point during arbitration.

5.3 The Applicant's date of employment (2nd April 2002) and the fact that she had been in continuous service with the

Respondent until the 4th June 2009, were never disputed by the latter, consequently she has discharged her *onus* .

5.4 Section 42 (2) of the Employment Act provides that, the employer has the onus to prove that the reason for dismissing an employee is one permitted by Section 36 of the Employment Act, and that taking into account all the circumstances of the case, it was reasonable to terminate the employee's services.

5.5 The Respondent terminated the Applicant's services for the reason that, she had absconded from work from the 20th December 2008 until the 3rd March 2009.

5.6 **John Grogan, <u>Dismissal</u> Jutta and Co Ltd, p 107** remarks that abscondment is deemed to have occurred when the employee is absent from work for a time that warrants the inference that the employee does not intend to return to work.

5.7 In **Alpheus Thobela Dlamini v Dalcrue Agricultural Holdings (Pty) Ltd (IC Case No: 123/05)** at p 10 the Judge President made the following observation;

> "**Absenteeism differs from absconding or, as it is more often described, desertion from work. Absenteeism is merely an unexplained and unauthorized absence from work, <u>whereas desertion means an unauthorized absence with the intention never to return.</u> Both absenteeism and desertion are breaches of the contract of employment, but desertion is repudiation of the contract. In other words, the employee's desertion manifests his**

intention no longer to be bound by his contract of employment". (Emphasis added).

5.8 The Judge President PR Dunseith in **Alpheus Thobela Dlamini** (supra) at 10-11, proceeds to remark as follows;

"**Whether or not absenteeism amounts to desertion is a matter of fact, the critical question being whether the employee has absented himself with the intention never to return. His intention must be determined from all the circumstances. The test is objective and is the same on that which applies to all alleged repudiation of a contract, namely <u>does the conduct of the employee, fairly interpreted exhibit a deliberate and unequivocal intention no longer to be bound by the employment contract".</u> (Emphasis added).**

5.9 Now the Applicant's defence against the charge of absconding is that she was on maternity leave, which was permitted by the Employment Act.

5.10 It is common cause that the Applicant neither applied for nor was granted maternity leave by the Respondent.

5.11 Section 102 (1) of the Employment Act provides that;

"**Every female employee whether married or unmarried, who has been in continuous employment of her employer for twelve months or more shall be entitled to maternity leave with at least two weeks full pay upon delivering to her employer-**

(a) a certificate issued a medical practitioner or a midwife setting forth the expected date of her confinement;

(b) a certificate issued by a medical practitioner or midwife setting forth the actual date of her confinement; or

(c) <u>such other evidence in support of the entitlement to maternity leave as is reasonable, having regard to all the circumstances of the case"</u> (Emphasis added).

5.12 In terms of Section 103 (1) of the Employment Act, maternity leave shall not be less than twelve (12) weeks, so arranged that the employee is allowed a period not exceeding six (6) weeks, before the date of confinement, and a period of not less than six (6) weeks from the date of confinement.

5.13 Section 2 of the Employment Act defines "confinement" as 'labour resulting in the issue of a living child, or labour after twenty-eight weeks of pregnancy resulting in the issue of a child, living or dead'.

5.14 The Employment Act envisaged circumstances where an employee's confinement may take place without the prior approval of her employer. Section 103 (3) of the Employment Act reads;

> "**Where confinement takes place <u>without an employee having been granted her entitlement of maternity leave</u>, or where the period of such leave taken before her confinement amounts to less than six (6) weeks, <u>the period of maternity leave after confinement shall, if the employee so desires, be extended so that the total period of such leave amounts to not less than twelve weeks".</u> (emphasis added).**

5.15 It is clear that Parliament envisaged two scenarios; where on the one hand the employee goes on leave after being granted by the employer, and where on the other she goes on maternity leave without having been granted. It is for that reason that Section 103 (4) of the Employment Act reads;

> "**Where an employee <u>has been granted</u> maternity leave and the date of confinement is a later date than that stated in the certificate or other evidence delivered to the employer under Section 102 as being the date on which confinement was expected, her maternity leave shall be extended to include the period that elapsed between these dates". (Emphasis added).**

5.16 There is no dispute that the Applicant was away from work for two (2) months. It is also common cause that the Respondent opened on the 5th January 2009 for business. In his findings and recommendations, the chairperson amended the alleged period of Applicant's abscondment, from 20th December 2008 until 3rd March 2009, to 5th January 2009 until 3rd March 2009, and found her guilty of absconding from work for the amended period.

5.17 Despite the Respondent's denial that it was aware that the Applicant was confined because of childbirth, the following facts prove otherwise;

(a) The Applicant's supervisor admitted that she knew about her pregnancy before she left on the 19th December 2008.

(b) In January the same Supervisor (Delsile Dlamini) read an sms from the Applicant, wherein she was informing a colleague (Nomsa Dlamini) about her confinement, and she asked Nomsa to report her. Even if the sms was not directed to her, upon acquiring knowledge of the Applicant's whereabouts, she had a duty to notify her immediate superior about this event.

(c) The Applicant produced the Child Health Card, and in the Card, which is issued by the Ministry of Health and Social Welfare of the Swaziland Government, the following information is recorded: the Child's name; Phephile Mabuza; Sex- F; Date of birth, 20.12.08; order of birth, 03: Mother's name, Khanyisile Dlamini; Fathers' name, Nkosinathi Mabuza.

5.18 Although the Respondent did not object to the admission of the Child's Health Card, its position was that since the Applicant failed to submit a certificate in terms of Section 102 (1), then her maternity leave was unauthorized.

5.19 However the authenticity of the Child's Health Card was not in issue. Even assuming it was in issue, the Industrial Court in **Jabulani Simelane v Cudbury Swaziland (Pty) Ltd** (IC Case No: 261/99); held that the onus of proving that hospital documents are false lies with the employer.

5.20 I find that the Child's Health Card issued by the Swaziland Government under the Ministry of Health and Social Welfare is an official document, and is what it purports to be, that is a record of the birth of the Applicant's child.

5.21 It was not alleged nor proved by the Respondent that when the Applicant returned to work she was still pregnant. Moreover no allegations were made nor proved that a pseudocyesis (phantom pregnancy) had occurred. The Respondent did not allege nor prove that a spontaneous (self-induced) miscarriage had taken place.

5.22 I find that in all the circumstances of the case, there was such other reasonable evidence in support of the Applicant's entitlement to maternity leave.

5.23 I also find that in the circumstances, the Applicant's maternity leave was authorized by Section 103 (3) of the Employment Act.

5.24 Although Section 105 (2) of the Employment Act permits the termination of a pregnant employee or one who has been confined because of childbirth for any of the reasons set out in Section 36 of the Employment Act, since the Applicant's absence (leave) was in terms of Section 103 (3) of the Employment Act, Section 36 (f) does not apply.

5.25 I find that the Respondent did not have a fair reason for terminating the services of the Applicant, and that in all the circumstances, it was not reasonable for the Respondent to dismiss her.

5.26 In his findings and recommendations, the disciplinary hearing chairperson relied on South African Law in deciding the question whether the Applicant's absence was authorized or not.

5.27 The chairperson quoted from **Derek Jackson's** comment sourced from **www. Labourguide.co.za/** going on maternity leave. According to Derek Jackson, It is every employee's duty to inform her employer timeously about her pregnancy and particularly when she will want to go on maternity leave.

5.28 **John Grogan**, **Workplace Law (8th ed) Jutta & Co Ltd , p 174**, remarks that an obligation rests on the employee to notify her employer in writing, if she can write, of the date on which she intends to start maternity leave and this is in terms of Section 25 of the Basic Conditions of the Employment Act of 1983.

5.29 While the Swaziland Employment Act does require an employee to produce a certificate by a medical practitioner or a midwife setting forth the expected or actual date of confinement, before she can be entitled to maternity leave, she however does not commit an offence if she proceeds on maternity without having first delivered the certificate .See Section 103(3) (Supra).

5.30 The case law that was cited by the Respondent's counsel in his closing submission are distinguishable because they deal with absenteeism in general. None of the cases referred to are in point (dismissal on the grounds of absenteeism because of pregnancy or maternity leave).

5.31 In terms of Section 4 (1) (a) and (j) of the Industrial Relations Act 2000 (as amended), the purpose and objective of the Act is to promote fairness and equity in labour relations, and also ensure adherence to international labour standards.

5.32 Now, the question of the application of Conventions and Recommendations of the International Labour Organisation was considered by the Industrial Court of Appeal in **Zodwa Kingsley** and **10 others** v **Swaziland Industrial Development Company Limited** (ICA Case No: 11/2003).

5.33 In the **Zodwa Kingsley** case (supra) the court referred with approval to the article by Sifiso S. Dlamini;

Swaziland's New Industrial Relations Act 2000: A Legal Response, 2000 ILJ 2174 at 2176. Per EBERSOHN JA at 4-5, the court made the following statement;

> "**Sifiso S. Dlamini in a very thorough and comprehensive article argued that when the Kingdom of Swaziland adopted the Labour Relations Act 2000 (Act 1 of 2000) (sic), is in effect incorporated the Conventions and Recommendations of the International Labour Organisation into the law of Swaziland. I am of the opinion that the learned author is correct. In so far as it may be argued that the Labour Relations Act of 2000 (sic) did not incorporate the Conventions and Recommendations of the International Labour Organisation and as it is necessary to remove any doubt about it, this Court after due consideration, hereby finds and confirms that the Conventions and Recommendations of the International Labour Organisation apply in the Kingdom of Swaziland and must be adhered to and be applied in conjuction**

with the labour legislation of Swaziland". (Emphasis added).

5.34 Articles 8(1) of the International Labour Organisation's Convention 183, the Maternity Protection of 2000, provides that;

"**It shall be unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave referred to in Articles 4 or 5 or during a period following her return to work to be prescribed by national law or regulation, except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. The burden of proving that the reason for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing shall rest on the employer". (Emphasis added).**

5.35 Articles 8(2) of Convention 183,2000 reads;

"**A woman is guaranteed the right to return to the same position or an equivalent position paid at the same rate at the end of the maternity leave**".

5.36 According to Section 2 of the Industrial Relations Act, if the reason for the dismissal of an employee is because of the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy, such dismissal shall be deemed to be automatically unfair.

5.37 Section 32(3) of the Constitution of the Kingdom of Swaziland

Act, 2005 provides that;

> "**The employer of a female worker shall accord that worker protection before and after child birth in accordance with the law".**

5.38 **John Grogan(supra) at 74** remarks that whether the reason for the dismissal is in fact related to the employee's pregnancy is a question of fact or, where the employer claims that other reasons were more pressing, is a question of legal causation.

5.39 In essence the Industrial Relations Act provides that, where an employer terminates the services of an employee because she went on maternity leave without its permission, that dismissal shall be deemed automatically unfair. However this is not an issue I have to decide.

5.40 Accordingly I find that the Applicant's dismissal was substantively unfair.

5.41 However I find that the dismissal was procedurally fair. The Applicant alleged that she noted an appeal against her dismissal, but she did not state when and to whom was the letter of appeal submitted at the Respondent's premises. She did not even produce a copy of the letter of Appeal together with such proof of service.

6. **RELIEF**

6.1 The Applicant seeks reinstatement as her preferred relief. In terms of Section 16 (2) of the Industrial Relations Act, the Courts and by extension, the Arbitrator shall require the employer to reinstate the employee unless; the employee does not wish to be reinstated; the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; it is not reasonably practicable for the employer to reinstate the employee or the dismissal is unfair only because the employer did not follow a fair procedure. The Industrial Court in the case of **Constance Simelane v Swaziland Electricity Board (IC Case No: 273/2003)** applied Section 16(2) (supra).

6.2 The following facts favour an award of reinstatement;

(a) the Applicant wishes to be reinstated;

(b) the Respondent's reason for dismissing the Applicant does not involve any dishonesty on her part. In the circumstances the trust between the Respondent and the Applicant has not been broken;

(c) the Respondent did not submit that it would not be reasonably practicable to reinstate the Applicant;

(d) despite the lapse of seventeen (17) months after the Applicant was dismissed, the nature of her job and the skill required to perform it would not entail any hardship in adjusting thereto;

(e) the Applicant's dismissal was not for a fair reason and in all the circumstances of the case unreasonable.

6.3 Section 16(1) (a) of the Industrial Relations Act reads;

> "**if the Court finds a dismissal is unfair, the Court may-order the employer to reinstate the employee from any date nor earlier than the date of dismissal".**

6.4 In the **Swaziland Electricity Board v Collie Dlamini (ICA Case No: 2 / 2007),** the Industrial Court of Appeal per Mamba JA in reference to Section 16(1)(a), made the following statement of law;

> "…**The Section empowers the Court to order an employer to reinstate the employee from any date not earlier than the date of dismissal. It could even conceivably be in future, that is to say after judgment. The Court has discretion on the issue".**

6.5 I hold that an order directing the Respondent to re-instate the Applicant in the position that she previously held, and with a pay rate not less than that at which she was previously paid, would be fair and equitable having regard to all the circumstances of the case.

6.6 It is also my holding that the Applicant's reinstatement shall be retrospective with effect from the date of her dismissal (4th June 2009) based on the following considerations;

(a) When the Applicant went on maternity leave her employment was expressly protected by these Acts of Parliament; The Employment Act, The Industrial Relations Act and the Constitution of the Kingdom of Swaziland Act. The International Labour Organisation's Convention 183, which is law in Swaziland also offered her protection.

(b) despite the reasons for her absence, which were advanced at the disciplinary hearing by her and in spite of her seven (7) years of service, the Respondent summarily dismissed her.

(c) the Respondent also suspended the Applicant without pay pending the disciplinary inquiry, without considering the effect of such loss of income would have on the new born child and her family.

(d) the Respondent summarily dismissed the Applicant without considering the negative impact the loss of earnings would have on the new born child and her family .

6.7 Taking into account all the circumstances of the case, the following order is made;

7. **AWARD**

7.1 I find that the dismissal was substantively unfair, but procedurally fair.

7.2 The Respondent is ordered to re-instate the Applicant in the position that she previously held or any other suitable position commensurate with her skill and experience, and with a pay scale not less than that at which she was previously paid.

7.3 The Respondent is directed to pay the Applicant arrear wages for seventeen(17) months from 4th June 2009 to 30th November 2010, being (E1086.80 X 17) = E18 475.60.

7.4 The Respondent is ordered to pay the Applicant the sum of E18 475 .60 at the CMAC Office Manzini not later than 16th December 2010.

7.5 The Applicant is to report at the Respondent's premises to resume her duties on the 1st December 2010.

7.6 There is no order for costs

DATED AT MANZINI ON THIS ……DAY OF NOVEMBER 2010

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VELAPHI ZAKHELE DLAMINI
CMAC ARBITRATOR