

IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

HELD AT MANZINI

CMAC REF: MNZ 873/06

In the matter between:

KHANYAKWEZWE DLAMINI APPLICANT

AND

SINKHWA SEMASWATI T/A

MISTER BREAD BAKERY RESPONDENT

CORAM

ARBITRATOR VELAPHI DLAMINI

FOR APPLICANT GCINA FAKUDZE
FOR RESPONDENT LAWRENCE HERMANSSON
NATURE OF DISPUTE UNFAIR DISMISSAL

DATE(S) OF ARBITRATION 18TH, 23RD JULY, 5TH AND
21ST AUGUST 2008

ARBITRATION AWARD 01/04/09

1. DETAILS OF HEARING AND REPRESENTATION

1.1 This Arbitration was heard on various dates from the 18th July to the 21st August 2008 at the Conciliation, Mediation And Arbitration Commission offices (Commission or CMAC), situated at 4th Floor, SNAT Co-operatives Building in the Manzini City, district of Manzini.

1.2 The Applicant is Khanyakwezwe Dlamini, an adult Swazi male of P. O. Box 851 Manzini. Applicant was represented by Mr Gcina Fakudze, a labour consultant.

1.3 The Respondent is Sinkhwa Semaswati, a limited company, trading as Mister Bread; its principal place of business is at Matsapha Industrial Town, in the district of Manzini. Respondent was represented by Mr Lawrence Hermansson, its Human Resources Manager.

2. BACKGROUND FACTS OF THE DISPUTE

2.1 The dispute was reported by the Applicant at the Commission's offices at Enguleni building in Manzini City on the 21st November 2006. The nature of the dispute was recorded at paragraph 5.1 as "unfair dismissal".

2.2 According to the Report of Dispute, the dispute first arose on the 24th October 2006. The issues in dispute were that on the one aspect, the dismissal was being challenged as being procedurally unfair because Applicant was denied the right to

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representation during his disciplinary hearing. Substantively, Khanyakwezwe was contesting the dismissal because he argued that the Respondent failed to adduce evidence to establish ownership of the tissue roll, which it was alleged that he stole from Respondent.

2.3 The outcome Applicant required from conciliation was that the Respondent pays him the following;

- (a) notice pay
- (b) additional notice pay

- (c) severance pay
- (d) payment of off days
- (e) 12 months compensation for unfair dismissal

2.4 My brethren Commissioner, Mr Thulani Dlamini was appointed by the commission to conciliate the dispute. However, the dispute remained unresolved such that the appointed commissioner issued a Certificate of Unresolved Dispute on the 8th February 2007.

2.5 Prior to the issuance of the Certificate of Unresolved Dispute, the parties on the 18th January 2007, requested for arbitration in terms of Section 85(2) and (3) of the Industrial Relations Act 2000 as amended.

2.6 The undersigned commissioner was appointed by the Commission to determine the dispute by means of arbitration. At a pre-arbitration conference held between the parties on

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the 5th May 2008, it was agreed as follows; all disputed and admitted issues remained so disputed and admitted respectively, all documentary evidence to be used during arbitration were exchanged, the services of an interpreter were required and there was no objection with my appointment as Arbitrator.

2. ISSUES IN DISPUTE

3.1 According to the Certificate of Unresolved Dispute, the issues in dispute were as follows;

- (a) reinstatement or alternatively;
- (b) notice pay
- (c) additional notice pay
- (d) severance pay
- (e) off days
- (f) 12 months compensation for unfair dismissal

3.2 The reasons for certifying the dispute as unresolved are that the Applicant alleged that he was unfairly dismissed following a disciplinary hearing, whilst the Respondent argued that the dismissal was fair in the circumstances of the case.

3.3 I am called upon to determine whether or not the dismissal was fair and taking into account all the circumstances of the case was the dismissal reasonable.

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4. ARBITRATION PROCEEDINGS

4.1 Mr Fakudze on behalf of the Applicant, in his opening statement merely repeated the statement recorded in the Report of Dispute and the Applicant's position recorded in the Certificate of Unresolved Dispute.

4.2 Respondent's representative, Mr Hermansson stated in his opening statement that the Applicant's dismissal was substantively and procedurally fair and in the circumstances of the case, reasonable. He went on to state that the Applicant was therefore not entitled to the claims he was praying for.

5. APPLICANT'S EVIDENCE

5.1 Three witnesses testified in support of the Applicant's case. These were; Winile Portia Mbingo, Mpendulo Matsenjwa and the Applicant, Khanyakwezwe Dlamini.

THE TESTIMONY OF WINILE MBINGO

5.2 Winile Mbingo testified under oath that she knew the Applicant. She was a market vendor, selling various goods including consumables at or near Mathangeni in Matsapha.

5.3 Mbingo stated that on the 12th October 2006, Khanyakwezwe came to buy certain items from her stall in the afternoon. The Applicant bought Mahewu drink, two white toilet paper rolls and avocados.

5.4 It was Winile's evidence that when Applicant bought the aforesaid items, she did not provide him with a receipt because it was a practice that a market vendor does not supply a customer with one after a transaction.

5.5 Mbingo testified that she only became aware that Khanyakwezwe had been dismissed for an offence that involved the toilet paper rolls he bought from her during the arbitration proceedings and not in October 2006.

THE TESTIMONY OF MPENDULO MATSENJWA

5.6 Then Mpendulo Matsenjwa testified after taking an oath. He stated that on the 12th October 2006, he was from a soccer practice session with Khanyakwezwe, when the latter fell ill with diarrhoea.

5.7 It was Matsenjwa's evidence that he accompanied Applicant to purchase from a market vendor at Mathangeni a toilet paper roll. Indeed at the stall Khanyakwezwe bought two toilet papers rolls.

5.8 Mpendulo testified that as he was staying with the Applicant, in a rented flat at or near Mathangeni area, in Matsapha, the two then left the stall and walked to the flat.

5.9 Matsenjwa never saw Applicant leaving for work the following day on the 13th October 2006 nor did Khanyakwezwe report any incident that had occurred involving the toilet paper when he came back from work in the afternoon.

5.10 Mpendulo stated that Khanyakwezwe did not attend the soccer practice on the 13th October 2006. He was informed by the Applicant on the 14th October 2006 that he had recuperated.

5.11 Matsenjwa did not see what else the Applicant bought at the market vendor's stall besides the toilet paper because he was standing afar.

THE TESTIMONY OF KHANYAKWEZWE DLAMINI

5.12 The Applicant then testified under oath. Khanyakwezwe stated that he was employed as a machine operator on the 12th December 2001. At the time of his dismissal he was earning a salary of E577.37 (Five Hundred and Seventy Seven Emalangenani Thirty Seven Cents) per fortnight.

5.13 Dlamini's evidence was that on the 12th October 2006, whilst from a soccer practice session, he fell ill with diarrhoea. He proceeded to a market vendor at Mathangeni area in Matsapha in the company of his friend, one Mpendulo Matsenjwa.

5.14 At the stall of Winile Mbingo, in the presence of Mpendulo, he bought Mahewu, two toilet paper rolls and avocados.

5.15 Khanyakwezwe testified that on the 13th October 2006, he packed the one unused toilet paper roll in his bag together with his soccer outfit.

5.16 It was Dlamini's evidence that since the diarrhoea had not abated, he intended to use the toilet paper at work since at times the ablutions there did not have toilet papers; especially in the mornings because his shift is earlier than the cleaning staffs'.

5.17 Applicant stated that however, on the 13th October 2006, he found that the toilet paper was there in the ablutions and as such, he ended up not using his.

5.18 Khanyakwezwe testified that he made a mistake by not declaring the toilet paper at the entry point of the Respondent's premises when he came to work at 5:50 am.

5.19 Dlamini stated that when he knocked off work, he proceeded to the exit point carrying his bag. At the

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security check point his bag was searched by Khanyisile Dlamini, a security guard.

5.20 Applicant's evidence is that upon searching the bag one white toilet paper roll was found inside. He tried to explain the circumstances surrounding the toilet paper being in his bag, but Khanyisile did not afford him the opportunity and she referred Applicant to another security guard by the name of Nkosingiphile Phiri.

5.21 Khanyakwezwe stated that instead of hearing his explanation Phiri also ignored him and requested Applicant to accompany him to Mr Raymond Nathanson's office to report the matter.

5.22 Applicant testified that at the Assistant General Manager's office, he then related how the toilet paper came to be in his bag during working hours.

5.23 Dlamini denied that the toilet paper was stolen from the company. He regretted not declaring that he was coming in with same in the morning at the security check point.

5.24 Applicant stated that during the discussions between him and Mr Nathanson, in the presence of Phiri, the Assistant General Manager went to the Human Resources Manager's office and came back with the notice to attend a disciplinary hearing and he was accompanied by the Human Resources Manager.

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5.25 Khanyakwezwe's evidence was that he refused to sign the notice resulting in the Human Resources Manager, Mr Lawrence Hermansson persuading him to sign the notice to attend a disciplinary hearing. It is after the plea by Mr Hermansson that he signed the notice.

5.26 Applicant testified that on the 20th October 2006, a disciplinary hearing was held where the Chairperson was Mr Hermansson and the complainant was Mr Nathanson. During the hearing, he was denied the right to representation and further the Respondent failed to adduce evidence that proved that the toilet paper was its property.

5.27 The Applicant denied attempting to bribe the security guard. Despite his denial of the theft and the lack of evidence, the Chairperson found him guilty as charged and it was recommended that he be dismissed.

5.28 It was Khanyakwezwe's evidence that he appealed against the verdict and sentence. However, the Chairperson of the Appeal hearing confirmed the disciplinary hearing verdict and sentence. After the testimony of the Applicant his case was closed.

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6. RESPONDENT'S CASE

6.1 The Respondent's representative called three witnesses to testify on behalf of the Respondent. These were Khanyisile Dlamini, Raymond Nathanson and Nkosingiphile Phiri.

THE TESTIMONY OF KHANYISILE DLAMINI

6.2 Under oath, Khanyisile Dlamini testified that on the 13th October 2006, at around 2 pm, at the

entry/exit gate to the Respondent's premises Khanyakwezwe's bag was searched on his way out by herself as a security guard at that time stationed at the gate.

6.3 She stated that on searching the bag, she found inside a white unused toilet paper roll, Khanyisile questioned the Applicant who responded by apologizing for taking the toilet paper at the ablutions and pleading that the security permit him to return it back and in return Applicant offered to give Khanyisile something after she knocked off work.

6.4 Khanyisile's evidence was that she rejected the Applicant's offer and called her colleague Nkosingiphile Phiri to continue with investigating the case as he was busy at the gate at that time.

6.5 The security guard denied fabricating a story against the Applicant.

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6.6 Khanyisile admitted that she was not at the gate in the morning of the 13th October 2006 when the Applicant arrived for work. She did not know whether Applicant's bag was searched or not in the morning.

6.7 It was the security guard's evidence that she recorded a statement on the incident involving the Applicant and she was called to testify at the Applicant's disciplinary hearing.

7. RAYMOND NATHANSON'S TESTIMONY

7.1 This witness testified under oath that he was the Assistant General Manager of the Respondent at the time of the Applicant's disciplinary case. It was his responsibility to order stock-in-trade and other goods used during the operations of the Respondent. These items included toilet paper rolls, which were ordered in bulk.

7.2 Raymond Nathanson stated that there were about fifteen ablutions at the Respondent's premises for use by all employees and these private rooms were always in supply of toilet paper rolls.

7.3 The Assistant General Manager testified that on the 13th October 2006, the Applicant came to his office accompanied by a security guard, Nkosingiphile Phiri. Phiri reported that Khanyakwezwe was caught stealing a toilet

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paper roll and he had to apologize to the security who caught him.

7.4 Raymond Nathanson stated that he interviewed Applicant about the report he received from Phiri. Khanyakwezwe denied stealing the toilet roll and explained that it was his and he had bought it outside the company, but he forgot to declare it at the gate in the morning.

7.5 The witness testified that he was not satisfied with the Applicant's explanation; consequently, he decided to charge him. However, the Applicant refused to sign the notice to attend a disciplinary hearing until the Manager went to the Human Resources Manager's office to consult him.

7.6 It was Nathanson's evidence that the Human Resources Manager, Mr Lawrence Hermansson came to the Assistant General Manager's office where he explained to the Applicant that by signing he was only acknowledging receipt of the notice.

7.7 After the Human Resources Manager explained to the Applicant, Khanyakwezwe Dlamini then signed. According to the notice to attend a disciplinary hearing, the Applicant was suspended for fourteen days pending a disciplinary hearing to be held on the 20th October 2006.

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7.8 Raymond Nathanson then charged the Applicant with an offence of dishonesty in that he was found with the unlawful possession of a toilet roll, by the security manning the gate when going off duty.

7.9 It was the Manager's evidence that a disciplinary hearing was held on the 20th October 2006. At the hearing, the Human Resources Manager was the Chairperson and he was the complainant or Applicant, as he preferred calling himself. The Applicant was in person, after all his rights were explained to him by the chairperson, Applicant elected to conduct his own defence.

7.10 The Assistant General Manager testified that after the charge was read to the Applicant, the evidence of the two security guards was led and the Applicant did testify in his defence. After submissions the Chairperson postponed the hearing to the 26th October 2006 for a decision.

7.11 On the 26th October 2006, the Chairperson found the Applicant guilty. Consequently the Applicant mitigated but the Chairperson recommended that he be dismissed. Khanyakwezwe was served with a letter of termination which was not written by him, but brought to him for signing by the Human Resources Manager, who had been the Chairperson of the hearing.

7.12 Raymond Nathanson testified that he had no knowledge of the Appeal hearing as he was not involved at that stage.

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7.13 The Manager denied that Applicant was not advised of his right to representation and that Khanyakwezwe was not given an opportunity to make submissions in mitigation.

7.14 It was the witness's evidence that he could not answer for the Chairperson who recorded the minutes of the disciplinary hearing, why it was not recorded that Applicant was advised of his right to representation, but elected to proceed and defend himself. It was his evidence further that he did not have a response to the question why the Applicant's submissions in mitigation were not recorded.

7.15 About the toilet paper roll found in Applicant's possession, whether it had been used or not, the Assistant General Manager said it was used if he recalls very well.

7.16 Raymond Nathanson denied that the disciplinary hearing was both substantively and procedurally unfair.

8. THE TESTIMONY OF NKOSINGIPHILE PHIRI

8.1 Nkosingiphile Phiri testified under oath and stated that he was a security guard on duty at Sinkhwa Semaswati on the 13th October 2006 when he received a report of a theft of a toilet paper roll case involving the Applicant.

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8.2 He testified that the report was from Khanyisile Dlamini, who was also on duty on the 13th October 2006 stationed at the gate. Khanyisile who was in the company of the Applicant handed over the case to him because she was busy at the gate.

8.3 It was Phiri's evidence that he then led the Applicant to Mr Raymond Nathanson's office to report the matter. A statement was recorded from him and the Applicant was charged and brought before a disciplinary hearing where he testified about what he knew of the case.

8.4 The security guard denied falsifying the facts about the Applicant. The Respondent's case was closed after the testimony of Phiri.

9. CLOSING SUBMISSIONS

9.1 The parties agreed to prepare written final submissions which would be filed on the 21st August 2008.

9.2 On the 21st August 2008 only the Respondent filed its submissions, but the Applicant's representative applied to file them on the 27th August 2008 however he failed to do so on that date. To date the Applicant never filed his final written submissions.

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10. RESPONDENTS FINAL WRITTEN SUBMISSIONS

10.1 The Respondent submitted that the Arbitrator should reject the evidence of the Applicant's witnesses, Winile Mbingo and Mpendulo Matsenjwa because it was not reliable.

10.2 None of these witnesses saw the Applicant leave with the toilet paper roll in the morning of the 13th October 2006 for work.

10.3 Further these witnesses were never called to testify at the disciplinary hearing nor at the first arbitration of the matter which was being arbitrated by my late brother Commissioner Mr Selby Magagula.

10.4 It was the Respondent's view that Mpendulo ought to be disqualified because it was clear that he was a social friend of the Applicant, with whom they played soccer.

10.5 Turning to the Applicant's testimony, the Respondent representative submitted that it should also be rejected because firstly the Applicant claimed E6 395.04 (Six Thousand Three Hundred and Nine Five Emalangeneni Four Cents) in respect of off days, however, he failed to produce any document supporting that claim.

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10.6 The Respondent submitted that when giving the Applicant off days, it was in compliance with the government gazette. It was therefore not Respondent's fault that the Applicant was entitled to more than two off days per month, which resulted in a decrease in his wages. Applicant could not claim any loss of wages as a result of the increase of off days that were permitted by law.

10.7 It was submitted by the Respondent that the disciplinary inquiry against the Applicant was procedurally fair because he was served with documents notifying him of an intended disciplinary hearing and he was advised of his rights to bring witnesses, representation, cross examining the company's witnesses. The Applicant elected not to exercise his right to representation. After he was found guilty by the disciplinary hearing Chairperson, the Applicant was afforded an opportunity to mitigate before the sanction was passed. The Applicant was even afforded the right to appeal, which he did exercise.

10.8 The Respondent submitted that the Applicant's dismissal was substantively fair because he was found in unlawful possession of a toilet paper roll which was the company's property. There was evidence that after being caught, the Applicant tried to bribe a security guard to let him off the hook as it were.

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10.9 Finally it was submitted by the Respondent that the Applicants dismissal was for a reason permitted by Section 36 (b) of the Employment Act 1980.

11. ANALYSIS AND THE LAW

11.1 The Applicant does not deny that at the time he was searched on the 13th October 2006, when going off duty, by the security he had in his bag an unused uncovered white toilet paper roll.

11.2 What is in dispute is the fact that the Applicant had committed an act of dishonesty in that he was in unlawful possession of the toilet paper roll. Khanyakwezwe staked a claim over the toilet roll.

11.3 The Respondent charged the Applicant with an offence as stated above. According to Section 42 (2) of the Employment Act 1980, an employee's services shall not be considered to have been terminated fairly unless the employer proves;

11.3.1 That the reason for the termination was one permitted by Section 36 of the Employment Act 1980, and

11.3.2 That, taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee.

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12. SUBSTANTIVE FAIRNESS

12.1 The Applicant claims to have bought the toilet paper roll the previous day from a street or market vendor, Winile Mbingo who confirmed this transaction. It was mentioned that he bought other items as well, those being the Mahewu and avocados.

12.2 Winile was never called by the Applicant to testify in support of his version during the disciplinary hearing. The only time the vendor testified was during this arbitration. The fact that Applicant failed to call her as his witness during the disciplinary hearing does not mean that her evidence is automatically discredited for that fact alone.

12.3 Winile did testify at this arbitration hearing and I am bound to consider her evidence. It has been held by the Industrial Court of Appeal that in determining an unresolved dispute, the Industrial Court or an Arbitrator does not sit as a Court of Appeal to review the evidence presented during the disciplinary hearing. An arbitrator has to make his own assessment of the facts and evidence adduced before him during an arbitration.

See THE CENTRAL BANK OF SWAZILAND V MEMORY MATIWANE (ICA CASE NO: 110/1993) and SWAZILAND UNITED BAKERIES V ARMSTRONG DLAMINI (ICA CASE NO: 117/1994).

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12.4 Winile testified that prior to this arbitration and at the earlier proceedings before my late brother Commissioner Mr Selby Magagula; she was not called to testify at any of these. This fact casts some doubt on Applicant's claim that he had bought a toilet roll and other items from her. The vendor had said she never left the site or stall which she used when selling her items since October 2006, if anything according to her it was the Applicant who disappeared.

12.5 The Applicant's case took a twist for the worse when Mpendulo Matsenjwa, his friend and roommate at that time testified that he did not observe what other items Khanyakwezwe bought from Winile. He could only remember the toilet paper, the reasons was that he was at a distance when the Applicant purchased these items.

12.6 In my view this story about a toilet paper being bought at Winile's stall is a fabrication and a recent concoction of the events of the 13th October 2006 by the Applicant. Firstly, Mpendulo testified that after buying the toilet paper roll, the two, Applicant and himself walked together to the rented flat. Mpendulo had ample opportunity to see what other items Applicant had bought. If he was at a distance, how did he know that Khanyakwezwe had bought two toilet paper rolls?

12.7 Secondly, when Applicant came back from work on the 13th October 2006, he did not inform Mpendulo what had

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transpired there in relation to the toilet paper roll. Applicant did not mention to him that he was

accused of theft of the same roll he had bought and was facing disciplinary action. Khanyakwezwe never solicited his assistance then to testify at the disciplinary hearing on the 20th October 2006.

12.8 Thirdly, the Applicant's version is not credible because he claimed to have been suffering from diarrhoea yet no report was made by him at work about his illness prior to being searched by the security guard when leaving the company premises. Further he states that he was going to use the toilet roll at St Georges Barracks where he trained. If he was seriously ill how could he still play soccer?

12.9 The Applicant stated that the reason why the tissue was unused with the first block still undetached from the roll was because he had found tissue rolls at the company toilets. If indeed the Applicant's diarrhoea started the previous day on the 12th October 2006, and it was serious, the toilet paper roll should have been used.

12.10 Regarding the aspect of the toilet roll's condition, one of Respondent's witnesses contradicted all the other witnesses from both sides. It is my view that Raymond Nathanson recollection on this aspect was quite unreliable. During the arbitration time and again he requested to be given time to remember what happened and most of the

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time he could not recall the events of the 13th and 20th October 2006.

12.11 It is my view that the toilet paper roll was unused and the last block was still undetached from the roll and this was admitted by the Applicant.

12.12 The Applicant's version pertaining the ownership of the toilet roll is found to be improbable and unreliable and is rejected as a fabrication. It is my opinion that the Applicant committed an act of dishonesty by unlawfully and without authority possessing a toilet paper roll, which was the Respondent's property.

12.13 The Respondent has proved that the Applicant was terminated for a reason permitted by Section 36 (b) of the Employment Act 1980.

12.14 I also find that it was substantively fair to terminate the Applicant's services. Dishonesty is a very serious misconduct and destroys the employment contract. The length of service of the Applicant cannot override the gravity of the offence he committed. Although he was not in a position of trust, the Respondent could not be expected to continue to employ a worker who steals.

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See NKOSINATHI NDZIMANDZE AND ANOTHER V UBOMBO SUGAR LTD (IC CASE NO: 476/05); CARTER V VALUE TRUCK RENTAL (PTY) LTD (2005) (1) BLLR 88 (SE) AND COUNCIL FOR SCIENTIFIC AND INDUSTRIAL RESEARCH V FIJEN (1996) (2) SA 1(A).

13. PROCEDURAL FAIRNESS

14.1 The Applicant stated in evidence that he was denied representation during the disciplinary hearing and during the appeal hearing.

14.2 It was also his case that the Respondent denied him the opportunity to plead in mitigation of sentence.

14.3 The Respondent disputed these allegations by presenting evidence to prove that Applicant was advised of his right to representation and that during the disciplinary hearing he was offered the chance to mitigate before the sentence was passed and he did mitigate before the Chairman passed sentence.

14.4 I will now proceed to consider the question whether the dismissal was procedurally fair and in doing so it behoves me to evaluate the evidence presented during the arbitration, more

importantly, the minutes of the disciplinary hearing and appeal hearing.

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14.5 According to the minutes of the disciplinary hearing, the Applicant or Complainant was R Nathanson and the Respondent/Accused was Khanyisile Dlamini and the Chairman was Hermansson. Mr Raymond Nathanson was called by the Respondent in the arbitration to testify on what transpired during the disciplinary hearing on the 20th October 2006.

14.6 I note that in the minutes, "Respondent Representative", it is written the letters "N/A".

14.7 According to the concise Oxford English Dictionary 11th Ed (2004) pg 948., the letter "N/A" means not applicable or not available.

14.8 The Respondent did not explain the meaning of these letters during the arbitration. It was its case though that when Khanyakwezwe was advised of his right to representation, he elected to conduct his own defence.

14.9 It was further the Respondent's case that by making marks next to the rights list in the second page of the minutes, it meant that they were read to the Applicant.

14.10 On the face of the second page, I observe that indeed there are marks made on the left side of the rights listed thereof. I further note that just below the last right is a space for the accused employee to sign presumably in

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acknowledgment of the fact that the rights have been read and explained to him.

14.11 Further I note that the space provided for the Applicant to sign was not signed neither is it written that he refused to sign. The following information recorded after the space for signature is the plea that was entered. Khanyakwezwe signed next to the "not guilty" plea.

14.121 further make the following observation. There is a list of proceedings to be followed during the disciplinary hearing and at the end there is a space provided for any questions or comments that the Applicant made. Nothing was recorded here.

14.13If the Applicant had chosen to conduct his own defence after the right to representation was explained, the Chairman of the disciplinary hearing should have recorded on the space provided. The Chairperson was not called to testify as to what transpired during the arbitration. Mr Raymond Nathanson could not be of much assistance because he could not recall some events. In any event, he was not the one who recorded the minutes, it was the Chairman who did so and was in a better placed position to give evidence on this aspect.

14.14Nathanson was not the author of the minutes, he could not therefore testify that the marks were made by the Chairperson and made following an explanation to the

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Applicant of his rights. As it is, there is no evidence to prove that the marks were made at the hearing pursuant to a reading of the rights to the Applicant. The Respondent elected not to call the Chairperson to be a witness during its case. He was made a representative during the arbitration.

He could therefore not give evidence from that representative position. The Respondent should stand or fall on its election.

14.151 also note that in the Appeal hearing minutes of the 10th November 2006, the Applicant did sign at the bottom space provided after the list of rights.

14.16In my view the Respondent failed to advise the Applicant of his right to representation. It is my

opinion that evidence *dehors* what is recorded in the minutes to prove what did happen during the disciplinary hearing is unreliable, especially evidence which is given by a witness other than the chairman. Ray Nathanson's recollection was also scanty and this he admitted.

14.17 The Industrial Court has held that an employee's right to representation is one of the six minimum standards that should be met before a disciplinary hearing can be said to have been procedurally fair.

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See CHRISTOPHER H. DLAMINI V INTER AFRICA SUPPLIERS (SWD) LTD, (IC CASE NO: 55/1997) and OSCAR Z MAMBA V SWAZILAND DEVELOPMENT AND SAVINGS BANK (IC CASE NO: 81/1996).

14.18 With regard to the assertion by the Applicant that the Chairperson did not invite him to make representations in mitigation of sentence, it is my observation that the minutes does not show that he was asked to mitigate before the dismissal sanction was passed. Again, the Respondent led the evidence of Mr Nathanson to prove that the Applicant was asked to mitigate. I have already found that Mr Nathanson's evidence on what procedural steps were followed at the disciplinary hearing is not reliable. It is my finding that the Applicant was not invited by the Chairman to plead in mitigation of sentence.

14.19 Grogan, Reikert's Basic Employment Law, 2nd edition

p 100, states that procedural fairness dictated that the employer gives the accused employee opportunity not only to defend himself, but also to plead in mitigation before the decision to dismiss is taken.

14.20 There are other aspects about the disciplinary process that are disquieting which I have observed.

14.21 During the investigation stage, which was quite brief, the Human Resources Manager, Mr Hermansson, who later chaired the Applicant's disciplinary hearing, was consulted

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by the complainant Mr Nathanson in the absence of the Applicant.

14.22 Mr Nathanson then went to consult Mr Hermansson at his office presumably as Human Resource Manager. The latter then went to the former's office and tried to persuade the Applicant to sign the notice.

14.23 There was a discrepancy in both parties version on this aspect. Applicant stated that Nathanson returned with the notice from Mr Hermansson's office accompanied by the Human Resources Manager. Whilst Respondent's evidence is that Applicant was asked to sign the notice in Mr Nathanson's office and when he refused, the complainant then went to Mr Hermansson's office.

14.24 At the stage of the investigation, there was nothing wrong with involving the Human Resources Manager after all, his entire role was to advise the parties and ensure that the processes were fair. The Human Resources Manager's involvement during the investigation and preparation stage entailed that he would acquire information and facts about the offence and the perpetrator. Even if it can be argued that Mr Nathanson and Mr Hermansson never discussed the details of the case when the former went to consult the latter, procedural fairness requires that there should be no reasonable ground for suspecting that the Chairperson was not impartial.

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See GROGAN, REIKERT'S EMPLOYMENT LAW, (SUPRA) and OSCAR Z MAMBA V SWAZILAND

DEVELOPMENT AND SAVINGS BANK (supra).

14.25 There is yet another aspect of the Respondent's procedure that I found to be very disturbing at the stage when the letter of dismissal was written.

14.26 The Chairperson in the verdict only recorded as follows;

"reference to Section 36 (b) of the Employment Act 1980 on the grounds;

- guilty of a dishonest act
- failed to comply with company procedure
- unlawful possession of company property with the intent to use for personal gain"

14.27 On the 24th October 2006, the Respondent issued out a letter of dismissal to the Applicant. The following observations are made concerning the termination letter; it was signed by Mr Raymond Nathanson and it had more findings than the Chairman had made.

The letter stated that the Applicant had failed to cross examine evidence brought against him, he had also failed to adduce evidence in support of his version, that his submissions were misleading and of a dishonest nature and burdened the future of the employment contract.

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14.28 The termination letter also stated that the Chairman had sanctioned the Applicant's dismissal on the aforementioned grounds. The letter was written by the Chairperson who then brought it to the initiator/complainant to sign.

14.29 In my view, the Applicant's disciplinary hearing was not procedurally fair and I make that finding. It has been held by the Industrial Court that even when an employer is convinced of the guilty of an employee, it is obliged to ensure that a fair disciplinary process is observed. See NKOSINATHI NDZIMANDZE AND ANOTHER V UBOMBO SUGAR (IC CASE NO: 476/05).

15. OFF DAYS

15.1 It is my view that the Applicant's claim for monetary compensation for having been given days off has no merit. He argued that the Respondent should not have offered him more off days than was agreed. Khanyakwezwe further argued that the parties agreement should have superseded the Regulations.

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15.2 Firstly, I was not referred to any agreement in relation to off days, neither was a Legal Notice adduced to prove that the Respondent gave him more off days than was required by law. This claim should be dismissed and it is by law.

16. CONCLUSION

16.1 I find that the Applicant's dismissal was for a reason permitted by Section 36 (b) of the Employment Act 1980 and it was substantively fair to terminate his services.

16.2 Further I find that there were procedural irregularities that occurred in the disciplinary process which rendered the inquiry procedurally unfair.

16.3 The Applicant made the following claims;

- | | |
|-------------------------------------|-----------|
| (a) reinstatement or alternatively; | |
| (b) notice pay | E 577.37 |
| (c) additional notice pay | E 888.20 |
| (d) severance pay | E2 220.50 |
| (e) off days | E6 395.04 |

maximum compensation for unfair dismissal	E13 856.88
TOTAL	E23 937.99

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16.4 The monetary claim in respect of off days is dismissed because it was not proved. Secondly, the Applicant is not entitled to severance allowance because it is my finding that the reason for the termination was permitted by Section 36, thus substantively fair.

16.5 In my view the Respondent's procedural failures merit a sanction by an award of compensation in favour of the Applicant equal to a payment of four (4) months wages.

16.6 The following order is made;

17. AWARD

17.1 Judgment is entered against the Respondent for payment to the Applicant as follows;

(a) notice pay	E1 154.74
(b) additional notice pay	E 888.20
(c) 4 months compensation for unfair dismissal (for procedural defect)	E4 618.96
TOTAL	E6 661.90

17.2 No order for costs is made.

17.3 Respondent is ordered to pay the sum of E6 661.90 (Six Thousand and Six Hundred and Sixty One

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Emalangeneni Ninety Cents) within 21 (twenty one) days of service of this award upon her.
DATED AT MANZINI ON THIS 1ST DAY OF APRIL 2009

VELAPHI DLAMINI CMAC ARBITRATOR