

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

**Held in Manzini SWMZ 188/08**

**In the matter between :**

**John Mefika Mthethwa Applicant**

**AND**

**Turns General Suppliers Respondent**

**CORAM:**

**Arbitrator : Mr Robert S. Mhlanga**

**For Applicant : Mr Z. Dlamini**

**For Respondent : Ms N. Kunene**

**ARBITRATION AWARD**

**Venue : CMAC Offices, Enguleni Building, Ground Floor.**

**1. DETAILS OF HEARING AND REPRESENTATION**

1.1 The Applicant is John Mefika Mthethwa, who was represented by Mr Zama Dlamini, from Leo Gama and Associates.

1.2 The Respondent is Turns General Suppliers, a company duly registered in terms of the Company Laws of Swaziland.

**2. BACKGROUND OF THE DISPUTE**

2.1 The dispute between the parties arose as a result of the termination of the Applicant's services by the Respondent on the grounds of absenteeism; it being alleged by the Respondent that the Applicant absented himself from work for more than (3) days without the Respondent's permission.

2.2 Pursuant to his dismissal the Applicant wrote a letter dated 25<sup>th</sup> June, 2008, to the Respondent wherein the Applicant demanded to be reinstated to work because his dismissal was allegedly both procedurally and substantively unfair.

2.3 Following the Respondent's failure to comply with the Applicant's demand, the Applicant reported a dispute of unfair dismissal to CMAC.

2.4 The dispute was conciliated upon, but it was not resolved and a Certificate of Unresolved Dispute was issued by the Commission.

2.5 The parties by consent referred the dispute to arbitration for determination hereof.

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2.6 On the 23<sup>rd</sup> October, 2008 a pre-arbitration meeting was held; and the purpose of this meeting was inter alia to enable the parties to agree on any documents to be used during the arbitration hearing, and to exchange same (if any); to determine the number of witnesses (if any) each party would call and to set a suitable date for the arbitration hearing.

**3. ISSUE TO BE DECIDED**

The issue or question to be determined in this case is whether or not the Applicant's dismissal was procedurally and substantively fair. Put differently, I am called upon to decide whether the Applicant's dismissal was in compliance with the provisions of Section 36 of the Employment Act, 1980, as amended.

#### **4. SUMMARY OF EVIDENCE 4.1 APPLICANT'S CASE**

4.1.1 John Mthethwa, hereinafter referred to as the Applicant testified in support of his case. I will refer to this witness as the Applicant or Mr Mthethwa as the case may be.

4.1.2 John Mthethwa, the Applicant herein testified under oath and stated that he was employed by the Respondent on the 2<sup>nd</sup> January, 2004, as a Salesman. He testified that at the time of the termination of his services he was earning E1, 200-00 per month.

4.1.3 The Applicant testified that on the 16<sup>th</sup> June, 2008 he went to work as usual, but at about 10:00am he asked for permission from Susan Du Pont to go out to buy tablets for his sick

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mother. He said that Susan Du Pont allowed him to go out to buy the tablets.

4.1.4 Mr Mthethwa testified that the person whom he had asked to collect the tablets from him and to take them to his sick mother failed to turn-up. He said that as a result he was forced to go home. He stated that at about 4:30pm he went home, after he had sought and been granted permission.

4.1.5 Mr Mthethwa further testified that when he got home he found that his mother was now critically ill, hence he did not go to work on Tuesday (17<sup>th</sup> June, 2008) and Wednesday (18<sup>th</sup> June, 2008) because he was attending to his sick mother.

4.1.6 The Applicant testified that on Tuesday, while he was at home he received a telephone call from a certain Mr Maphalala, a Police Officer from Sigodvweni Police station, who informed him that he should come to Sigodvweni Police Station, for questioning in relation to alleged stolen goods belonging to his employer (Respondent).

4.1.7 The Applicant said that on Thursday 19<sup>th</sup> June, 2008, he went to Sigodvweni Police Station. The Applicant stated that he telephonically informed Susan Du Pont, his supervisor that he would come late to work on that day (Thursday) because he had been summoned by the Police to come to Sigodvweni Police Station.

4.1.8 The Applicant said that the police questioned him about stolen goods belonging to his employer which were allegedly found in the

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possession of his relative. Mr Mthethwa (Applicant) said that he told the police that he did not know anything about the alleged stolen goods.

4.1.9 Mr Mthethwa stated that, after the interrogation the police released him; but the police told him to come back on Friday, 20<sup>th</sup> June, 2008. Mr Mthethwa testified that he then did not go to work on Thursday.

4.1.10 The Applicant testified that he did not go to work on Thursday (after he had been released by the police) because he had been informed by the police that it was his employer (Respondent) who had reported the case of theft against him to the police, hence the investigation against him.

4.1.11 The Applicant said that on Friday (20/06/2008) went to Sigodvweni Police Station again, for further interrogation regarding the alleged stolen goods. He said that on Friday the Police detained him until Saturday (21/06/2008). On Saturday, the police released him, but the police informed him to report back on Monday, 23<sup>rd</sup> June, 2008. On Monday (23/06/2008) the Applicant went to the Police Station. He stated that on this day (Monday) the police told him that he was now free to go back to work.

4.1.12 It was the Applicant's testimony, that from the Police he went straight to work on the same day (Monday). The Applicant testified that at work Susan Du Pont advised him to see Mrs Du Pont before

he could start working. The Applicant said that he waited for Mrs Du Pont, who eventually arrived. He said that he met

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Mrs Du Pont, who was in the company of the Human Resources Manager, Ms Nomphumelelo Kunene. He said that he told Mrs Du Pont why he could not come to work on the following days namely; Tuesday (17/06/08), Wednesday (18/06/08), Thursday (19/06/08), Friday (20/06/08) and Saturday (21/06/08).

4.1.13 In particular he testified that he told Mrs Du Pont that he had sought permission from Susan Du Pont, and that he also informed Susan that on Thursday he would come late to work because he was suppose to go to Sigodvweni Police Station. The Applicant stated that Susan Du Pont was called upon to confirm his version. He said that Susan Du Pont was evasive in that she said she did not remember; she did not specifically deny that she knew about his whereabouts and the fact that the Applicant had been given permission by her.

4.1.14 The Applicant said that Mrs Du Pont told him that his services were already terminated due to the fact that he was absent from work for more than three (3) working days. The Applicant testified that he was given a letter of dismissal dated 20<sup>th</sup> June, 2008. The Applicant said that he told Mrs Du Pont and the Human Resource Manager that they knew his whereabouts because it is the company which reported a case of theft against him to Sigodvweni Police Station.

4.1.15 Mr Mthethwa (Applicant) testified that he responded to the Applicant's letter of dismissal. He said that in his response he brought it to the Respondent's attention that his dismissal was both procedurally and

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substantively unfair. Mr Mthethwa stated that the Respondent did not reply to his own correspondence. He said that subsequently, he reported a dispute of unfair dismissal to CMAC.

4.1.16 Mr Mthethwa stated that during the conciliation process the Respondent allegedly offered to reinstate him with the payment of arrear wages. Mr Mthethwa said that he declined the Respondent's offer because the continuation of employment would be intolerable because of the manner in which he was dismissed. He said that there was no more trust between him and his employer (Respondent).

4.1.17 On the other hand, the Applicant, Mr. Mthethwa testified that during the conciliation, the Respondent alleged that the Applicant was through a letter notified of a disciplinary hearing. The Applicant disputed this; he said that he was never notified of any hearing. He said that the Respondent should have called him because the Respondent knows his cell number, as well as his residence or home. The Applicant also disputed or denied the fact that he was absent from work for more than three (3) working days. However, he admitted that he was absent from duty for two (2) days only.

## **CROSS EXAMINATION**

4.1.18 During cross examination the Applicant testified that he did not spend the whole day at Sigodvweni Police Station on the 19<sup>th</sup> June, 2008.

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4.1.19 The Applicant was asked by the Respondent's representative as to why he did not go to work to report about his situation since he did not spend the whole day at the Police Station. In response the Applicant testified that he could not go to work because he discovered that his employer was the one who reported the case of theft against him to the Police, hence the Police investigation. He also testified that another reason why he could not go to work was that by the time he left the Police Station, it was already late; he left the Police Station after 5:00pm.

## **4.2 RESPONDENT'S CASE**

4.2.1 The Respondent led the evidence of one witness namely, Susan Du Pont, in support of its case.

#### **SUSAN DU FONTS TESTIMONY**

4.2.2 Susan Du Pont testified under oath and said that she is employed by the Respondent as a Sales Assistant that she is based at the Respondent's Matsapha Branch.

4.2.3 Susan Du Pont testified that on Thursday 18<sup>th</sup> June, 2008 the Applicant was summoned by the Police for questioning in connection with the alleged stolen company goods namely, pressure pumps and boosters which were found in a house at Kwaluseni near the University of Swaziland.

4.2.4 Ms Du Pont further testified that on the 16<sup>th</sup> June, 2008 at around 9:00am the Applicant asked for a permission to go out to buy tablets for his sick mother. She said that the Applicant

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was permitted to go out to buy the said tablets; but the Applicant never came back to work on that day. Ms Du Pont said that one day (she could not recall the actual date) the Applicant passed by and informed her that he did not get the tablets at the pharmacy. She said that the Applicant did not come to work even on this particular day.

4.2.5 Ms Du Pont said that since the 16<sup>th</sup> June, 2008 (the day when the Applicant asked for a permission to go to the pharmacy to buy tablets for his sick mother) the Applicant never reported for duty or come to work.

#### **CROSS EXAMINATION**

4.2.6 During cross examination Susan Du Pont was asked by the Applicant's representative as to what steps did she take as a supervisor, following the Applicant's absence from work. She was asked if she reported the Applicant's absence to her superiors. In response thereto Susan stated that it was not her responsibility to report the Applicant's absence. Susan Du Pont further stated that this was the responsibility of the security officer who is manning the main entrance at the workplace. Susan explained that at the workplace there is a security officer, who is tasked by the company to record the employees' attendance. She said that an attendance register or book is kept by the security at the main entrance on which every employee's attendance or non-attendance is recorded. She further testified that the security officer at the end of the day makes a report and same is submitted to the management, in particular to Mrs Du Pont. She

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said that from the attendance report, Mrs Du Pont would know as to who was absent on a particular day.

4.2.7 During re-examination Susan testified that the Applicant during his absence never contacted her regarding his whereabouts.

#### **5. ANALYSIS OF EVIDENCE AND SUBMISSIONS**

5.1 I am now called upon to analyze the evidence adduced (including the documents filed herein) together with the parties closing arguments or submissions, and thereupon I will accordingly make my award.

5.2 Briefly, let me outline the parties' closing submissions. The Applicant, with regard to procedural fairness, submits that the termination of his services was procedurally unfair in that he was never afforded the opportunity to defend himself against any misconduct prior to his dismissal. The Applicant submits that no disciplinary enquiry was conducted or convened by the Respondent to enable him to present his side of the story in so far as the alleged misconduct for which he was subsequently dismissed is concerned.

5.3 It is the Applicant's further submissions that, "the rules of natural justice provide that the employer must conduct an investigation for the alleged misconduct. Thereafter, the employee must be invited to a disciplinary hearing to show cause why his services should not be terminated. The Applicant further submits that, in the present case, the Respondent, in total disregard of the rules of natural justice, opted to dismiss the Applicant without the

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due process of a fair disciplinary hearing. Therefore, the termination of the Applicant's services was procedurally unfair in this regard.

5.4 With regard to substantive fairness, the Applicant submits that the termination of his services was substantively unfair in that the Respondent did not lay any charges against him, nor any allegations of misconduct was proved by the employer to justify his dismissal. It is the Applicant's argument that, Section 35 (2) of the Employment Act, 1980 as amended provides that no employer shall terminate the services of an employee unfairly.

5.5 The Applicant further argues that Section 42 (2) of the Employment Act, 1980 provides that "the services of an employee shall not be considered as having been fairly terminated unless the employer proves that the reason for the termination is permitted by section 36, and that taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee".

5.6 It is the Applicant's further submission that, the Respondent has contravened the above cited provisions of the Employment Act, in that the Respondent arbitrarily and summarily terminated the Applicant's services without a just cause, because no misconduct was proved by the Respondent against the Applicant. The Applicant submits that, "although absenteeism is a ground for dismissal under section 36 of the Act, this misconduct was not proved by the Respondent against the Applicant. Moreover, the Respondent knew the whereabouts of the Applicant during the period that he was absent from work".

5.7 The Applicant argues that he had sought permission and he was granted such

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permission to go and buy tablets for his ailing mother. The Applicant further contends that the Respondent was at all material times fully aware that the Applicant was summoned by the Police to report at Sigodweni Police Station to show cause why criminal charges should not be laid against him for loss of certain company goods. Therefore, it is argued that it was unreasonable in the circumstances of the case for the Respondent to terminate the Applicant's services for absenteeism.

5.8 In conclusion, the Applicant prays for an Award to be granted in his favour, for the payment of the following terminal benefits namely, notice pay in the sum of E1200-00, Additional notice in the sum of E553-08; Severance allowance amounting to E1, 384-50 and compensation for unfair dismissal which is equivalent to 12months' wages amounting to E14, 400-00; and the total being claimed herein is a sum of E17, 538-30.

5.9 On the contrary, the Respondent submits that "in terms of the common law, employees have a fundamental duty to render services and their employers have a commensurate right to expect them to do so. A basic element of this right is that employees are expected to be at their workplace during working hours unless they have adequate reason to be absent. Wilful absence from work constitutes a breach of contract and justifies summary termination of the contract. Further, the longer the period of absence the more justified an employer will be in terminating the contract".

5.10 The Respondent further submits that, "the elements of the offence of absenteeism are that the employee

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must have been absent from work at a time the employee was contractually obliged to render services and that the employee had no reasonable excuse for his absence".

5.11 The Respondent further contends that in the present case, the Applicant (employee) was expected to be at work from the 17<sup>th</sup> to 21<sup>st</sup> June, 2008, but he failed to do so. It is argued herein that the Applicant failed to inform the Respondent immediately about the reason for his absence. The Respondent refers me to the case of Metal Allied Workers Union vs Horizon Engineering (Pty) Ltd (1989) 10 ILJ 782, wherein it was held that the onus rests on the employees to provide a satisfactory explanation for their absence.

5.12 The Respondent therefore submits that "employees accused of being absent are entitled to be heard before their contracts are terminated". It is argued that, "in the present case, the Applicant was given a fair opportunity to influence the decision whether he should be dismissed or not but he failed to forward a satisfactory explanation. Therefore, it is the Respondent's submission that the Applicant was fairly dismissed. It is argued that the Applicant's dismissal was in line with section 36 (f) of the Employment Act, 1980 as amended. In conclusion the Respondent prays that the Applicant's case be dismissed.

5.13 In casu I am required to decide whether or not the Applicant's dismissal was fair and reasonable in the circumstances of the case. It is not in dispute that the Applicant was an employee to whom section 35 of the Employment Act, 1980 applied. Therefore, the onus in terms of section 42 (2) (a) and (b) of the Employment Act, 1980 as amended, is on the Respondent to prove the following:

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- 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 Applicant's services.

5.14 In its quest to discharge the onus of proof aforementioned the Respondent led the evidence of one witness, Ms Susan Du Pont. Over and above that, the Respondent submitted or filed the following documents namely; Annexure "TGS1" and "TGS2" in support of its case. However, what is worth mentioning is that during the time when the Respondent was presenting its case, no reference was specifically made to any of the aforesaid Annexures. Nevertheless I will take into account these documents in my analysis. Another relevant document which I have to take into consideration herein is the letter of dismissal dated 20<sup>th</sup> June, 2008.

5.15 In casu, it is common cause that the Applicant was dismissed by the Respondent purportedly in terms of section 36 (f) of the Employment Act, 1980 as amended, following the Applicant's absence from work from the 17<sup>th</sup> June to 21<sup>st</sup> June, 2008. According to the letter of termination of services, the Applicant's services were terminated on the 20<sup>th</sup> June, 2008. The said letter of termination of services reads as follows; "kindly note that as a result of absenting yourself from work for more than three (3) working days without a valid notification of your absenteeism, your services with the company are hereby terminated with immediate effect from the 20<sup>th</sup> June, 2008. Such termination is in line with section 36 (f) of the Employment Act as amended.

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Further take notice that the company regrets, that it is not able to continue the employment relationship with you". The letter was written by the Respondent's Human Resources Manager, Ms Nomphumelelo Kunene.

5.16 Section 36 (f) of the Employment Act, 1980 as amended provides that, where an "employee has absented himself from work for more than a total of three working days in any period of thirty days without either the permission of the employer or a certificate signed by a medical practitioner certifying that he was unfit for work on those occasions, it shall be fair for an employer to terminate the services of that employee".

5.17 The thrust of the Applicant's case, as it is fully shown in the foregoing submissions, is that his services were unfairly terminated both in procedure and substance. On the contrary, the Respondent's case is that the termination of the Applicant's services was both procedurally and substantively fair. With regard to the procedural fairness of the Applicant's dismissal; it is the Respondent's argument

that the Applicant was given an opportunity to influence the decision whether he should be dismissed or not, but he failed to forward a satisfactory explanation, hence his dismissal. I do not agree with the Respondent's submission or contention in this regard. The Respondent's submission herein is patently false and misleading as it is not premised on any evidence, hence it is rejected.

5.18 In casu, no evidence was adduced by the Respondent to prove that the Applicant was afforded an opportunity to state his case or put his side of the story before his services were terminated by the Respondent. Susan Du Pont, being the only witness

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who testified on behalf of the Respondent, never testified that the Applicant was afforded an opportunity to defend himself or state his case before the termination of his services. In other words, no evidence was led by the Respondent to the effect that a disciplinary enquiry was convened or instituted against the Applicant wherein he was afforded a chance to defend himself against the charge of absenteeism. During cross examination, the Respondent's Representative failed to dispute the Applicant's allegation that the termination of his services was procedurally unfair.

5.19 In his evidence-in-chief the Applicant stated that on the 23<sup>rd</sup> June, 2008 Mrs Du Pont who was in the company of the Human Resources Manager, told him that his services were terminated because he had absented himself from duty for more than three (3) working days. He said that he was then given a letter of termination of services. He said that he replied to the Respondent's letter of dismissal. He said that in his response he brought to the attention of the Respondent that his dismissal was both procedurally and substantively unfair.

I accept the Applicant's contention that no disciplinary hearing was convened against him wherein he could be able to defend himself prior to his dismissal herein.

5.20 The said letter of the termination of the Applicant's services also states that, the termination of the Applicant's services was with immediate effect, from the 20<sup>th</sup> June, 2008. This means that the Applicant's services were terminated on the 20<sup>th</sup> June, 2008; obviously this was done in his absence. It is not in dispute that the Applicant received the letter of termination on the 23<sup>rd</sup> June, 2008, whereupon he

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was informed by the Respondent, through Mrs Du Pont that his services were already terminated.

5.21 In Annexure "TGS2", being the Respondent's reply to the Applicant's aforesaid letter, the Respondent through its Managing Director, Mr H. T. Du Pont wrote this letter, which in part reads as follows; "Further to your letter delivered to us on the 26<sup>th</sup> June, 2008 our response is as follows", "Our HR Manager is to schedule a hearing accordingly and you will be notified in due course". Clearly from this letter, which was a response to the Applicant's challenge to his alleged unfair dismissal, the Respondent seemed to have realized that a procedural defect had occurred and it was prepared to conduct a hearing to rectify the procedural flaw. Unfortunately, despite the promise to hold one, no disciplinary hearing was ever held, to enable the Applicant to state his case, as the Applicant was never called to any disciplinary hearing.

5.22 The Respondent is further required to prove that the Applicant's dismissal was substantively fair. It is the Respondent's argument that the termination of the Applicant services was substantively fair. The Respondent submits that the Applicant was fairly dismissed due to his absence from work from the 17<sup>th</sup> to 21<sup>st</sup> June, 2008 without the Respondent's permission or reasonable explanation justifying his absence.

5.23 The Applicant denies that he was absent from work from the 17<sup>th</sup> June, to 21<sup>st</sup> June, 2008 without the Respondent's permission. The Applicant contends that he sought and was granted permission by Susan DuPont, his supervisor to go and buy tablets for his sick mother. However, the Applicant admitted that

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he was only absent from work on Tuesday, the 17<sup>th</sup> June and Wednesday, the 18<sup>th</sup> June, 2008. He testified that on the 19<sup>th</sup> June, 2008 he was at Sigodweni Police Station for questioning in connection with goods belonging to the Respondent company, which were allegedly stolen. He said that the goods were found in the possession of his relative by the Police.

5.24 On the contrary the Respondent, disputes the Applicant's allegations. Susan Du Pont testified that the Applicant, on the 16<sup>th</sup> June, 2008, asked for a permission to go and buy tablets for his sick mother at the pharmacy. Susan testified that the Applicant disappeared or left the workplace on that day and he never came back to work since then, until the 23<sup>rd</sup> June, 2008. The Applicant, through his representative never disputed Susan Du Pont's evidence in this regard, as it was never put to her during cross examination that her version was not true.

5.25 The Respondent in support of its version presented Annexure "TGS1". These are copies of the extracts of the daily attendance register for all the Respondent's employees. These copies are collectively marked as Annexure "TGS1"

5.26 Annexure "TGS1" clearly shows that the Applicant was absent from work on the 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> June, 2008. It is reflected therein that he came back to work on Monday, the 23<sup>rd</sup> June, 2008, and on this day he reported for duty at 9:00am. Therefore, I accept the Respondent's version and submission that the Applicant was absent from work on the aforementioned days. Then the question which begs for an answer is; is it true that the Applicant had been permitted by the Respondent to

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be away from duty during the entire period of absence, that is, from 17<sup>th</sup> June, to 21<sup>st</sup> June, 2008?

5.27 Regarding this issue the Applicant's testimony and submission is that the Respondent granted him permission to go and buy tablets for his sick mother. In his evidence-in-chief, he said that his mother was critically ill, and as such he did not go to work on Tuesday (17<sup>th</sup> June, 2008) and Wednesday (18<sup>th</sup> June, 2008) because he was attending to his sick mother. The Applicant did not testify that he was given permission to stay at home on the 17<sup>th</sup> and 18<sup>th</sup> June, 2008, in order to attend his sick mother.

5.28 The Applicant also testified that whilst he was at home on Tuesday (17<sup>th</sup> June, 2008), he received a call from Sigodweni Police Station, to the effect that he should come to Sigodweni Police Station. He said that he went to the police on Thursday (19<sup>th</sup> June, 2008). He said that on this day, before he left for the police station, he called Susan Du Pont and informed her that he would come late to work on that day because he had to go to the police station first. It is the Applicant's evidence that after the police had released him on Thursday he never reported for duty. In his evidence in chief, he said that he could not go to work because he had been informed by the police that it was the Respondent (Turns General Suppliers) which reported a case of theft to the police against him.

5.29 During cross examination, the Applicant testified that another reason which prevented him from coming to work on the 19<sup>th</sup> June, 2008 (Tuesday) was due to the fact that when he left the police station it was already late (it was after 5:00pm). He testified that on Friday, the 20<sup>th</sup> June, 2008, the police detained him and he was released on the following day

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(Saturday). From the evidence adduced herein, there is no mention by the Applicant that the Respondent had authorized or permitted him to be absent from work during the aforesaid days. The Applicant was only given permission to go out to buy tablets for his sick mother and he was expected to come back to work on that day, but instead the Applicant absconded.

## **6. CONCLUSION**

6.1 From the totality of evidence adduced herein and in the light of the foregoing analysis thereof; it is my conclusion that the Respondent has failed to prove on the balance of probabilities that the Applicant's dismissal was procedurally fair. The evidence led revealed that the Respondent never

convened a disciplinary enquiry against the Applicant so to enable him to defend himself against the alleged misconduct of absenteeism.

In Van Jaarsveld & Van ECK: Principles of Labour Law (2<sup>nd</sup> Edition), at page 198; it is stated that, "In general the holding of a disciplinary hearing is regarded as a basic pre-dismissal procedure and will prevent the impression that the employee was dismissed unfairly. Therefore an employee should be given a fair and proper disciplinary hearing before being dismissed".

6.2 PR. Dunseith, Judge President (as he then was) in the case of Nkosinathi Ndzimandze & Another vs Ubombo Sugar Limited, Industrial Court Case No: 476/05, stated with regard to procedural irregularity, that "even in situations where management is convinced of the guilt of employees, it is still obliged to ensure that fair

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disciplinary process is observed". In casu, it is my finding that the Applicant's dismissal was procedurally unfair.

6.3 With regard to substantive fairness, it is my conclusion that the Respondent has been able to prove on the balance of probabilities that the termination of the Applicant's service was substantively fair and reasonable in the circumstances of the case. Following my careful analysis of the entire evidence led in this case, I have come to the conclusion that the Applicant willfully absented himself from work. The Respondent has proved that the Applicant had committed misconduct of absenteeism which warranted his dismissal in terms of section 36 of the Employment Act, 1980, as amended.

6.4 It is my finding that the Applicant was never given permission by the Respondent to be absent from work from the 17<sup>th</sup> June, to 21<sup>st</sup> June, 2008. The facts of the case also revealed that no plausible or reasonable and satisfactory explanation was given by the Applicant on the 23<sup>rd</sup> June, 2008, which could justify his absence from work on the days in question. Though no disciplinary hearing was convened by the Respondent to enable the Applicant to present his case, but at least he was asked by the Respondent to explain as to why he failed to come to work on the aforementioned days, before he was given the letter of termination of his services(albeit this does not constitute a disciplinary enquiry).

6.5 In his evidence in chief the Applicant testified that he told Mrs Du Pont that they knew about his whereabouts, because the respondent had reported the case of theft of the company goods to the police against him. Clearly this was not a reasonable

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explanation; the Applicant seems to be accusing the Respondent for his implication in the alleged theft of the company goods. The Applicant in his correspondence dated 25<sup>th</sup> June, 2008, in which he was responding to the Respondent's letter of termination dated 20<sup>th</sup> June, 2008; wherein he wrote that, "on the 17<sup>th</sup> June, 2008 I duly reported for duty and I am surprised that I have not reported for duty for 36hours where else (sic) in real fact your office reported that I have committed an offence in my work place reported by yourself. I was detained and I believe that your office partaked (sic)". In the same letter the Applicant also wrote that, "I am surprised that your offices were not aware of my whereabouts, where else (sic) Mrs Du Pont (Director) came to my place of aboard (sic) on the 16<sup>th</sup> June, 2008 with the company of the Royal Swaziland Police".

6.6 From the above quoted contends of the Applicant's letter, it is clear that the Applicant is pointing an accusing finger to his employer for his own misconduct of absence. The Applicant's aforesaid conduct and attitude demonstrate that the Applicant was not remorseful for being absent all these days. The Applicant did not apologize for his absence from work without the employer's permission, instead he 'poured' out his anger and bitterness to the Respondent for no apparent reason. However the Respondent politely responded towards the Applicant's accusation through its Managing Director, as reflected in Annexure "TGS2", wherein it is stated that; "the company only reported missing items to the police; they are making their own investigation at present we are still awaiting a response from them".

6.7 It is my conclusion that the Applicant failed to justify his absence from work during the period from 17<sup>th</sup>

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June to 21<sup>st</sup> June, 2008 and consequently it was substantively fair and reasonable for the Respondent to terminate his services. Clearly, the Applicant deliberately breached one of the material terms of the contract of employment between the parties namely, to render his services to the employer at all times during the currency of his employment. Rycroft A, et al; A guide to South African Labour Law, 1<sup>st</sup> Edition (1990) at page 44 states that; "The employee is obliged to make his or her services available until the contract comes to an end, except of course, during periods of authorized absence. Failure to do so constitutes a breach of contract which may entitle the employer to dismiss the employee summarily, i.e without notice".

6.8 In my view the Applicant is entitled to compensation for procedurally unfair termination of his services. In my opinion an award of three (3) months' wages is a fair and equitable remedy in the circumstances of the case. Therefore, the Applicant is entitled to be paid by the Respondent a compensation which is equivalent to three (3) months' wages.

6.9 With regard to the Applicant's claim for the payment of his other terminal benefits namely, notice pay, Additional notice pay and Severance allowance, it is my finding that the Applicant is not entitled to same because his dismissal was for a reason permitted by section 36 (f) of the Employment Act, 1980, as amended.

## **7. AWARD**

7.1 Pursuant to my foregoing conclusion and findings herein; I hereby make an Award that the Respondent shall pay the Applicant compensation for

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procedurally unfair dismissal which is computed as follows; E1,200-00 x 3 months = E3,600-00.

7.2 The Respondent is ordered to pay the Applicant the sum of E3600-00 (Three Thousand Six Hundred Emalangeneni Only) within 14 days from the date of receipt of this Award.

DATED AT MANZINI ON THIS 31<sup>st</sup> DAY OF JULY 2009.

ROBERT S. MHLANGA

(CMAC COMMISSIONER)

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