IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION

HELD AT MANZINI SWMZ 518/08

In the matter between:

Eddie Thring Applicant

And

Prime Trucking & Logistics (Pty) Ltd Respondent

Coram
Arbitrator : Khanyakwezwe Khumalo
For Applicant : Ncamiso Manana
For Respondent : Lobenguni Manyatsi

Nature of dispute : Alleged unfair dismissal

Date of arbitration : 22nd February 2010

ARBITRATION AWARD

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1. DETAILS OF HEARING AND REPRESENTATION

1.1 This arbitration hearing was held at the Conciliation, Mediation and Arbitration Commission (CMAC) offices, situated in Manzini. The arbitration hearing was held on the 22nd February 2010.

1.2 Mr. Eddie Thring of P. O. Box 1137, Nhlangano, was the Applicant in this matter and shall be referred to as Mr. Thring or the Applicant as the case may be. Mr. Ncamiso Manana, an attorney from B.S Dlamini Attorneys, represented the Applicant and for ease of reference, he shall hereinafter be referred to as Mr. Manana or the Applicant's representative.

1.3 At the other end of the spectrum, the Respondent in this matter was Prime Trucking and Logistics (Pty) Ltd, a juristic person, of P. O. Box 268 Matsapha. The Respondent was represented by Ms. Lobenguni Manyatsi, a labour consultant from Maduduza Zwane Labour Law Consultants. For purposes of this arbitration hearing, and she shall be referred to as the Respondent's representative or simply Ms. Manyatsi.

1.4 Following the alleged unfair dismissal of the Applicant, he reported a dispute to the Commission. The dispute between the parties was, unfortunately, unresolved thus leading the Commission to issue a certificate of unresolved dispute on the 9th February 2009. Subsequently, the dispute was referred to the Industrial Court of Swaziland by the Respondent for final determination.

1.5 It ought to be stated from the outset that the Applicant noted an application for this matter to be referred to compulsory arbitration in terms of the discretion vested in the President of the Industrial Court of Swaziland under Section 8 (8) of the Industrial Relations Act,

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2000 (as amended). Subsequently, the President of the Industrial Court of Swaziland directed that the matter be referred to arbitration under the auspices of the Commission in terms of Section 85 (2) of the Industrial Relations Act, 2000 (as amended).

1.6 This arbitration hearing was preceded by a pre-arbitration conference whose main purpose was to:

- Enable parties to be familiar with the arbitration process.
- Remind parties to exercise their right to representation.
- Establish the need for an interpreter.
- Agree on the exchange of documents, including their nature.
- Establish if witnesses were to be called, including the number of witnesses.
- Confirm the participation of the parties in this arbitration hearing.
- Set date(s) on which the arbitration proceedings will be held, including the venue and time.

1.7 At the beginning of the pre-arbitration and arbitration proceedings respectively, the parties did not object to my appointment by the Commission to arbitrate in this dispute. The parties agreed that the arbitration hearing was properly constituted and agreed to abide by the ground rules, including switching off cellular telephones, addressing each other with respect and refraining from unnecessary personal attacks. Most importantly, the arbitration hearing went on smoothly.

2. BACKGROUND TO THE DISPUTE

2.1 The Applicant stated that the Respondent employed him as a Fork Lift Driver/Hyster Operator on or about the 6th July 2007. The Applicant also averred that his dismissal by the Respondent on the 15th August 2008 was both procedurally and substantively unfair and unlawful in all material respects. The Applicant further stated that at the time of his dismissal he earned a gross monthly salary of E2000.00.

2.2 On account of the fact that the Applicant averred that his dismissal by the Respondent was both procedurally and substantively unfair and unlawful, he then sought the following relief:

- Notice pay
- Leave pay
- Overtime
- Maximum compensation for unfair dismissal

2.3 The Respondent, on the other hand, contended that the dismissal of the Applicant was not only fair and lawful but was also both procedurally and substantively fair and in accordance with the employment laws of Swaziland and hence the Respondent prayed that the Arbitrator finds that the Applicant's application must be dismissed.

3. ISSUES TO BE DETERMINED

3.1 The issue with which I am faced in this arbitration hearing is to determine whether the allegation made by the Applicant that he was unfairly dismissed by the Respondent is supported by evidence or not. I also have to determine whether or not the Applicant is owed annual leave by the Respondent.

4. SUMMARY OF EVIDENCE AND ARGUMENT

4.1 THE APPLICANT'S CASE

4.1.1 The only witness that supported the Applicant's case was the Applicant himself. The Applicant stated that the Respondent employed him as a Fork Lift Driver/Hyster Operator on the 6th July 2007. The Applicant further averred that following the events that unfolded on the 18th May 2008, the Respondent suspended him from work with full pay on the 20th May 2008 (see ET 1). The Applicant stated that, in a letter dated the 16th July 2008, he was invited by the Respondent to a disciplinary hearing on the 25th July 2008, at the Respondent's workplace; at 8.30am see (ET 2).

4.1.2 The Applicant continued to testify that the Respondent preferred the following charges against him:

- Slept on duty on the 18th May 2008;
- Drunk during working hours on the 18th May 2008;
- Dereliction of duty on the 18th May 2008;
- Dishonest on the 18th May 2008.

4.1.3 It was the Applicant's account that the Respondent eventually found him guilty of the following transgressions:

- Sleeping on duty on the 18th May 2008;
- Dereliction of duty on the 18th May 2008;
- Dishonest the 18th May 2008. low employee;
- Drunk during working hours.

4.1.4 The Applicant's account of his evidence was that on all the three charges preferred against him above, the Respondent gave him three final

written warnings; with the exception that the Respondent summarily terminated his services of employment on having been drunk during working hours in a letter dated the 15th August 2008.

4.1.5 The Applicant stated that the Report of Dispute is premised on the fact that the dismissal of the Applicant was unfair and unlawful both procedurally and substantively because the Respondent, on a balance of probability, failed to adduce evidence to prove that the Applicant was drunk during working hours on the 18th May 2008.

4.1.6 In his testimony, the Applicant stated that he remembered that he was on night duty on the 18th May 2008. The Applicant also averred that he also recalled that on the 18th May 2008 he went to the Knitwear warehouse with the intention to work on the pulp that had to be loaded. The Applicant argued that he soon realized there were no trucks and therefore, no work to be done.

4.1.7 The Applicant further averred that he then proceeded to the scrap yard that is opposite the Knitwear warehouse and took cans of beer with the sole intention to consume them at home once it had been end of business for him.

4.1.8 The Applicant further stated that Mphilisi Dlamini(fellow employee) and another Chrisilda employee came and picked him up to the main warehouse. It was the Applicant's testimony that Mphilisi Dlamini dropped him at the gate and preferred to leave his beers that were in a plastic bag at the gate.

4.1.9 The Applicant stated that upon entering the

premises of the main warehouse, he participated in the loading and offloading of the three trucks that had already arrived.

4.1.10 While waiting for another set of trucks to arrive from Bhunya, the Applicant submitted that he retired to sleep next to the bales as the waiting room was no longer accessible to staff for use. While having a nap, which in his view was allowed, trucks arrived from Bhunya and his colleagues could not find him. The Applicant stated that at the end, a one Majomba awakened him and he soon started to work.

4.1.11 The Applicant stated that Mr. Bongie Tsabedze, his Supervisor, arrived at 5am, and was surprised as to why there was still a lot of work that needed to be done. The Applicant testified that he told Mr. Bongie Tsabedze that the hyster that he was using developed mechanical problems and in effect delayed and slowed him down. The Applicant averred that, in an attempt to alleviate the workload, he worked until 7.30am and proceeded to retire at his place of abode soon thereafter.

4.1.12 The Applicant averred that while at home on the 19th May 2008, Mr. Raymond Bothma, a

manager at the workplace, called him to ask if could come back to work and he told him that he was unable because he was tired. In addition, the Applicant stated that he told Mr. Raymond Bothma that he could only show up for work at 12noon. It was the averment of the Applicant that when he entered into service, he was given a letter of suspension in connection with the events of the 18th May 2009.

4.1.13 Making his submissions on behalf of the Applicant, Mr. Manana stated that the dispute hinges on the

Procedural and substantive unfairness of the dismissal of the Applicant and in particular the fact that the Applicant was drunk during working hours.

4.1.14 It was Mr. Manana's submission that the Applicant was not drunk during working hours as no evidence was adduced by the Respondent to that effect. Besides, the Applicant's representative revealed that the Respondent did not have a Code of conduct that spells out a disciplinary mould; especially one that clearly states that it is a dismissible offence to be drunk during working hours.

4.1.15 The Applicant's representative further stated that in accordance with common law and The Employment Act, 1980 (as amended); there is no provision that it is a dismissible offence for an employee to be found to have been drunk during working hours.

4.1.16 The Applicant's Representative submitted that the Chairperson of the disciplinary hearing that heard the Applicant's case failed to apply his mind to support his finding of guilty for the offence which he recommended that the Applicant be dismissed.

4.1.17 Mr. Manana observed that in his analysis of evidence in relation to finding the Applicant guilty of drinking during working hours, the Chairperson held that the evidence of the Respondent's witnesses, namely: Mphilisi Dlamini and Machawe Ndlela was suspect in that Mphilisi Dlamini was accused of having changed his story under cross examination while Machawe Ndlela was accused for having been a hostile witness.

4.1.18 The Applicant's representative averred that he wondered how then the Chairperson found the Applicant guilty of the offence of being drunk during

working hours when in fact he had reservations about the evidence of the two witnesses.

4.1.19 The Applicant's representative lamented the conspicuous absence of the chairperson of the disciplinary hearing from the from the arbitration because his presence would have helped this arbitration hearing in that he would stated the reasons for finding the Applicant guilty of having been drunk during working hours and cross examined.

4.1.20 It was further the submission of the Applicant that no medical evidence was adduced by the Respondent to prove and confirm that the Applicant was drunk during working hours. The Applicant's representative argued that the only evidence led was in respect of Mphilisi Dlamini who postulated that he saw the Applicant carrying a plastic bag with cans of beer and nothing was said about him partaking in the drinking of the alcoholic beverages.

4.1.21 Mr. Manana submitted that he was not struck by Mphilisi Dlamini as a credible witness not only because he contradicted himself during the arbitration hearing but also because he failed to answer questions put to him under cross examination.

4.1.22 The Applicant' representative argued that Machawe Ndlela testified that the Applicant disappeared for a long time and was eventually found by Almon Dube sleeping on a hyster. Machawe Ndlela further said that Almon Dube found a can of beer on the hyster yet he was not present when that occurred. Besides, the Applicant's representative argued that he never revealed whether or not the can was empty.

4.1.23 Mr. Manana submitted that the evidence of Machawe Ndlela was inadmissible, especially in the absence of corroborative evidence from Almon Dube, thus rendering the testimony of Machawe Ndlela hearsay.

4.1.24 The Applicant's representative argued that the Applicant noted an application for appeal but to no avail. Mr. Manana submitted that the Respondent failed to dispute the issue about an appeal hearing and as such the Applicant's version was unchallenged that the Applicant was dismissed on all counts without having been afforded an appeal hearing.

4.1.25 Although the Respondent has no provision for a disciplinary code, Mr. Manana revealed that in the letter of dismissal, the it was clear and loud that the Applicant could take the Respondent on appeal if the need arose. The Applicant noted and submitted that it was mandatory for the Respondent to hear the appeal of the Applicant.

4.1.26 With reference to John Grogan, Workplace Law, 9th edition, page 204, sub title 5.2.12, the

Applicant's representative quoted the following:

> "Provides that where an appeal is provided for in a disciplinary code, it must be afforded unless the employee waives his or her right of appeal."

4.1.27 Finally, the Applicant registered his relief sought as follows:

- Notice
- Additional notice
- Leave pay
- Maximum compensation for unfair dismissal
- Costs of arbitration

4.2 RESPONDENT'S CASE

4.2.1 The Respondent called Mphilisi Dlamini and Machawe Ndlela respectively in support of his case.

WITNESS 1: Mphilisi Dlamini

4.2.2 Testifying under oath, Mr. Dlamini stated that he used to work for the Respondent as a driver and knew the Applicant as a fellow employee. Mr. Dlamini continued to state that on the 18th May 2008 [19th May 2000], between lam and 2am, the Applicant approached him and asked if he could drive him to the Knitwear warehouse to load a Durban truck together with Chrisilda transport operators. Mr. Dlamini stated that he refused because there was no authorization that had been generated from the office of the clerk as it was the normal procedure.
4.2.3 Realizing that Mr. Dlamini was refusing to drive the Applicant to the Knitwear warehouse, the Applicant hitched a lift from the Chrisilda operators who were headed for the Knitwear warehouse.

4.2.4 Mr. Dlamini averred that he went to Bongie Tsabedze, the clerk, and told him that the Applicant had gone to work at the Knitwear warehouse and the Clerk was unaware of that development.

4.2.5 Consequently, Mr. Dlamini was then instructed by Bongie Tsabedze to go and pick up the Applicant. The reason for Mphilisi to be sent to pick the Applicant up was not only because the Applicant had no work to do at the Knitwear warehouse but was also because work had accumulated at the main warehouse to the extent that the only hyster could not cope up with the workload.

4.2.6 Mr. Dlamini testified that when he got to the Knitwear warehouse, he found the Applicant together with the Chrisilda operators in the scrap yard where there was a lot of liquor.

4.2.7 Mr. Dlamini stated that on his return to the main ware house, the Applicant was carrying his beer in a plastic bag. It was the testimony of Mr. Dlamini that the Applicant took some of the beers into the main warehouse.

Witness 2: Machawe Ndlela

4.2.8 Mr. Ndlela testified under oath that he worked the same shift as the Applicant on the 18th May 2008. Mr. Ndlela stated that on the 18th May 2008, he contended with a lot of workload because the Applicant briefly entered into service and disappeared for a long time. The clerk, Bongie Tsabedze asked about the Applicant's whereabouts, and he stated that he never allowed him to work at the Knitwear warehouse.

4.2.9 Mr. Dlamini felt that the Applicant was drunk on duty because an empty can of beer was found on the hyster he was using before he left for home. Mr. Ndlela also testified that he concluded that the Applicant was drunk during working hours because he was staggering at work. Mr. Ndlela also argued that he noticed that the Applicant was drunk during working hours because he looked very differently on his face.

4.2.10 Submitting on behalf of the Respondent, Ms. Manyatsi stated that the Applicant was the former

employee of the Respondent who had been employed in July 2007 and whose services of employment had been fairly terminated on August 2008, consequent to a properly conducted disciplinary hearing.

4.2.11 The Respondent's representative argued that the adduced evidence of the two witnesses showed that the Applicant was not sober at work because he had taken one too many on the 18th May 2008, that is, he was drunk during working hours.

4.2.12 The Respondent's representative argued that in light of the adduced evidence, it is now clear that the dismissal of the Applicant was both procedurally and substantively fair and lawful and hence the Applicant's application must be dismissed by the arbitrator.

5. ANALYSIS OF EVIDENCE

5.1 It must be mentioned that my intention in this arbitration hearing was not necessarily to take stock of the evidence that was adduced by the parties but instead, was to focus on what I consider to be main elements of the evidence that will conclusively inform this arbitration award.

5.2 Clearly, it is now common cause that the Applicant is the former employee of the Respondent who was suspended with full pay and called for a disciplinary hearing and subsequently dismissed by the Respondent for having been drunk during working hours.

5.3 However, the Applicant disputed the fact that his dismissal by the Respondent was fair, just and lawful in all material respects. The Applicant contended that his

dismissal was fraught with both procedural and substantive irregularities.

5.4 The Respondent, on the other hand, argued that in dismissing the Applicant, all the procedural and substantive protocol was adhered to.

5.5 Clearly, it is expected of the Respondent that he will show that in terminating the services of the Applicant, he complied with Section 42 (2) (a) (b) of The Employment Act, 1980 (as amended) which provides that:

"The services of an 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.

5.6 While an employer is not expected to handle disciplinary hearings according to the standards of a court of law, it is nonetheless expected that the following bare minimum procedures must be followed, and these include the following:

i) The employer should advice the employee in advance of the precise charge or charges that he or she is to meet at the hearing. This requirement is tied up with the need for adequate preparation.

ii) The employee should be advised in advance about the right to representation, and the representative of his

choice, not imposed by the employer or any other person.

iii) The chairman or presiding official should be impartial. That is to say he or she must weigh up the evidence presented before him or her and make an informed and thought out decision. There should be no grounds for suspecting that his or her decision was based on erroneous factors or considerations.

iv) The employee must be given ample opportunity to present his or her case in rebuttal of the charge or charges preferred against him or her and to challenge the assertions of his or her accusers.

v) The employee must be present to the hearing, and it is essential that everything possible be done to enable him or her to understand the proceedings, (i.e. interpreter).

vi) There should be a right of appeal, this should be explained to the employee.

vii) The hearing must be timeous. It must be convened as soon as it is practicable after the incident that led to the disciplinary action.

viii) The employee must be allowed to call and question witnesses. (See Grogan, 2005:193-198).

5.7 In the matter between Swaziland Federation of Trade Unions v The President of the Industrial Court of Swaziland and the Minister of Enterprise and Employment, Case N11/97, where the learned judges of Appeal quoted with approval the following passage from Baxter, p. 540, wherein Lord Wright stated the policy of the courts in 1942:

> "If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision".

5.8 The Applicant's representative stated that although the Respondent never afforded the Applicant an appeal hearing despite the fact that in the letter of dismissal dated 15th August 2008, the Respondent promised him that he could appeal to the managing director yet when he did so his letter of application was never responded to. It is my view that such was procedurally defective and worked against the principles of natural justice.

5.9 it is my finding that the Respondent failed in this arbitration hearing to adduce evidence to the effect that the Applicant was found drunk during working hours. What was proven though was the fact that the Applicant was that the Applicant was seen by Mphilisi Dlamini carrying cans of beer to the main ware house of the Respondent and left same in the security gate. It must be pointed out that carrying his beers in a plastic bag can never be synonymous with having been drunk during working hours.

4.2 It is common cause that the Respondent does not have in place a Code of Conduct at his workplace and apparently the Respondent does not have a disciplinary mould to state that, for instance, it is a dismissible offence to be found to have been drunk during working hours.

4.3 In his analysis of evidence, the chairperson of the disciplinary found that the testimonies of the Respondent's witnesses were found to be wanting in

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that in that Mphilisi Dlamini had changed his story under cross examination. Similarly, Machawe Mdluli's evidence was found by the Chairperson to have suspect and was dubbed as a hostile witness. I entirely agree with the Applicant when he wonders how the Chairperson can find against the Applicant when in fact he had misgivings and reservations about the evidence of the Respondent's witnesses. This is, in my view, a contradiction in terms.

4.4 I find that it is a top secret of the Respondent as how he arrived at the conclusion that the Applicant was drunk during working hours as there is no medical evidence at my disposal to that effect.

4.5 There is no evidence placed before me that medical tests were done to show that the Applicant ever drank alcohol that night and exceeded the limit permissible by the state. In the absence of this vital medical evidence, I find that it was far from enough for the Applicant to conclude that the Applicant was drunk during working hours by merely stating that he was staggering and physically drunk on his face. It is my belief that a rather more objective and scientific test should have been carried out by the Respondent.

5.14 The Applicant also testified that the Respondent substantively unfairly dismissed him. John Grogan (2005) workplace Law (8th edition) p. 157 states that the substantive fairness of a dismissal must meet the following criteria, whether or not the:

"I The employee flouted or contravened a rule or standard regulating conduct in, or of relevance to the workplace.

II The employee was aware, or could reasonably be expected to have been aware of the rule or standard.

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III The rule or standard has been consistently applied by the employer.

IV Dismissal was an appropriate sanction for the contravention of the rule or standard."

5.15 In making a determination on the reasonableness of the dismissal of the Applicant, I make reference to the decided case of British Leyland (UK) ltd v Swift quoted in le Roux and van Niekerk, ibid, p.119:

> "The correct test is: was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair".

5.16 I am completely convinced, in view of the evidence of the parties before me, that it is highly improbable that a reasonable employer would have dismissed the Applicant, particularly in the

absence of a disciplinary code of good practice. It was also not reasonable for the Applicant to dismiss the Applicant in the absence of medical evidence.

6. CONCLUSION

My conclusion in this matter is as follows:

6.1 It is not clear as to how the Applicant finally dismissed when the Respondent himself was doubtful of his two witnesses evidence.

6.2 The Respondent failed to back up his case with medical evidence that the Applicant was drunk during working hour.

6.3 It must be stated that in accordance with the Report of

Dispute and the Certificate of Unresolved Dispute, the Applicant also prayed for Reinstatement, overtime and leave. However during the arbitration hearing, the Applicant decided to abandon it.

6.4 In respect of overtime, the Applicant did not adduce evidence to that effect and as such there is no evidence before me to suggest that the Applicant ever worked overtime for which the Respondent did not pay him. The same thing applies to leave pay; neither was evidence adduced during the arbitration proceedings nor was it addressed in the closing arguments of the Respondent. The Applicant proceeded to pray that he be granted additional notice pay. I am afraid to mention that his service record does not statutorily entitle him to enjoy that benefit and hence he shall not be granted it.

6.5 On a balance of probability, I find that the dismissal of the Applicant was procedurally and substantively unfair and unjust.

7. AWARD

7.1 My award in this matter has taken into account the special circumstances of the Applicant, length of service, track record and the extent to which he contributed to his fate. It is also informed by Section 16 (6) of the Industrial Relations Act, 2000 (as amended).
7.2 The Respondent is ordered to pay the Applicant as follows:

7.3 One month's notice pay = E2000.00

7.4 Compensation for unfair dismissal (7 months)
= E14.000.00

7.5 The Respondent is ordered to pay the Applicant a total sum of E16.000 on /or before the 28th May 2010.

DATED AT MANZINI ON THIS 6TH DAY OF MAY 2010-

KHANYAKWEZWE KHUMALO

ARBITRATOR