

CONCILIATION, MEDIATION AND ARBITRATION COMMISSION(CMAC)

HELD AT MANZINI SWMZ 328/08

In the arbitration matter between:-

PAULOS DLAMINI Applicant

AND

LONG DISTANCE TRANSPORT (SWD) Respondent

ARBITRATION AWARD

DATE OF ARBITRATION: 19th March 2009 and 20th March 2009

CORAM:

ARBITRATOR : Commissioner B.Ngcamphalala
FOR APPLICANT : Mr. Stanley Mavuso
FOR RESPONDENT : Ms. Mmatsepho Masinamela

1. DETAILS OF PARTIES AND REPRESENTATION

1.1 The Applicants in this matter is Paulos Dlamini, I shall refer to him as the Applicant or Employer.

1.2 The Respondent is Long Distance (Pty) Ltd a company duly registered and incorporated in accordance with the company laws of the Kingdom of Swaziland and having its principal place of business at Matsapha in the region of Manzini. I shall refer to the Respondent as the Respondent or the Employer or the Company.

2. REPRESENTATION

2.1 During the Arbitration hearing the Applicant was represented by Mr. Stanley Mavuso. The Respondent by Ms. Mmatsepho Masinamela the Respondent's Industrial Relations Officer.

3. BACKGROUND OF DISPUTE

3.1 On the 16th day of September 2008, the Applicant reported a dispute at the Commission's offices in Manzini.

The nature of the dispute was recorded as an unfair dismissal. The dispute is said to have arisen on the 18th August 2008, it being alleged by the Applicant that the Respondent had unfairly dismissed him.

3.2 It was alleged by the Applicant that his dismissal by the Respondent was substantively unfair in that the evidence adduced by the Respondent was not enough to find him guilty of the charge preferred against him.

3.3 The Commission then appointed a Commissioner to conciliate the dispute, however the dispute could not be resolved and a Certificate of Unresolved Dispute was issued.

3.4 In terms of the Certificate of Unresolved Dispute, the issue (s) in dispute were recorded as

- a) Re-instatement, alternatively
- b) Notice pay E2, 138.00 (two thousand one hundred and twelve Emalangeni);
- c) Severance pay E5, 280.00 (five thousand two hundred and eighty Emalangeni);
- d) Unlawful deduction E2, 150.00 (two thousand one hundred and fifty Emalangeni);
- e) 12 (twelve) months maximum compensation E25, 536.00 (twenty five thousand five hundred and thirty six Emalangeni)

3.5 The Applicant alleged that his dismissal was substantively unfair whilst the Respondent on the

contrary argued that the dismissal of the Applicant was both procedurally and substantively fair, taking into consideration the circumstances of the case.

3.6 As a consequence of the dispute remaining unresolved the parties requested for arbitration in terms of Section 85(3) of the Industrial Relations Act 2000. I was accordingly appointed Arbitrator on the 2nd of December, 2009.

3.7 A pre- arbitration conference was held wherein the following issue was discussed and agreed upon. It was agreed that the only issue in dispute was the substantive fairness of the dismissal. It was further agreed that the parties would exchange documents before the

commencement of the hearing, which would form part of their evidence.

4. ISSUES TO DETERMINE

4.1 The issue before me that I must determine is whether or not the dismissal of the Applicant by the Respondent was substantively fair or unfair.

5. SUMMARY OF EVIDENCE

OPENING SUBMISSIONS BY BOTH PARTIES

5.1 The opening statements revealed that it was common cause between the parties that the Applicant was employed by the Respondent as a driver, on the 2nd September 2002 earning a monthly salary of E2, 128.00 (two thousand one hundred and twenty eight Emalangeni). It was also further common cause that the Applicant had been dismissed on the 18th day of August 2008 on a charge of theft.

5.2 I have summarized the key aspects of the evidence led, attending only to those issues relating to the ultimate award. The Applicant was the only one to give evidence in support of his case. The Respondent's case was supported by four witnesses namely Mduduzi Simelane, Dean Van Zyl and Paula Van Zyl and Thabiso Masina.

5.3 It was submitted by the Applicant's representative that they believed that the dismissal of the Applicant was substantively unfair and prayed that the Commissioner find in their favour.

5.4 The Respondent's representative on the contrary argued that the Applicant had been charged with misconduct of theft, and on a balance of probability found guilty of theft by the Respondent. It was its submission that the Respondent prayed that the sanction of dismissal be upheld and the Applicant's claim dismissed.

6. THE APPLICANTS CASE

6.1 The Applicant testified under oath that he started working for the Respondent on the 2nd day of September 2002 as an Assistant Driver, and in 2005 was promoted to the position of Driver. It was his evidence that he earned a monthly salary of around E2, 100.00 (two thousand one hundred Emalangeni). He went on to testify that prior to his dismissal on the 18th August 2008 he was charged by the Respondent for stealing diesel in June 2007, he then proceeded to explain how this event came about.

6.2 It was his evidence that on the 5th June 2007 he had gone to fetch a truck from service in Johannesburg at the instruction of the Respondent. On his return he stopped at a town called Leslie to see whether the tyres on the truck were okey, as he had been instruction to proceed to Matla Power Station. He submitted that after checking his tyres he had mistakenly locked himself out. He testified that due to the high risk of hijacking he always locked his passenger side door. He went on to testify after discovering that he had mistakenly locked his door, he then proceeded to remove the ventilator door on the truck so that he could put his hand through the ventilator door and open inside. It was his testimony that the ventilator door is positioned in such a way that when removed a hand may be put through and the driver's door can be opened.

6.3 When he had removed the ventilator door and unlocked the driver's door, he drove off and proceeded with his journey to Matla Power Station. It was his evidence that he was to load fly ash at the Power Station and proceed back to Swaziland to offload same. He submitted that he slept over at the station on the 5th June 2007, and returned on the 6th June 2007, wherein he proceeded to offload the fly ash at Holsim where he waited for a while as there was a long queue and proceeded to Respondent's premises.

6.4 His testimony was that upon his arrival he was advised by his supervisor Mr. Simelane that he had to return back to Matla Power Station to pick up another load of fly ash. The truck was accordingly filled with diesel and he proceeded with his journey back to Matla Power Station.

6.5 It was his evidence that when he got to Oshoek he found the parking bay within the border premises full, and parked the truck at a truck stop outside and not at the border-parking bay. Whilst parked there and waiting, he submitted that he decided to put back the ventilator door as he had not done so the day before, when he had removed it to open up the truck after locking himself out. The reason he wanted to put the ventilator back was that he wanted to ensure that the truck was safe whilst he attended to his passport at the border.

6.6 Whilst fitting the ventilator onto the truck a man driving a Pajero stopped in front of the truck and enquired from him what he was doing. He submitted that at first he did not respond to the question, but the man asked him again and he responded and stated that he was putting the ventilator back into the truck.

6.7 It was his testimony that the man then accused him of stealing diesel. He then called Paula who was Applicant's then General Manager and told her that he (Applicant) was stealing diesel. He was then asked by the man whether he knew who he was. He stated that he did not know who he was. It was at that point, that the man told him that he was Paula's husband Applicant's General Manager.

6.8 He then proceeded to remove the truck to the parking bay within the border on the Swazi side. He submitted that he attended to the stamping of his passport and, after stamping his passport he received a call from his supervisor Mr. Simelane directing him to return back to Respondent's premises. He was questioned by his supervisor on the incident that had occurred at the border concerning the truck. He duly advised him that he had been putting back the ventilator door onto the truck, and not stealing diesel as the questioned was posed to him by his supervisor.

6.9 He then proceeded to Respondent's premises in Matsapha, where he parked the truck and went home. The following morning he reported for work wherein he was advised by his supervisor to fill up the truck, but before he could attend to that he was called by his manager Paula Van Zyl to the boardroom wherein he was questioned about the happenings of the previous day. Whilst waiting for Paula in the boardroom he was called by one of the Respondent's security officers, who advised him that they were refueling the truck and required him to be present whilst they were doing this.

6.10 It was his evidence that 72 litres of diesel were filled into the truck. He proceeded back into the boardroom wherein he was questioned by his manager and suspended on allegations of diesel theft. Whilst he was leaving he saw mechanics removing the sieve/strainer from the trucks petrol tank. He testified that he was then charged with theft, and the charge sheet was issued by, Paula his manager. It was his evidence that he believed he should have been charged by his supervisor Mr. Simelane and not Paula his manager, as it was procedural that he be charged by his supervisor.

6.11 A hearing was held by the Respondent wherein the testimony of Dean Van Zyl was produced in the form of a letter. The Applicant submitted that he objected to the letter on the ground that he had alleged in the letter that the Applicant had been stealing diesel when he had been not. Further that he stated that there had been a VW Jetta/Fox next to the truck, which was denied by the Applicant as it was his evidence that there was no car parked by the truck.

6.12 It was his testimony that the letter of Mr. Van Zyl was used despite his objection of same. The Applicant as evidence during his testimony produced his supervisor's letter which was marked "Annexure 1" the Pre Equiry Notification of Rights and Summons to attend a Disciplinary Hearing as "Annexure 2" and the letter of Dean Van Zyl marked "Annexure 3". He submitted that after the hearing he received a letter of termination of his services. Under cross- examination when it was put to the

Applicant what company procedure was regarding repairing or removing any part on any of Respondent's trucks, he stated that he did not know the procedure but knew that when there is a breakdown/fault on the truck he must report to his supervisor.

6.13 The Respondent's representative then made reference to the Applicant's statement as reported in CMAC Form 1, the Report of Dispute which was contained in page 11 of the batch of the documents handed in by the Respondent as evidence in particular the last sentence on the paragraph which reads "I am fixing the ventilator."

6.14 It was then put to the Applicant whether he knew what company procedure is on fixing anything on the truck. He responded that there is none that is known to him. The Applicant was questioned on whether or not he knew that it was company policy to report any defects on the truck to his supervisor, and whether he had reported the defect to his supervisor. He testified that he did not report the issue of the ventilator to his supervisor, and that the only policy known to him is that he reports to his supervisor when there is a breakdown. It was further put to the Applicant whether or not any meetings were held by his supervisor wherein he would advise/brief them to drive carefully and safely on the road, and on company procedure should they encounter any difficulties. He stated that sometimes meetings were held by his supervisor wherein he would advise them to drive carefully and safely on the road.

6.15 When questioned on whether there were any discussions on policy when reporting damages on the truck. He testified that the supervisor had informed them that after each 100 (one hundred) kilometers the driver is to stop and check the tyres, and further that if a tyre bursts, they are call the supervisor.

6.16 The Applicant was then referred to page 20 of the documents submitted by the Respondent in its bundle of documents. The document to which the Applicant was referred was the minutes of a meeting held on the 9th April 2007, and amongst the names on the attendance register was the Applicant's name, he was asked whether he had attended the said meeting, and he stated that he had not.

6.17 He was questioned on why his name would appear as one of the individuals in attendance when he was not part of the meeting.

6.18 He stated that he did not know how that had happened. It was put to him whether he was disagreeing with the evidence given by his supervisor and General Manager during the Disciplinary Hearing, regarding reporting of faults on the trucks to the supervisor.

6.19 He responded that he was aware that if there is a problem he must report to his supervisor. He was questioned whether he had reported that he had removed the ventilator, he submitted that he had not because it was not a breakdown and it was his evidence that it was something he could put back.

6.20 When questioned on why he had put it back on the 6th June 2007 when he had taken it out on the 5th June 2007. His response was that he did not get time on the 5th June 2007. When it was put to him why he did not put it back on the 6th June 2007, whilst at Respondent's premises, he submitted that he was rushing to the border and he did not want it to close on him.

6.21 He was questioned on why he had decided to put the ventilator back whilst at the border, when from his evidence he stated that he did not report the ventilator because he could put it back and further it was not so important that he should report it.

6.22 He submitted that he put the ventilator back because he was leaving the truck to stamp his passport, he wanted it to be safe. It was then put to him that he had left the truck over night at Matla on the 5th June 2007, when he picked up a load of fly ash, had the truck been safe then? It was his evidence that he had slept in the truck in a safe place.

6.23 When questioned on the VW Polo/Jetta which in the statement of Mr. Van Zyl was said to have been parked next to the truck. He stated that there was no car parked next to the truck, and no pipe protruding from the boot as per the evidence of Dean Van Zyl on the day in question.

6.24 When it was put to him why Mr. Van Zyl would say there was a car parked next to the truck he was driving, and a pipe protruding from the boot. He stated that he did not know. His evidence that maybe Mr. Van Zyl saw him with the ventilator which has a seal that extends, and which looks like a pipe. Maybe he mistook the seal for a pipe. He was further questioned on why he had stopped at the truck stop, instead the parking bay within the border premises. It was his evidence that the parking bay was full thus there was no space for him to park.

6.25 When it was put to him that after being confronted by Mr Van Zyl he was able to drive and find parking at the border parking bay, when he had initially said the bay was full. He submitted that he discovered that there was parking space, and he proceeded to park the truck and stamp his passport. When he was question on whether he was able to put back the ventilator door, he stated that he did not continue to put it back.

6.26 It was put to the Applicant whether he was aware that the Respondent had a rule which stipulated designated stopping areas during a trip. He stated that he knew the rule, and Oshoek was one of those stops when travelling to Matla.

6.27 When it was put to him that the area he had parked at was not a designated stoppage area, he submitted that he stopped at a truck stop at Oshoek.

6.28 The Applicant was questioned on whether he knew why the sieves/strainers had been checked then removed by the Respondent. He stated that he got to know about the sieves at the hearing. They advised him that they found that the sieve had been tampered with. It was his evidence that when he requested to see it they failed to show it to him.

6.29 The last questioned posed to him, was whether he knew who was authorized within the Company to charge Employees for any offences. It was his evidence that he believed that his supervisor should charge him, but he was not aware of the Companies procedure.

7. THE RESPONDENT'S CASE

7.1 The Respondent called its 1st witness Mr. Mduduzi Simelane. It was this witness's evidence that he was employed by the Respondent as an Operations Controller which is equivalent to Contracts Manager. He submitted that he knew the Applicant as an Employee of the Company, however he was dismissed. The reason for his dismissal was that whilst performing his duties, a report from an eyewitness was received to the effect that the Applicant had been seen within the vicinity of Oshoek siphoning diesel, from Respondent's truck.

7.2 The witness was Mr. Dean Van Zyl, the husband of the General Manager Paula Van Zyl. He was not an employee of the Company. It was his evidence that the Applicant was told to abandon the trip and return to Respondent's premises. When he questioned the Applicant on the incident, he was informed by the Applicant that he was attending to the ventilator door which he had removed the day before.

7.3 It was his evidence that the Applicant was suspended whilst an investigation was conducted. He testified that before the Applicant was suspended the truck was refueled in the presence of the Applicant to ascertain the amount of fuel consumed. It was submitted that the truck before its departure had been refueled. It was his evidence that 72 litres were pumped into the truck, which in essence meant that from Matsapha to Oshoek, the Applicant had used up 72 litres.

7.4 It was also discovered that the sieve/ strainer had been tampered with and damaged when the truck was checked by a mechanic. The witness's testimony was that the Company procedure/policy stipulates that when a truck experiences any mechanical fault, the supervisor must be informed.

7.5 It was his evidence that several meetings were held wherein the drivers including the Applicant were briefed of this Company policy. He testified that the Applicant was not at the authorized stoppage point when spotted by Mr. Van Zyl, as he was parked within the vicinity of Oshoek and not at the border. It was his evidence that the Applicant was aware of such Company policy. This witness further testified that the witness who spotted the Applicant siphoning diesel, except for the fact that he was the husband to the General Manager, it was his submission that he did not know the Applicant

therefore did not have any personal vendetta against him to accuse him falsely.

7.6 He testified that in terms of company policy the General Manager had the authority to charge the Applicant, which was rightly done. The Applicant was charged after a thorough investigation was conducted by the Respondent.

7.7 When it was concluded that the Applicant failed to report the incident concerning the removal of the ventilation, and further that an excessive amount of fuel had been consumed by the Applicant from Matsapha to Oshoek and the Applicant's failure to stop at an authorized area, the Company came to the conclusion that indeed diesel had been siphoned from the truck. Further the Company believed that the statement made by the witness, as the witness had no reason to lie about the incident.

7.8 A hearing was held wherein the chairman from the evidence adduced found the Applicant guilty. It was his evidence that the Company had a history of diesel theft, hence the installation of the sieves/strainers. He further testified that the Company trucks have manual locking, so it was incomprehensible how the Applicant had locked himself out of the truck, let alone his failure to report the incident. He further testified that the Company trucks all have signs at the back with a telephone number encouraging all citizens to report negligent driving, the number belongs to Paula the General Manager.

7.9 His testimony was taking into account the evidence and the ruling of the Chairman the Respondent had no other alternative but to dismiss the Applicant. This was the evidence of this witness in summary.

7.10 The 2nd witness called was Dean Van Zyl. The testimony of this witness was short. It was his testimony under oath that on the 5th June 2007 in the company of his mother immediately after crossing the border into Swaziland at Oshoek border post, as he was turning the circle he observed the Applicant siphoning diesel out of one of the Respondent's truck. The diesel was being siphoned into the boot of a VW Polo/ Jetta which was parked close to the truck. It was his evidence that he then proceeded to call his wife and informed her of his observation. His wife requested that he reverse and confront the driver.

7.11 Indeed he proceeded to confront the driver, whom he did not know, and asked him what he was doing. The sedan had already left at that time. He again asked the Applicant what he was doing, and his evidence was that he could not remember what his response was as the incident had happened a while ago. He testified that he was driving his wife's car, it was his view that the Applicant knew who he was when he saw the car. He further testified that he noticed fresh diesel stains on the side of the truck.

7.12 He asked the Applicant why he was stealing diesel, and his response was that he was not stealing diesel. The Applicant then got on to the truck and drove off. He inturn called his wife and told her what he had seen.

7.13 Under cross-examination the witness was asked to clarify what the car model was as it was alleged that, in his statement he had stated that it was a VW Polo/Jetta, but now he was referring to it as a sedan. It was his evidence that a sedan is a form of vehicle, being a small car, and that his position was still that the car was a VW Polo/ Jetta.

7.14 He was further questioned whether he had noted down the vehicles registration number, and handed same to the police. In response he stated that he had not noted down the registration number, and had not reported the incident to the police as that was not his duty, but that of the Respondent.

7.15 He was further questioned on whether he asked the Applicant about the diesel spillages on the side of the truck, when he approached him. He stated that indeed he questioned the Applicant but could not recall what his response had been.

7.16 The 3rd witness to be called was Paula Van Zyl the Respondents then General Manager. Her evidence was that she got a call from her husband, informing her that he had seen one of the Company trucks, and it appeared as if someone was siphoning diesel from it. It was her evidence that he asked what he should do, and she requested that he confront the driver. He phoned again and

advised that he had confronted the driver, and he had been very evasive. It was her evidence that her husband informed her that he could smell the diesel and had seen spillage on the side of the truck. She proceeded to contact the driver's supervisor to ascertain who the driver was, and instructed him to recall the driver. She was advised that the Applicant was the driver.

7.17 The truck returned to the depot, and the following morning it was refueled to ascertain how much diesel had been consumed by the truck. This was done to enable them to know how many litres had been used from Matsapha to Oshoek. It was discovered that a substantial amount of fuel had been used, which was not equivalent to the distance travelled. She accordingly called the Applicant to the board room and questioned him on what he had been doing when it was reported that he was stealing diesel. She testified that he said he had been fixing the ventilator. The Applicant was then suspended to conduct investigations. It was her evidence that the Company procedure did not allow drivers to attend to faults on the truck. Procedure dictated that any fault are to be reported to their supervisor and accordingly attended to by a mechanic. It was her evidence that the Applicant knew this policy as he had been repeatedly told by his supervisor with other drivers in meetings held.

7.18 Her testimony was that an investigation was conducted by herself and her team, wherein it was discovered that the Applicant had failed to report a fault on the truck. Further, that he was not parked at an authorized stop when he was seen allegedly siphoning diesel, and that a substantial amount of diesel could not be accounted for. The Applicant was charged with theft, a hearing was held and the Applicant dismissed. He appealed and his appeal was overruled. It was her evidence that the Applicant was correctly charged and dismissed.

7.19 Under cross-examination the witness was asked whether she was present during the hearing, she advised that she gave evidence but was not there throughout the hearing. She was questioned on whether she was part of the investigations, and if she was, who else was involved. She stated that a team was part of the investigation which included herself, the 1st witness and other Employees.

7.20 The 4th witness called was Mr. Thabiso Masina. His evidence was that he is a Government Attorney, who deals with criminal, civil and labour issues on behalf of the Government. It was his evidence that he also gives advice to different ministerial departments. He testified that he was the Chairman that had presided over the Applicant's disciplinary hearing. In summary his evidence was that the Applicant was given an opportunity to state his case.

8.2 The Applicant in his case has alleged that his dismissal by the Respondent was substantively unfair. When narrowing down the issues during pre- arbitration it was agreed upon that the procedural fairness of the dismissal was not in issue, leaving the substantive fairness of the dismissal in issue. In cases of unfair dismissal, the labour courts as a matter of legal principle have adopted the civil standard principle, which is predicted on a balance of probabilities. In the case of Selamolele vs Makhado 1988 (2) SA 372 page 375 D-E it is stated that:

"what is being weighed in the balance is not quantities of evidence but the probabilities arising from the evidence and all the circumstances of the case."

8.3 The issue I am required to determine or decide in the arbitration hearing relates to whether or not the Applicant's employment was lawfully terminated within the meaning of substantive fairness, after having taken all the circumstances of this case into account.

8.4 In a dismissal case the onus is borne by the Respondent to prove that in terminating the services of the Applicant it has satisfied the requirements of Section 42 (2)(a) and 42 (2)(b) of the Employment Act 1980 (as amended). Section 42(2)(a) and (b) provides that:-

The service of the employee shall not be considered as having been fairly terminated unless the employer proves:

- a) that the reason for the termination was one permitted by section 36; and
- b) that taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee.

9. SUBSTANTIVE FAIRNESS

9.1 I have to determine, on a balance of probabilities the extent to which the conduct of the Applicant amounted to a dishonest act of theft. John Grogan , Workplace Law 9th edition, Juta page 157-8, states that the substantive fairness of the dismissal is assessed according to the following criteria;

- a) whether or not the employee contravened a rule or from the truck to his supervisor. From his own evidence he testified that he was aware that any breakdown should be reported to the supervisor.

9.2 He had plenty of time to report on the ventilator and have it replaced whilst the truck was at Respondent's premises on the 6th June 2007, when he ha returned from Matla. The fault could have been taken care of by a qualified mechanic whilst the truck was being refueled. Why would the Applicant have wanted to burden himself with the task of replacing the ventilator.

9.3 Another aspect of the evidence given by the Applicant that is puzzling, is why the Applicant chose to replace the ventilator at the truck stop where he supposedly parked because he could not find parking within the borders parking bays, yet when he was approached by the 2nd witness he proceeded to the parking bay within the border boundaries, wherein there was no longer a problem of parking. Further he did not proceed to replace the ventilator, when he eventually parked within the border.

9.4 He did not deny that he was approached by the 2nd witness, he further did not deny that there were diesel stains on the side of the truck, his evidence was that same were not fresh. But still it is incomprehensible how, the 2nd witness would accuse the Applicant of siphoning diesel, not knowing him and having no reason to lie.

9.5 I found that the evidence of the 4 witnesses brought by the Respondent corroborated and was truthful, even though the 3rd witness tended to be hostile to the Applicant's representative, and un co-operative. During cross-examination no questions were posed to the witnesses which would lead me to doubt the evidence adduced.

9.6 The Respondent has on a balance of probability brought overwhelming evidence against the Applicant leading me to believe that indeed the Applicant is guilty of the charge preferred against him.

9.7 The Respondent has proven that the Applicant broke several rules, rules which were known to him and consistently applied across the board, one of which is dishonesty in the form of theft. The question that now must be answered is whether dismissal was fair taking into account the circumstances of the case.

9.8 Perhaps one can borrow the words of Tips AJ in Standard Bank SA Limited v CCMA and Others(1998) 6 BLLR 622

DATED AT MANZINI ON THIS THE 7TH DAY OF MAY, 2009

COMMISSIONER BANELE NGCAMPHALALA

ARBITRATOR