

IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION

HELD AT SIMUNYE SIM 012/08

In the matter between:

PETER SIMON KHATHWANE APPLICANT

And

LM STORES RESPONDENT

CORAM

**ARBITRATOR : ROBERT S. MHLANGA
FOR THE APPLICANT : IN PERSON
FOR THE RESPONDENT : MR A. SLIGHT**

ARBITRATION AWARD

VENUE: CMAC OFFICES, SIMUNYE PLAZA

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1. DETAILS OF HEARING AND REPRESENTATION

1.1 The applicant is Peter Simon Khathwane, who appeared in person and or represented himself in these proceedings.

1.2 The respondent is L.M. Stores whose principal place of business is situated at Lomahasha. The respondent was duly represented by its Managing Director namely, Mr. Alec Slight.

2. BACKGROUND OF THE DISPUTE

2.1 In casu, the applicant Mr Peter Simon Khathwane reported a dispute of unfair dismissal to CMAC, it being alleged by him that he was unfairly dismissed by the respondent, L.M Stores on the 19th March 2008.

2.2 Initially the parties were invited to a pre conciliation meeting. The pre conciliation did not bear any fruits because the parties failed to reach a settlement herein.

2.3 Subsequently the parties were invited for a conciliation of this dispute. The disputed was not resolved as the parties again failed to reach a consensus regarding

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same. As a result thereof a Certificate of Unresolved Dispute was issued by the commission.

2.4 However, by consent the parties referred the dispute to arbitration for determination through adjudication.

2.5 The arbitration hearing was preceded by a pre-arbitration meeting, which was held simultaneously with the arbitration hearing on the 27th October 2008. After having explained the purpose of the pre-arbitration conference, both parties agreed that the matter should proceed on the same date.

3. ISSUE TO BE DECIDED

In the present case, being an unfair dismissal dispute, the onus is on the employer (respondent) to prove that the termination of the applicant's services was in accordance with Section 42 (2) (a) (b) read together with Section 36 of the Employment Act of 1980 (as amended). Therefore, I am called

upon to decide whether or not the applicant was dismissed in the first place. If it is established that the applicant was indeed dismissed by the respondent, then I have to determine if the applicant's dismissal was

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in compliance with the aforesaid Section 42 and Section 36 of the Employment Act of 1980 (as amended).

4. SUMMARY OF EVIDENCE

4.1 APPLICANTS CASE

4.1.1 The applicant, Peter Simon Khathwane gave evidence under oath in support of his case. His testimony was the only evidence adduced in the applicant's case.

4.1.2 The applicant testified that he was employed by the respondent.

4.1.3 The applicant stated that on the 7th March 2008, his boss Mr Slight insulted him for no apparent reason. The applicant said that he related this incident to his colleague or co-worker one, Mr Siphon Nyoni. He further stated that he then asked Mr Nyoni to accompany him to see his boss so that the issue of the insult could be discussed.

4.1.4 Mr Khathwane (applicant) stated that Mr Nyoni agreed that he could accompany him. They were supposed to see Mr Slight on Monday, but unfortunately

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the intended meeting never materialized as Mr Nyoni was not available on that day.

4.1.5 It was Mr Khathwane's testimony that on the 19th March 2008, as usual, he collected the guard dogs from Mr Slight's residence and then went off to his work station (shop).

4.1.6 The applicant further testified that Mr Slight was present at his house when he took the guard dogs, but he did not notice him (applicant).

4.1.7 It is said that Mr Slight later on followed the applicant and he found the applicant along the way before he reached his work station. The applicant testified that Mr Slight told him to take back the guard dogs, and thereafter go back to his home to sleep. Mr Khathwane stated that he was puzzled by his boss' action, but nevertheless he complied with his boss' aforesaid instruction.

4.1.8 He stated that he returned the dogs and then went back home. The applicant said that he did not know the reason why his boss told him to go back home.

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4.1.9 The applicant stated that on the following day (20th March 2008), while he was waiting for the bus at the bus stop (the bus stop is situated nearby the respondent's business premises), Mr Slight sent one of his employees, one Lwazi to call him (applicant) to come to him (Mr Slight) at the shop to discuss the issue of the alleged dismissal.

4.1.10 The applicant said that he was not able to go to Mr Slight at that time because he was being sent by his parents to deliver a message somewhere (applicant did not state the place where he was going). He said that he informed Lwazi to tell Mr Slight that he could not see him at that time, but that he would see him in the afternoon during the applicant's time for work.

4.1.11 Mr Khathwane said that indeed on that afternoon he went to see Mr Slight in his residence. Mr Khathwane stated that to his surprise, his boss (Mr Slight) told him to go back home. Again, they could not talk as he went back home.

4.1.12 The applicant testified that along the way he met his workmate, Mr Siphon Nyononi (daytime security guard). He stated that he related to his colleague that his boss

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had dismissed him for no reason; as he did not know why his boss was dismissing him.

4.1.13 The applicant testified that, following his dismissal by the respondent, he waited for six (6) days at home before he reported a dispute of unfair dismissal to CMAC. He said that he expected his boss to call him to apologize, but this never happened hence his decision to report the dispute herein.

4.1.14 The applicant testified that the parties were subsequently invited by the commission for a conciliation of this dispute. He said that the dispute was not resolved during the conciliation in that the respondent failed to pay his terminal benefits set out in paragraph 6.3 of his report of dispute.

4.1.16 The applicant stated that, during the conciliation of the dispute, he insisted on the payment of his terminal benefits as opposed to reinstatement, because of the fact that he could no longer work for the respondent given the circumstances under which his services were terminated.

4.1.17 The applicant said that ever since he started working for the respondent, his boss has always been ill-

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treating him in that he would now and then insult him for no apparent reason, whenever he talks to him (applicant).

4.1.18 In conclusion the applicant prays for an order and or award to be issued in his favour for the payment of his terminal benefits outlined in paragraph 6.3 of his report of dispute.

CROSS EXAMINATION

4.1.19 During cross-examination, the respondent in the form of its Managing Director, Mr Slight disputed the fact that the applicant was dismissed by the respondent.

4.1.20 The applicant insisted that he was unfairly dismissed by the respondent.

4.1.21 During cross-examination, it was further put to the applicant by the respondent, that Mr Slight did not fire the applicant, but that he told the applicant to take the guard dogs back home, and go to work without the guard dogs, because it was obvious that he was loafing; he was not doing the job, but it was the guard dogs which were doing his job. In response, the applicant denied the aforesaid allegations.

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4.1.22 The respondent, through its representative, further put it to the applicant that he was never dismissed, but that he was reprimanded for inter alia, coming late for work, and that this had become the applicant's habit, such that from time to time Mr Slight would reprimand him whenever he came late for work. Again, the applicant denied that he was in the habit of coming late for work. He insisted that he was dismissed without any lawful justification.

4.1.23 Under cross-examination, the applicant admitted the fact that he did not go to Mr Slight at the time when he called him during the morning hours, but that he eventually came to see him in the afternoon at his residence.

4.2 RESPONDENT'S CASE

ALEC SLIGHT'S TESTIMONY (RW1)

4.2.1 Mr Alec Slight, the respondents' Managing Director, who also appeared as the respondent's representative in these proceedings, gave his evidence under oath in support of the respondent's

case.

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4.2.2 Mr Alec Slight, to whom I will refer to as RW1 and or Mr Slight, testified that it is not true that the applicant was dismissed. He said that he never fired the applicant.

4.2.3 Mr Slight stated that the applicant had a habitual problem of coming late to work. He said that as a result hereof, he has on numerous occasions reprimanded the applicant. He testified that whenever he had reprimanded the applicant for late coming, he (applicant) would be okay for a while and then he would relapse or start coming late again.

4.2.4 RW1 stated that the reason why the applicant would come late for work, was due to the fact that, he did not sleep or rest during the day. He said that the applicant would be seen loitering in Lomahasha during the day (instead of resting so that he would be able to come to work on time for his night duties).

4.2.5 RW1 further testified that he regarded this incident (which resulted in the present dispute) as one of the occasions wherein he reprimanded the applicant.

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4.2.6 Mr Slight (RW1) maintained in his testimony that the applicant was never dismissed. He said that the applicant left on his own volition.

4.2.7 It was Mr Slight's testimony that the parties were initially invited by CMAC for a pre-conciliation of this dispute, wherein on "without prejudice basis" the respondent offered to reinstate the applicant, but unfortunately the applicant declined the offer of reinstatement.

4.2.8 Mr Slight further stated that, again during the conciliation process, he offered to reinstate the applicant 'on without prejudice basis'; but again the applicant refused to be reinstated. He said that, he then made an offer of E2000-00 in full and final settlement of this dispute, which offer was also turned down by the applicant.

4.2.9 Mr Slight emphasized that he made the aforesaid offers strictly on 'without prejudice' because the respondent never dismissed the applicant and thus it is not liable to him.

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4.2.10 RW1 maintained that the applicant was not doing his job well, but that it was the guard dogs which were doing the job supposed to be done by him. Mr Slight said that one night some time back, there was a break-in at his shop, which occurred whilst the applicant was on duty. Mr Slight stated that the thieves cut a hole on the roof of the shop to gain entry, but surprisingly the applicant did not notice that occurrence.

4.2.11 RW1 said that, if he wanted to dismiss the applicant, he would have dismissed him on the ground of poor work performance following the aforesaid break-in incident. He said he did not dismiss him because as per his character he does not believe in dismissing an employee (all he would do is to reprimand that employee, and the matter would be then settled). He testified that the only time where he can dismiss an employee, is where that employee has committed theft.

4.2.12 With regard to the incident which led to this dispute; Mr Slight stated that he received a report from the security who works at a Butchery next door or opposite his business, that the police came to his business premises the previous night, but the police did not find

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the applicant there and then they (police) asked the applicant's whereabouts from that security.

4.2.13 Alec Slight also denied the fact that he insulted the applicant. He said that he never ill-treated

the applicant. Mr Slight said that, though at times he would shout or rebuke his employees, but he is not a difficult employer. He stated that the applicant was fairly and well treated by him.

4.2.14 Mr Slight also testified that on the 20th March 2008, he sent Lwazi to call the applicant in order to discuss the dispute at hand, but the applicant refused to meet him.

CROSS EXAMINATION

4.2.15 During cross examination the applicant put it to Mr Slight that on the 20th March 2008, he (applicant) was dismissed by the respondent.

4.2.16 The respondent's witness, Mr Slight disputed the fact that the applicant was dismissed from work by the respondent. However, Mr Slight testified that he ordered

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the applicant to take the guard dogs back home and that he should go to work without the dogs.

4.2.17 Mr Slight reiterated the fact that the applicant was told to go to work without the guard dogs, because he was not doing his job, but that it was the guard dogs which were doing the guarding job.

4.2.18 During cross examination the applicant also asked the respondent as to how would the respondent reinstate him, because someone had already been employed by the respondent to replace him. RW1 vehemently disputed the allegation that the respondent had replaced the applicant.

4.2.19 The applicant also reiterated the fact that Mr Slight insulted him, which allegation RW1 denied.

4.2.20 RW1 said that it is not true that he insulted the applicant. However, RW1 stated that he reprimanded the applicant for coming late to work.

4.2.21 RW1 (referring to the incident of the 19th March 2008), testified that he only reprimanded the applicant for coming late to work and the fact that he took the guard dogs from his residence without his knowledge. He said

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the applicant never apologized to him (Mr Slight) for having come late to work on the said day.

4.2.22 RW1 also testified that the applicant was told to come back to work (though he had not been dismissed by the respondent); but the applicant refused to go back to work.

4.2.23 During cross examination the applicant put it to RW1 that following his alleged unfair dismissal the respondent is liable to pay him his terminal benefits set out in paragraph 6.3 of the report of dispute form.

4.2.24 The respondent through RW1 specifically denied that it is liable to the applicant.

4.2.25 After cross examination by the applicant, the arbitrator asked RW1 why the respondent could not pay the applicant his leave (6 days) in the sum of E215.70.

4.2.26 RW1 then agreed to pay the applicant the accrued leave in the aforesaid sum, and over and above that the respondent, in the form of RW1, out of a good heart or as a kind gesture (ex gratia) agreed to pay the applicant additional notice and severance pay.

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4.2.27 Subsequently the parties signed a memorandum of agreement dated 24th November 2008, in terms of which the respondent "on without prejudice basis" agreed to pay the applicant a total sum of E1 083-70, being in respect of the aforesaid leave, additional notice and severance allowance.

4.2.28 RW1 stated that the respondent is aware that it is not obliged to pay the applicant the terminal

benefits being claimed herein because he (applicant) was never dismissed from work, but that he left his job on his own. He said that, this payment was on ex gratia.

SIPHO NYONI'S TESTIMONY (RW2)

4.2.29 Sipho Nyoni, hereinafter referred to as RW2, testified under oath that he is currently employed by the respondent as a dayshift security guard.

4.2.30 Mr Nyoni testified that during the Easter Convention week, between Wednesday and Thursday (Mr Nyoni said that he could not remember the exact date), his boss, Mr Slight informed him about the incident involving him (Mr Slight) and the applicant, Peter Khathwane.

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4.2.31 RW2 stated that Mr Slight told him (RW2) that Mr Khathwane (applicant) came to his house and took the guard dogs without his knowledge. He also said that, Mr Slight informed him that the applicant reported late for work on the previous day.

4.2.32 RW2 said that, his boss further informed him that he ordered the applicant to return home the dogs and go to work without the guard dogs, because the applicant was allegedly not doing his job, but the dogs were.

4.2.33 Mr Nyoni further testified that, Mr Slight told him that he wanted to talk to the applicant about the issue of the dogs. He said that, during the morning hours on that day, Mr Nyoni was seen by Mr Slight at the bus stop (which is about 100 metres away from the shop).

4.2.34 Mr Nyoni said that his boss then sent one of his employees namely, Lwazi to call the applicant (who was at the time waiting at the bus stop) in order to sort out the issue or misunderstanding between them. RW2 stated that the applicant failed or refused to go to Mr Slight at the shop.

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4.2.35 RW2 further testified that on the same day, and in the afternoon the applicant came to his home wherein he (applicant) told him that Mr Slight had fired or dismissed him (applicant) for no valid reason. He said that the applicant related to him what had happened between him (applicant) and Mr Slight which led to the applicant's alleged dismissal.

4.2.36 RW2 stated that he advised the applicant to go back to work maybe Mr Slight might have a change of heart and then reverse his earlier decision of dismissing him.

4.2.37 Mr Nyoni further testified that he told the applicant that he and his boss needed to sort out their differences or misunderstanding through dialogue.

CROSS EXAMINATION

4.2.38 During cross examination RW2 admitted that the applicant once told him that RW1, Mr Slight insulted him.

4.2.39 During cross examination RW2 testified that though the applicant informed him about the quarrel or misunderstanding between him and Mr Slight, but he

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denied the fact that he (RW2) agreed to accompany the applicant to Mr Slight to discuss this issue between them.

4.2.40 RW1 stated that he only advised the applicant to talk to Mr Slight in order to resolve the conflict between them.

4.2.41 RW1 also testified that he did not recall (due to lapse of time) whether or not the applicant told him that he was dismissed by Mr Slight. RW1 said that Mr Slight only told him and the other

employees that there was a misunderstanding between him and the applicant.

4.2.42 Mr Nyoni confirmed that Mr Slight told him that he ordered the applicant to take the guard dogs back home, because it was obvious that the applicant was not doing his work, but that it was the dogs which did the applicant's job. Then the applicant was allegedly told to go to work without the said dogs.

5. ANALYSIS OF EVIDENCE AND SUBMISSIONS

5.1 My analysis in this matter will mainly focus on the evidence which I deem relevant to my award.

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5.2 In the present case the main issue which falls for determination is whether or not the applicant's services were fairly terminated by the respondent.

5.3 Since the respondent denies that the applicant was dismissed in the first place; therefore I am again called upon to determine if the applicant was dismissed from work by the respondent. Once it has been established or proved that the applicant was indeed dismissed, then the ultimate issue would be whether or not the applicant's dismissal was in compliance with the provisions of Section 42 (2) read together with Section 36 of the Employment Act of 1980 (as amended).

5.4 Briefly, the applicant's argument is that he was unfairly dismissed by the respondent, in the form of its Managing Director, Alex Slight.

5.5 It is the applicant's submission that on the 19th March 2008, while he was going to work with the guard dogs, the Managing Director, Alec Slight stopped him on his tracks and he ordered him to take the guard dogs back home. He said that Mr Slight told him to go home to sleep thereafter.

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5.6 Mr Khathwane (applicant) argued that he took the guard dogs back to Mr Slight's residence as ordered by his boss and thereafter he went back home.

5.7 It is said that the following day (20th March), he went to see Mr Slight at his residence in the afternoon. He said that he had informed his boss through Lwazi (whom Mr Slight had sent to call him while he was waiting for the bus in the morning), that he would see or meet him (Mr Slight) in the late afternoon.

5.8 The applicant argued that he failed to meet and or talk to his boss on this day because Mr Slight told him to go back home once again.

5.9 The applicant alleged that the respondent's Managing Director's actions or conduct amounted to an unfair dismissal or termination of his services. The applicant argued that it was for the first time that his boss told him to take the dogs back home. He said that he had done nothing wrong which warranted his alleged dismissal; hence his dismissal was allegedly both procedurally and substantively unfair.

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5.10 Following his alleged unfair dismissal herein, the applicant claims the payment of his terminal benefits outlined in paragraph 6.3 of his report of dispute.

5.11 On the other hand, the respondent's case is that the applicant was never dismissed. The respondent, through RW1 stated that the applicant left his job on his own volition. It is argued by the respondent through its Managing Director, that the applicant was ordered to take the guard dogs back home and then to proceed to work (without the dogs).

5.12 It is argued that the applicant decided to go home after he had returned the guard dogs. The respondent alleges that the applicant was not doing his job, but it was the guard dogs which were

doing the job instead. The respondent also alleges that the applicant used to come late to work, despite several reprimands by the respondent.

5.13 It is also the respondent's submission that the applicant was offered back his job (even though the respondent had not fired him).

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5.14 The respondent submits that the applicant was told to go back to work on two (2) occasions; it was during the pre-conciliation session and conciliation process at CMAC. It is alleged that on both occasions the applicant refused to be reinstated or go back to work.

5.15 It is also argued on behalf of the respondent that on the 20th March 2008, the applicant was invited by the Managing Director, Mr Slight to come to the shop in order to discuss the dispute or the issue of the alleged dismissal, but the applicant refused to come and or meet the Managing Director.

5.16 In the present case, it is common cause that the applicant was an employee to whom Section 35 of the Employment Act 1980 (as amended) applied. Accordingly the respondent bears the onus to prove in terms of Section 42 (2) of the Employment Act 1980 (as amended), that:

5.16.1 The reason for the termination was one permitted by Section 36 of the Act and that;

5.16.2 Taking into account all the circumstances of the case, it was reasonable to terminate the services of the applicant.

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5.17 In order to determine whether or not the applicant was dismissed herein, one has to look clearly at the two incidents in this case namely, the incident of the 19th March and 20th March 2008. These are the decisive events in so far as the determination of the issue at hand is concerned. Over and above this, I have to take into account the entire circumstances of this case.

5.18 It is common cause that on the 19th March 2008, the respondent's Managing Director, Mr Alec Slight instructed the applicant to take back home the guard dogs. It is also common cause that the applicant was employed as a night watchman; and that the applicant was aided by the guard dogs in the execution of his security duties.

5.19 The respondent disputes the fact that he told the applicant to go home to sleep after having taken back the said dogs.

5.20 The respondent, according to RW1's testimony, told the applicant to go to work without the guard dogs because he (applicant) was not doing the job, but it was the dogs which were doing the job. The applicant however disputes this allegation, the applicant insists that he was told to go home to sleep by his boss (Mr Slight).

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5.21 The evidence adduced herein reveals that, on the following day (20th March 2008), the respondent's Managing Director, Mr Slight saw the applicant at the bus stop (the bus stop is said to be about 100 metres away from the respondent's business premises). It is also revealed from the evidence led that, the respondent's Managing Director sent Lwazi (one of his employees) to call the applicant so that they could discuss or resolve the misunderstanding which ensued on the 19th March, following Mr Slight's instruction that the applicant should take back the guard dogs. Unfortunately, the applicant could not meet the said Managing Director, and as such the misunderstanding between the parties was never addressed.

5.22 The applicant, does not dispute the fact that the respondent, in the form of its Managing Director, invited him to come and discuss the aforesaid issue, but he contends that he could not meet Mr Slight at that particular time because he was on his journey; he was going somewhere. However, he alleges that in the afternoon he went to Mr Slight's residence, but he (Mr Slight) ordered him to

go back home.

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5.23 The applicant alleges that, Mr Slight's act of telling him to go home amounted to an unfair dismissal or termination of his services.

5.24 Having looked closely at the facts pertaining to the incidents of the 19th March and 20th March 2008; I have come to one conclusion that the applicant was never dismissed by the respondent in the first place. There is nowhere in the applicant's testimony where Mr Slight (Managing Director) is shown to have expressly and or specifically told the applicant that his services were now terminated.

5.25 In my view, the fact that the Managing Director told the applicant to go home to sleep on the 19th March and that he also ordered him to go back home on the 20th March 2008, does not constitute the dismissal or termination of the applicant's services with the respondent.

5.26 With regard to the incident of the 19th March 2008, the applicant in his evidence stated that his boss (Mr Slight) ordered him to take back the guard dogs and that he should thereafter go home to sleep. There is no mention of the fact that the Managing Director told him

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that he was being dismissed and or that he should not come back to work anymore.

5.27 Again, with regard to the event of the 20th March 2008, the applicant testified that Mr Slight told him to go back home. Even on this day, there is no evidence that the Managing Director expressly told him to go home and never come back to work anymore, and or that his services were terminated.

5.28 On the other hand, I am convinced that on the 20th March 2008, the respondent's Managing Director, Mr Alec Slight told the applicant to go back home. In my opinion this does not mean that he was dismissing the applicant. I am of the view that, the Managing Director was not prepared to talk to the applicant at that time, following the fact that the applicant refused to come to him earlier on the day when he sent for him. Seemingly, Mr Slight's refusal to talk to the applicant was a reaction to the applicant's refusal to meet him in the morning on the same day. It is obvious that Mr Slight was angry with the applicant for failing to come to him when he called him.

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5.29 The Managing Director may not be blamed for telling the applicant to go back home, when one considers the fact that the applicant had gone to see him at his residence and it was after hours or not during the working hours. The right place for the parties to meet was at the respondent's business premises, during the working hours. Another adverse factor is that the applicant wants to see the Managing Director alone and yet the parties have had a quarrel on the previous day, and as a result of which there was this pending dispute which needed to be resolved.

5.30 In my opinion, Mr Slight's instruction of the 20th March 2008, that the applicant should go back home, does not amount to a dismissal or termination of the applicant's services; but rather it constitutes an implied informal suspension from work (pending the resolution of the misunderstanding or conflict between the parties).

5.31 Clearly there is no doubt that there was a misunderstanding or conflict between the parties which ensued on the 19th March 2008. The evidence led herein reveals that the cause or source of the said misunderstanding is the guard dogs. The Managing Director ordered the applicant to take the guard dogs

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back home because the applicant was allegedly not doing his job. Incidental to this was also the issue

that the police had come to the respondent's premises one night and they (police) did not find the applicant there. There was also the issue of the alleged poor time keeping by the applicant.

5.32 Regard being had to the aforementioned issues, it was necessary for the parties to meet in order to resolve same as it was detrimental to their contractual relationship.

5.33 In his testimony the applicant stated that after having waited for six (6) days at home (seeing that the respondent was not calling him to come back to work), he then reported a dispute of unfair dismissal to CMAC (Commission). It is my considered view that the report of dispute herein was premature, as the applicant had not made a formal demand to the respondent to be reinstated to work and or failing that to demand the payment of his terminal benefits. During the arbitration hearing the applicant confirmed that he could not go back to work anymore due to his ill-treatment by the respondent's Managing Director.

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5.34 In my view had the applicant done the aforesaid, any doubt whether or not his services were terminated would have been cleared. For instance, if the respondent, after such demand failed to reinstate him or pay him his terminal benefits, then the factual issue that he was unfairly dismissed would have been confirmed or well founded. Taking this into account I am inclined to agree with the respondent's submission that the applicant was never dismissed, but that he left his job on his own volition.

5.35 I have also taken into consideration the following factors in support of my foregoing conclusion that the applicant was never dismissed namely:

5.35.1 That the respondent, through its Managing Director took the initiative to address the misunderstanding between the parties. It is not in dispute that on the 20th March, 2008, the respondent, in the form of Mr Slight, called the applicant to meet him so that the issue aforesaid could be discussed; but unfortunately the applicant failed to come at that time (save that he went to see Mr Slight late in the afternoon in his residence).

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5.35.2 I have also considered the fact that during the pre-conciliation and conciliation meetings at CMAC, the respondent, on "without prejudice" basis offered to reinstate the applicant, but the applicant declined the offer and instead he insisted on the payment of the terminal benefits.

5.35.3 I have taken into consideration the fact that on the 24th November 2008 the respondent, 'without prejudice' to its rights herein paid the respondent a sum of E1,083 which was in respect of leave pay, additional notice and severance allowance. This is a clear indication that the respondent had not dismissed the applicant. This also demonstrates that the employment relationship between the parties has not broken down, and as such a continued employment relationship was still possible. Therefore, the applicant's refusal to be reinstated was not justified and in my view, this is tantamount to the repudiation of the contract of employment.

5.36 In the light of the foregoing analysis of evidence herein, it is my final conclusion that the respondent has proved on the balance of probabilities that the applicant was never dismissed by the respondent.

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6. AWARD

6.1 Pursuant to my foregoing findings and or conclusion, I now make the following award:

6.2 That the applicant's case is hereby dismissed.

6.3 Consequently, the respondent is not liable to pay the applicant any compensation for the alleged unfair dismissal.

DATED AT SIMUNYE ON THIS 17th DAY OF APRIL 2009.

ROBERT S. MHLANGA CMAC – ARBITRATOR

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