



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

HELD AT MANZINI

MNZ 642/07

In the arbitration matter between:-

BHEKI MAZIYA

Applicant

and

SWAZI AUTO SCRAP & GLASS

Respondent

ARBITRATION AWARD

DATE OF ARBITRATION: 1st August 2008, 8th August 2008, 22nd August 2008 and 11th September 2008 (date closing statements received)

VENUE: CMAC OFFICES, MANZINI

CORAM:

Arbitrator : Commissioner M.B. Mkhonta

For Applicant : Mr. Bongani Mkoko (Applicant's Representative)

For Respondent: Ms. Sebenele Mwelase (Respondent's Representative)

1. PARTIES AND HEARING:

The Applicant in this matter is Mr. Bheki Maziya of P.O. Box 2439, Sidvokodvo, hereinafter referred as the Applicant or as the employee.

The Respondent is Swazi Auto Scrap & Glass of P.O. Box 2286, Manzini, hereinafter referred as the Respondent, or the employer.

2. REPRESENTATION

The Applicant was represented by Mr. Bongani Mkoko. The Respondent was represented by Ms. Sebenele Mwelase.

3. ISSUES IN DISPUTE

Applicant submitted that Respondent dismissed him unfairly both procedurally and substantively on the 30th May 2007. Applicant claimed notice pay and twelve (12) months compensation for unfair dismissal.

On the other hand, Respondent submitted that Applicant terminated his own employment by absconding from work and that his claim for unfair dismissal must therefore be dismissed.

4. BACKGROUND INFORMATION

The background information to this dispute is that Applicant was employed as a Driver on the 15th June 2006 at Respondents undertaking and at the time of his termination, he was earning E1, 200.44 per month. Applicant remained in continuous employment at Swazi Auto Scrap & Glass until his services were terminated on or

about the 30th May 2007. Applicant submitted that he was dismissed unfair both procedurally and substantively in that following accusations that he had stolen car spares from his employer and after police were called to investigate the incident. Applicant furthermore highlighted that he was taken by the police for questioning and was released by the police after writing a statement on the incident. In addition, Applicant noted that the police advised him to go home and not to interfere with the police investigations. After two weeks Applicant submitted that he went back to the police who then advised him to go back to work. On arrival at work, Applicant averred that his boss asked him why he had not come to work for the past two weeks and then proceeded to verbally dismiss him with immediate effect.

Respondent disagreed with Applicant and highlighted that Applicant terminated his employment by absconding from work following the reporting of theft to the police. Respondent also submitted that the police came and took the Applicant for questioning and that was the last time they saw Applicant until they received a Report of Dispute from CMAC. Respondent specifically denied that there had been any contact with Applicant after he was taken by the police for questioning on the 7th May 2007 in relation to the disappearance of car spares at Respondent's undertaking. Respondent also denied that Applicant contacted any of the company directors after the 7th May 2007 to engage them on reasons for his absence from work.

The dispute was conciliated by CMAC although no record of the Certificate of Unresolved Dispute was found in the case file. Both parties however consented to arbitration on the 4th March 2008 and I was appointed Arbitrator on the 17th April 2008.

5. OVERVIEW OF EVIDENCE

The parties agreed amongst themselves that the Respondent will be the first to make submissions. Furthermore, the parties thereafter proceeded to submit documents they would refer to during the arbitration proceedings, starting with the Respondent: -

- Affidavit of Bheki Maziya - RSP 1
- Report of Dispute Form - RSP 2

Respondent also noted that evidence will be led through three witnesses, being:

- Dimic Krutz
- Shiraz Kahn
- Aftab Dada

Applicant submitted the following documents as evidence during the arbitration:

- Report of Dispute Form - APP 1
- Certificate of Unresolved Dispute - APP 2

Applicant also indicated that they would lead evidence through one witness, being:

- Mr. Bheki Maziya
- Mr. John Sellsroom

6. ANALYSIS OF EVIDENCE AND ARGUMENTS

Whilst it is not my intention to detail all the evidence that was adduced by the parties, I will however, give a brief account of the evidence that has influenced my ultimate award, beginning with the Respondent's evidence.

Respondent's Version

Respondent submitted that Applicant was employed on the 15th June 2006 as a Driver on a temporary contract of employment i.e. casual. On the 5th May 2007, Respondent averred that Applicant was, as usual sent to Betta Parts in Mbabane to collect spares for the Matsapha shop which included; rear differential for a Kombi, 3 boxes of sundry spares and five loose light lenses which were not in boxes. On arrival at the Matsapha shop, Respondent submitted that the Respondent's Manager, Aftab Dada received the goods through verifying the physical goods delivered and the Betta Parts invoice and it was discovered that the five light lenses were missing. Respondent also submitted that this was acknowledged by Applicant and because it was close to closing time, management then decided that the matter would be resolved on the following Monday the 7th May 2007. In addition, Respondent also highlighted that the Matsapha shop had been experiencing shrinkage and management had resolved that in the event theft incidences were suspected, police would be contacted to assist with the investigations. Thus on the 7th May 2008m, police were called and to come and make their investigations following the disappearance of goods on the previous Saturday (5th May 2007) and they then took Applicant away to write a statement at the Sigodweni Police Station in Matsapha.

Respondent further submitted that Applicant went with the police on the 7th May 2007 and never came back until Respondent received the Report of Dispute Form (also referred to as RES 1). In addition,

Respondent emphasized that that Applicant was never dismissed as alleged but simply deserted.

Testimony of Mr. Aftab Dada

The first witness, Mr. Aftab Dada (referred hereinafter as Mr. Dada or the 1st witness) confirmed that Applicant was sent to collect motor vehicle spares from Betta Parts in Mbabane and on his return around 12pm on the 5th May 2007, certain parts were found to be missing. The entire goods were then put aside and it was decided that the matter will be sorted out the following Monday as the shop closes at 12pm on a Saturday. In addition, Mr Aftab Dada testified that it was now company policy that police are advised when theft is suspected as the shop had experienced an increase in such cases of late.

Under cross-examination, the witness testified that the reason police were not called on the 5th May 2007 was because they had indicated that there were no police vehicles available at around 12pm and Applicant as well was rushing somewhere. In addition and more importantly, the witness confirmed that the goods were checked by himself as the Manager and the Applicant, and Applicant acknowledged that certain goods were missing although he did not formally sign for this nor was it a requirement that he did so. Mr. Aftab Dada also highlighted that they did not look for Applicant following his failure to return to work on the 7th May 2007 as they did not know where he lived but they attempted to call his mobile phone which unfortunately was switched off. Furthermore, Mr. Dada also testified that about two to three employees have been reported to police on suspicion of theft and after writing statements, they had reported back to work and named them as John and Sambulo (both surnames he could not recite). The 1st witness also clarified under cross-examination

that in both instances the cases had not been closed conclusively as the police had continued to state that investigations were still continuing.

Testimony of Mr. Shiraz Kahn

Mr. Shiraz Kahn (hereinafter referred to as Mr. Kahn or the 2nd witness) testified that he was not employed by the company but owns a shop that does business with Swazi Auto Scrap & Glass and that on the 5th May 2007, he happened to be in the shop. Mr. Kahn also submitted that he knew the Applicant as one of the employees of Swazi Auto Scrap & Glass. The 2nd witness testified that on the day in question as he was at the shop waiting for the arrival of his goods which the shop had ordered from Betta Parts and that Applicant then arrived in a truck and offloaded a number of spares after which there was an argument with Mr. Aftab Dada on missing spares. Mr. Kahn submitted that because he happened to be close to them, he had advised them both of them (Mr. Aftab Dada and Applicant) to discuss this issue amicably and that he recalls that an attempt was made to contact the police who unfortunately indicated that they would not be able to come to the shop at that point in time and that he left the shop having told Mr. Aftab Dada to sort out this issue the following Monday.

Applicant's Version

Applicant submitted he was verbally dismissed for having deserted work on the 30th May 2007 after he had returned to work, following instructions from police given to him on the 7th May 2007 not to disturb police investigations. Applicant furthermore highlighted that he had been taken by police on the 7th May 2007 after the company had called police to report a case of theft following accusations that motor spares

had gone missing the previous Saturday, the 5th May 2007. Applicant highlighted that he had stayed at home for two weeks following specific instructions from the police for him not to return to work as this would undermine and disturb police investigations. In addition, Applicant averred that Respondent had an obligation to instruct Applicant to return to work following the reporting of the case to the police, which thing Respondent failed to do and that he had only been able to go back to work after having contacted the police when the two weeks had expired and was advised to go back to work.

Testimony of Mr. Bheki Maziya

Mr. Bheki Maziya (hereinafter referred to as Mr. Maziya, the 3rd witness or simply as Applicant) testified that he was employed by Swazi Auto Scrap & Glass as a Driver on the 15th June 2006 and that he was not given a formal employment contract, but that he was in continuous employment up to and until his verbal summary dismissal by Respondent on the 30th May 2007.

Mr. Maziya testified that on return from collecting goods at Betta Parts in Mbabane on the 5th May 2007, he delivered them at his employer's premises in Matsapha around 12pm which was the normal knock off time on a Saturday and was told to give the invoice to Mr. Aftab Dada. Applicant submitted that on this day, Respondent managers were preparing for a car drag race on Sunday and were quite busy hence the shop closed without them verifying the goods delivered against the invoice that he had been given at Betta Parts. In addition, Applicant further submitted that on Monday the 7th May 2007, the reconciliation of the goods were done and it was discovered that certain car spare parts were missing and police were then called to come and investigate the suspected theft and that he was then taken to the

Sigodvweni Police Station to write a statement on the matter. After he had completed writing his statement, Applicant averred that police then instructed him to go home as they were investigating and that in the evening of that day, one of the managers, Mr Tarik called him to enquire what had transpired and he advised him that police had told him to go home because they were still investigating. Mr. Maziya confirmed that when the police released him to go home on the 7th May 2007, they did not discuss anything about work but merely indicated that he should go home because they are still investigating the case.

Applicant furthermore testified that whilst at home, a work colleague, Mr. Sifiso Magongo would consistently check on him using company vehicles and that the relief Driver also came by to enquire directions to Durban and that none of them gave him a message that his managers had called him back to work, although he clarified that the employees had not been sent by his managers to him but had come to him out of their own volition. Mr. Maziya further testified that “after a while” he went back to the police to enquire about the status of their investigations and they told him that because the investigations had not yielded anything, he should go back to work which advice he took and on his way to work, he was fortunate to be given a lift by Mr. John Sellsroom. On arrival at work, Mr. Maziya averred that he met Mr. Tarik who enquired as where he was all this time and after explaining, he (Tarik) told him in English that he was being “fired with immediate effect”.

Under cross-examination, Mr. Maziya confirmed that the police had not arrested him, that he did not call his managers after seeing the police because he did not have money and that when he had delivered the goods on the 5th May 2008, he was with Mr. Sifiso Magongo, that on this day the goods were never reconciled with the invoice and that he

(Bheki Maziya) did not acknowledge that certain goods were missing. Mr. Maziya also confirmed that he had heard about incidences of theft at his employers undertaking but had not seen someone stealing before nor employees being taken to police for investigations as he did not spend too much time at work as a Driver. He confirmed to have signed a statement although under duress confirming that he had actually seen employees stealing from the company and sharing the proceeds amongst them. In addition, Mr. Maziya confirmed that Mr. Shiraz Kahn was indeed at the shop when he delivered the goods on the 5th May 2007 although he was too far from where he offloaded the items.

Respondent's vs. Applicant's Version

It is common cause that the Applicant was employed on the 15th June 2006 as a Driver and on a verbal contract of employment. It is also common cause that he was sent to Betta Parts in Mbabane on the 5th May 2007 to collect motor vehicle spares which included five loose light lenses. Applicant agreed with Respondent that the shop had been experiencing shrinkage and that he (Mr. Bheki Maziya) had actually submitted a statement to the company to that effect even though he indicated that this had been done under duress (which duress was not qualified). The rest of the evidence submitted by the parties is contradictory and this includes the following key points:

- a) Whilst Respondent submitted that Applicant was a 'casual' i.e. worked based on a fixed renewable contract of employment, Applicant argued that his contract of employment was continuous up to the 30th May 2007, when he was verbally dismissed for desertion by Respondent. Respondent however did not submit evidence that proved that employee worked on a

temporary basis and thus fell outside the protection of Section 35 of the Employment Act (1980) as amended.

- b) Respondent argued that on return from Mbabane on the 5th May 2007, a reconciliation of the goods was done and certain items were found to be missing i.e. five light lenses and that Applicant had verbally acknowledged that these items were missing. Applicant however argued that he returned from Mbabane close to knock off time around 12pm and as a result the goods from Betta Parts were not reconciled on the 5th May 2007 but on Monday the 7th May 2007 in the presence of Mr. Sifiso Magongo. Whilst Respondent submitted evidence in support of their submission through the testimony of Mr. Aftab Dada and Mr. Shiraz Kahn (who Applicant confirmed had been present at the shop that day), Applicant on the other hand did not substantiate his submissions that the reconciliation took place on the Monday the 7th May 2007 and specifically did not call Mr. Sifiso Magongo to corroborate his version. In addition, Applicant did not clarify how the spares shop could have released goods to Mr. Shiraz Kahn without these goods having been registered as new stock in the shop. Mr Shiraz Kahn testified that he had remained in the shop waiting for the truck which had been sent to Betta Parts to deliver his goods and that when this was done, he took delivery of the items.
- c) Respondent argued that at the completion of the taking of the statement by the police on the 7th May 2007, Applicant was obliged to return to work to fulfill his contract of employment, which thing had been done by at least two employees before who were caught in a similar predicament. On the other hand, Applicant averred that he was told by the police to “go home” pending the police investigations and only returned to the police

to enquire about the progress of the investigations “after a while” (which his representative alluded to as two weeks).

d) Respondent submitted that there was absolutely no contact with Applicant from the 7th May 2007 and that the only time his issue cropped up was when the company received a Report of Dispute from CMAC and an invitation to conciliation. Respondent also indicated that they tried to call Applicant on the 7th May 2007 but that his mobile phone was off. Applicant on the other hand, submitted that one, Mr. Tarik called him (Applicant) on the evening of the 7th May 2007 and he told him that the police had advised him to go home pending completion of their investigations. In addition Applicant submitted that he did not call his employers after he had completed writing his statement to the police on the 7th May 2007 because he did not have money. Applicant nevertheless indicated that when he went to the shop on the 30th May 2007, the only person who witnessed this other than his manager was Mr. John Sellsroom who unfortunately was not called in to testify on behalf of Applicant despite that he had been listed as one of Applicant’s two witnesses.

7. CONCLUSIONS

The question which I must address is whether the dismissal of the Applicant was procedurally and substantively fair. To do this, I must determine whether or not the Applicant’s employment was terminated on the 30th May 2007 as he alleges or as stated by Respondent, the Applicant terminated his service by absconding from work from the 7th May 2007. To do this I must evaluate the parties’ evidence submitted in support of their submissions to determine which is more probable. In

addition, I must also validate my conclusions based on the applicable case law.

In **Andre Van Niekerk: Unfair Dismissal, (2002) Siber Ink at Page 39**, Van Niekerk A argues that:

“Desertion is distinguishable from absence without leave in that, in the former instance, the employer’s conduct indicates or gives the employer reason to believe that the employee has no intention of returning to work. Unless employees who have deserted or absconded are able to produce compelling reasons for their conduct, their conduct would normally justify dismissal”.

John Grogan: Workplace Law, 8th Edition, (2005), Juta & Co Ltd at Page 52, highlights that:

“the main obligation of employees under the contract of employment is to place their personal service at the disposal of their employer. The tender of service is a prerequisite to the employee’s right to claim payment of wages”...“failure to render service may take many forms, ranging from desertion through absenteeism to unpunctuality”...“that whether absence from work justifies termination of the contract depends on the facts of each case”...“that in Myers v Sieradzki it was held that the period of absence that constitutes a legitimate ground for summary dismissal depends on the facts of each case. In Strachan v Prinsloo the court ruled that the essential issue was whether or not the employees conduct amounted to a breach of a vital term of the contract of employment, whether express or implied”... “that greater latitude must be allowed when the absence is due to circumstances beyond the control of the employees”.

Grogan J goes on to argue that:

“In dismissal proceedings, the onus is on the employees to prove that they were in fact dismissed, and on the employer to show that the dismissal was fair. Proof that a dismissal took place requires employees to prove on a balance of probabilities that they were employees as defined at the time of the terminating of the employment relationship”...“the primary significance of the onus is that when the evidence on a point is evenly balanced or indecisive, the balance will tip against the party upon whom the onus rests. However, subject to the overall onus, the burden of proving particular points may shift to the party not bearing the onus, on the basis of the principle that he who asserts must prove”...“If the employee fails to discharge the evidentiary burden on a particular point, it may be that the employer will be held to have discharged its overall onus”.

Let me begin by addressing the question of whether Applicant was an employee to whom Section 35 of the Employment Act (1980) as amended i.e. whether he was a permanent employee or a fixed term contract employee. Respondent made submissions that he was not a permanent employee but had been employed on fixed term renewable contract. Applicant however disputed this and argued that he was employed on the 15th June 2006 and remained in continued service until the 30th May 2007 when he was verbally dismissed by Respondent. In this regard, the onus to prove that Applicant was not an employee, rests on Respondent who despite having made this submission, failed to provide any evidentiary proof that Applicant had been employed on fixed term contract. As highlighted by Grogan J, he who asserts must prove and having failed to submit evidence in this

regard, Respondent's submission stands to be challenged as a fallacy. I therefore accept Applicant's submission that he was in continuous service until at least the 7th May 2007.

Having asserted that he was an employee who must be protected by Section 35 of the Employment Act (1980) as amended, Applicant then submitted that his services were unilaterally and verbally terminated by Respondent on the 30th May 2007. Again as argued by Grogan J,

"In dismissal proceedings, the onus is on the employees to prove that they were in fact dismissed, and on the employer to show that the dismissal was fair. Proof that a dismissal took place requires employees to prove on a balance of probabilities that they were employees as defined at the time of the terminating of the employment relationship"

Whilst I accept that Applicant was a permanent employee, I do however find it difficult to accept his version of events as probable in respect to the incidents that occurred on the 5th, 7th May 2008 and supposedly on the 30th May 2007. Beginning with the 5th and 7th May 2007, Applicant submitted that after he had delivered the goods he had fetched from Betta Parts, the goods were never reconciled until the morning of the 7th May 2007. Applicant does not explain how it was possible that Mr. Shiraz Kahn could have been allowed to take possession of some of the goods (which he testified he had been waiting for), without these goods having been recorded. Applicant also failed to provide evidentiary proof that the goods were not reconciled on the 5th but on the 7th May 2007. Moreover, Mr. Shiraz's testimony in respect to his presence at the shop on the 5th as well as his recollection of the reconciliation was not repudiated by Applicant. Mr. Sifiso Magongo, who Applicant asserts was present when the reconciliation

was done on the 7th May 2007, was not called to testify in his defense. The consequence of this omission by Applicant is that his version of events is subject to being challenged. As was noted by Grogan J,

“The primary significance of the onus is that when the evidence on a point is evenly balanced or indecisive, the balance will tip against the party upon whom the onus rests.

Based on the foregoing, I accept Respondent’s version as more probable as there is nothing in Applicant’s version that corroborates his submission.

Secondly, it is common cause that the police were called on Monday the 7th May 2007 and took Applicant for questioning. Respondent argued that when Applicant left with the police, it was the last time they saw of him until they received a Report of Dispute Form from CMAC. Respondent however indicate that they did attempt to call Applicant in the evening of the 7th May 2007 but were unsuccessful as his mobile phone was off. Applicant submitted that he stayed at home for about two weeks until he was advised by the police to go back to work. By his own admission, the police never instructed him to stay at home nor did they define the period he should supposedly wait so that they concluded their investigations. Normally members of the police are quite knowledgeable about work protocol and should have known what the impact of their decision was, assuming that they indeed did ‘instruct’ Applicant to stay at home and not go back to work. It is trite law that criminal investigations and workplace disciplinary issues are not necessarily dependant on each other. Thus Applicants reason for ‘staying at home on the instructions of the police’ is quite incomprehensible particularly as he was not formally charged by the police. As noted by Grogan J,

“the main obligation of employees under the contract of employment is to place their personal service at the disposal of their employer. The tender of service is a prerequisite to the employee’s right to claim payment of wages”...“failure to render service may take many forms, ranging from desertion through absenteeism to unpunctuality”...“that whether absence from work justifies termination of the contract depends on the facts of each case”...“that in Myers v Sieradzki it was held that the period of absence that constitutes a legitimate ground for summary dismissal depends on the facts of each case. In Strachan v Prinsloo the court ruled that the essential issue was whether or not the employees conduct amounted to a breach of a vital term of the contract of employment, whether express or implied”... “that greater latitude must be allowed when the absence is due to circumstances beyond the control of the employees”.

Applicant knowingly stayed away from home and in so doing, failed to meet a critical aspect of his contract of employment i.e. that of rendering service to his employer. His reasons for doing so were not beyond his control as he was neither incarcerated nor had he been formally charged by the police or his employer. Whilst Applicant highlighted that he was absent for about two weeks, factually he was not at work for about 20 days (up to the 30th May 2007 if I am to take his word for it). This is an unreasonably long period to stay at home and not bother to go back to the police to enquire about the progress of the investigations (if that is what he believed the police had ordered in the first instance). Applicant further submitted that other than the Respondent’s manager who dismissed him on the 30th May 2007, the only person who witnessed his supposed return to work that day was Mr. John Sellsroom, who conveniently was never called to testify for

Applicant, despite Applicant indicating that he would. Not only does Applicant not take reasonable steps to engage his employer following the incident of the 7th May 2007 he also failed to even phone his employer as he argued that he had no money on the 7th May 2007 and by implication he had no money up to until the 30th May 2007). The facts of this case are such that it is very hard to take Applicants version as coherent and plausible. Thus as noted by Van Niekerk A,

“...the employer’s conduct indicates or gives the employer reason to believe that the employee has no intention of returning to work. Unless employees who have deserted or absconded are able to produce compelling reasons for their conduct, their conduct would normally justify dismissal”.

I cannot agree more with Van Niekerk. Applicant’s reasons for not reporting to work earlier than the 30th May 2007, are clearly not compelling and it is not too far fetched to conclude that *“the employee had no intention of returning to work”*.

Lastly and having concluded per above, it is therefore not necessary for me to deal with the question of whether the Applicant’s termination was fair both procedurally and substantively as it is my conclusion that whilst Applicant was permanently employed, his reasons for asserting unfair dismissal are without merit. In actual fact, it is my precise conclusion that Applicant repudiated his contract of employment with Swazi Auto Spares & Glass.

8. AWARD

It is my finding that Applicant's employment was terminated on his own accord for reasons of desertion and that as a result thereof, his dispute on unfair dismissal by Respondent is therefore dismissed.

DATED AT MANZINI ON THIS 28TH DAY JANUARY 2009.

MAX B. MKHONTA
CMAC ARBITRATOR