

breakdown at Madlangempisi. The Applicant testified that one of the company trucks had a breakdown at Madlangempisi and the Applicant was instructed to go there to fix it as a matter of urgency.

4.1.4 Mr Novela (Applicant) testified that he left for Madlangempisi at around 1:00pm (lunch time). He said that at or near Mafutseni, on his way to Madlangempisi, he was stopped by the police from Mafutseni police station. The Applicant alleged that the police told him that they were waiting for him, because someone had alerted them that he

-3-

was drunk. He said that he tried to negotiate with the police to let him go, but they refused, and subsequently he was taken to Mafutseni police station where he was kept in the police custody on suspicion that he was drunk. The Applicant stated that Mr Fred Nhlabatsi came to Mafutseni police station to collect the company car he was driving on the same day.

4.1.5 The Applicant stated that the police charged him with driving while he was under the influence of liquor. He said that on the following day, the police took him to Manzini Magistrate's Court for prosecution. It was the Applicant's evidence that the police advised him to plead guilty to this offence because he would be given a fine of E2000-00, and that if he could pay the said fine, he would be released. The Applicant alleged that as a result he pleaded guilty to the charge in question and he was found guilty as charged, and he was sentenced to pay a fine of E2000-0 or failing which to serve 2years imprisonment. He said that he was able to pay the fine and thus he was released. However, the Applicant denied that he was drunk, he said that he pleaded guilty because he wanted to be released.

4.1.6 It was the Applicant's testimony that after his release from custody, he reported for duty. He said that the Respondent charged him inter alia, with the misconduct of driving the company motor vehicle while he was under the influence of alcohol or liquor. He was suspended from work and subsequently he was summoned to a disciplinary hearing.

-4-

The Applicant alleged that Michael Dlamini (alias mical), who represented him during the disciplinary hearing, was never chosen by him to be his representative. The Applicant alleged that this representative was given to him by Fred Nhlabatsi (Supervisor). Mr Novela further alleged that the disciplinary hearing was conducted in English language, and as a result he was prejudiced because he does not understand English.

4.1.7 Mr Novela also stated that he did not plead guilty to the charge of driving while under the influence of liquor. However, he alleged that he only admitted the fact that the police detained him on suspicion that he was drunk. The Applicant further alleged that during the disciplinary hearing the Respondent failed to prove that he committed the misconduct in question, because neither a witness testified that he was indeed drunk nor a police report was submitted to prove the commission hereof. Therefore, the Applicant alleged that his dismissal was unfair. In conclusion, the Applicant prayed that an award be granted in his favour, directing the Respondent to pay him all the terminal benefits set out in paragraph 6.3 of his report of dispute.

CROSS EXAMINATION

4.1.8 During cross examination, the Respondent's representative asked some few questions. I have only recorded the questions and answers which I deem relevant herein.

-5-

4.1.9 Under cross examination, the Applicant admitted that he drinks alcohol (he is a drinker). With regard to representation, the Applicant insisted that Michael Dlamini was imposed on him by Fred Nhlabatsi; he never elected him to represent him. He said that Mr Nhlabatsi told him that Michael was a suitable representative because he is a senior employee, and he has previously represented quite a number of fellow employees at the workplace.

4.1.10 Regarding the language, the Applicant testified during cross examination that both SiSwati and English languages were used during the disciplinary hearing. On the other hand, the Applicant was asked whether or not he was in a good working relationship with his supervisor, Fred Nhlabatsi. His response was that he is in good terms with his supervisor.

4.2 RESPONDENT'S CASE

FRED NHLABATSI'S TESTIMONY

4.2.1 The Respondent called Fred Nhlabatsi as its first witness herein. I will refer to this witness as Mr Nhlabatsi or RW1 as the case may be.

4.2.2 Mr Nhlabatsi testified under oath that he is currently employed by the Respondent as a Distribution Controller. He stated that on the 25th May, 2009 he instructed the Applicant (Azaria Novela) to attend the company truck which had a breakdown at or near

-6-

Madlangempisi. Mr Nhlabatsi testified that the Applicant left for Madlangempisi before 1:00pm. It was Mr Nhlabatsi's evidence that at around 4:00pm he got a message from the Receptionist that a certain Mr Mabuza, a police officer from Mafutseni called; he left his number and he requested Mr Nhlabatsi to call him.

4.2.3 Mr Nhlabatsi stated that he called this police officer, and he (police officer) informed him that the Applicant was arrested for drink-driving. It was Nhlabatsi's evidence that he rushed to Mafutseni police station to collect the motor vehicle the Applicant was driving. RW1 (Fred Nhlabatsi) said that the Applicant's detention caused a great inconvenience because he was forced to secure an independent mechanic to attend to the breakdown at Madlangempisi.

4.2.4 RW1 testified that the Applicant was sober when he left the company premises for Madlangempisi on the day in question. It was RW1's evidence that the Applicant was brought to court on the following day, whereupon he pleaded guilty to the charge of drink-driving, and he was found guilty as charged. He was released after having paid a fine of E2000-00.

4.2.5 RW1 said that the Applicant upon his return to work, was subsequently charged with driving the company motor vehicle during the working hours while he was under the influence of liquor. With regard to representation, it was RW1's testimony that he only advised the Applicant that the

-7-

offences or charges he was facing were serious. He then advised him to get a competent representative and thus he recommended Michael Dlamini (fellow-employee) to be his representative during the disciplinary proceedings. RW1 denied the allegation that he forced the Applicant to choose Michael Dlamini as his representative; but he only recommended him because of his experience and expertise in labour matters, and he has previously represented a number of fellow employees at the workplace.

4.2.6 Regarding the language used during the hearing, RW1 testified that Siswati was used during the disciplinary hearing. RW1 also testified that the disciplinary hearing was at all times conducted in the presence of the Applicant's representative. On the other hand, RW1 stated that there was a good working relationship between him and the Applicant.

CROSS EXAMINATION

4.2.7 During cross examination RW1 was asked whether a hearing was conducted before the Applicant was suspended from work, in order to determine whether there was a case against the Applicant which warranted a disciplinary action. RW1's answer was in the negative; no such hearing was conducted.

4.2.8 RW1 was also asked about the Applicant's state of sobriety when he reported for duty on the day in question. He was asked

-8-

whether or not he was sober. RW1 testified that the Applicant was sober when he left for Madlangempisi to attend to the truck. RW1 was further asked if any evidence was led by the Respondent to prove that the Applicant had committed count one (driving while under the influence of alcohol). In response, RW1 stated that he was informed by the police that the Applicant was drunk. However, he admitted that he did not notice whether Applicant was drunk at the time he arrived at the police station to collect the company car. RW1 also stated that if he was not drunk, the police could not have arrested and detained him for drink-driving.

4.2.9 It was put to RW1 that the Respondent failed to present evidence during the disciplinary hearing to prove that indeed the Applicant was drunk, more so because no police report was submitted to that effect. In response, RW1 denied this; he said that if the Applicant was not drunk, the police could not have arrested him nor could have been prosecuted for the offence in question. He said that the Applicant could not have paid the fine of E2000-00. RW1 further testified, on the other hand, that the Applicant also pleaded guilty to the offence in question.

4.2.10 RW1 denied the allegation that Michael Dlamini was imposed by him to be the Applicant's representative. He mentioned that he only recommended to the Applicant Michael Dlamini as a suitable representative.

-9-

JEROME MATHE'S TESTIMONY

4.2.11 Jerome Mathe was the second witness called by the Respondent. He is also the last witness on the Respondent's side. I will refer to this witness as Mr Mathe or RW2 as the case may be. Mr Mathe also gave his testimony under oath. It was Mr Mathe's evidence that he was the Chairman of the disciplinary hearing herein.

4.2.12 RW2 (Jerome Mathe) testified that at the commencement of the disciplinary proceedings, he asked the pre-enquiry questions to ensure that all the procedural requirements are met. In particular he testified that he asked the Applicant if he had sufficient time to prepare for the hearing; he also asked if he had representation and the language to be used was agreed upon; and he said that SiSwati language was used during the hearing. RW2 stated that the Applicant did not raise an objection about representation. He said that the Applicant was represented by Mr Michael Dlamini (alias micah). It was the second witness' evidence that he asked the Applicant if he understood the charges he was facing, and the Applicant answered in the affirmative.

4.2.13 He alleged that the Applicant was charged with two (2) counts of misconduct namely; on count one, he was charged with driving the company vehicle registered SD 430 EN, while he was under the influence of intoxicating liquor or drugs, on the 25th May, 2009, where he was on his way to attend a breakdown at Madlangempisi. On count two,

-10-

the Applicant was charged with misappropriation of company vehicle, SD 430 EN in that on the 25th May, 2009, while driving the said motor vehicle he was caught by the police drunk at 1545hours on his way to Madlangempisi, yet he was expected to take 30 minutes' drive from Matsapha to Madlangempisi. RW2 alleged that after having read the aforesaid charges to the Applicant, the Applicant told him that he understood them and he was then asked to plead thereto.

4.2.14 RW2 alleged further that the Applicant pleaded guilty to count one; and not guilty to count two. RW2 testified that during the disciplinary hearing, the Applicant stated that he drank till late on the previous day, and he could feel the effects of the previous drinking on this day, because when he drank water he felt like he was drunk.

4.2.15 RW2 testified that at no stage did the disciplinary proceedings proceed in the absence of the Applicant's representative. It was RW2's evidence that the Applicant was consequently found guilty on count one (1) and not guilty on count two (2) because this charge was later abandoned by the Respondent.

CROSS EXAMINATION

4.2.16 It was put to this witness by the Applicant's representative that the disciplinary hearing was procedurally unfair because English Language was used yet the Applicant does not understand it. In response, RW3

-11-

disputed this; he maintained that the disciplinary hearing was procedurally fair because Siswati Language was used during the hearing. RW3 said that though the minutes were written in English, but the minutes were read and translated to the Applicant in Siswati before all the participants signed them.

4.2.17 It was further put to RW3 that his decision to terminate the Applicant's services was based on hearsay evidence, because no evidence was led by the Respondent during the disciplinary hearing to prove that the Applicant committed the offence in question (count one). RW3 denied this; he reiterated that the Applicant pleaded guilty to count one. He also said that the fact that the Applicant was arrested and detained by the police for drink-driving convinced him that indeed the Applicant was guilty of the charge in question.

4.2.18 The Applicant's representative also put it to RW2 that the Applicant did not plead guilty to count one. RW3 reiterated that the Applicant pleaded guilty to this charge.

5. ANALYSIS OF EVIDENCE AND SUBMISSION

5.1 In casu, both parties filed closing submissions in support of their respective cases.

5.2 Briefly, the Applicant's case as encapsulated in his closing submissions, is that the Applicant's dismissal was both procedurally and substantively unfair. It is submitted on behalf of the Applicant that his dismissal was procedurally unfair because

-12-

the disciplinary proceedings were conducted in English, a language which the Applicant does not understand. It is argued herein that there was no independent Interpreter. It is further argued by the Applicant that the representative, who represented him during the disciplinary hearing was never chosen by him; it is alleged that he was recommended by Mr Fred Nhlabatsi, hence his right to choose a representative of his choice was infringed.

5.3 It is further alleged by the Applicant that the Respondent failed to prove that the Applicant committed the misconduct in question in that during the hearing, no evidence was adduced by the Respondent. It is the Applicant's submission that the Chairperson of the disciplinary enquiry relied on hearsay evidence. It is argued herein that hearsay evidence is not admissible in terms of the law. It is argued that the fact that the Applicant paid a fine at the magistrate's court could not be used against him as proof that he was drunk.

5.4 On the contrary, it is submitted on behalf of the Respondent that the Applicant's dismissal was fair and reasonable in view of the circumstances of the case.

5.5 It is the Respondent's submission that the Respondent was able to prove on a balance of probabilities that the Applicant was under the influence of alcohol on the date of his arrest by the police and that he pleaded guilty to the criminal charge of drink-driving at the magistrate's court as appears in Annexure "A14".

-13-

5.6 With regard to the allegation that the disciplinary hearing was conducted in English, the Respondent disputes that. It is the Respondent's submission that same was conducted in Siswati. On the other hand, the Respondent denies that the Applicant does not understand English.

5.7 The Respondent also refutes the Applicant's assertion that the person who represented him during the disciplinary hearing was never chosen by him. It is the Respondent's submission that during the said hearing the Applicant never raised an objection to the effect that he was not happy about his representative (because he was not chosen by him).

5.8 From my analysis of the oral evidence presented before me, together with the supporting documents (Annexures) filed herein; I have found that the following facts are not in dispute, and as such they are accepted.

5.8.1 It is not in dispute that on the 25th May, 2009, the Applicant was arrested and detained by the police on suspicion that he was under the influence of alcohol, yet he was driving a motor vehicle. Subsequently, he was charged with drink-driving. Infact according to the police report (Annexure "A12") filed by the Respondent, he was charged with driving a motor vehicle, SD 430 EN, while he was under the influence of liquor, thus contravening Section 91 (1) of the Traffic Act No: 6 of 2007.

5.8.2 It is common cause that on the 26th May, 2009, the police brought him to the

-14-

magistrate's court in Manzini for trial. During the hearing of his case, the Applicant pleaded guilty to the charge and consequently he was found guilty as per his plea. He was convicted and sentenced to pay a fine of E2000-00 or failing which to serve 2 years imprisonment (See Annexure "14", being an extract of the court record filed herein).

5.8.3 After his release the Applicant returned to work, whereupon he was subsequently suspended, charged with two (2) acts of misconduct. On count one (1) he was charged with driving the company motor vehicle, registered SD 430 EN, on the 25th May, 2009 while he was under the influence of intoxicating liquor or drugs. Under count two (2), the Applicant was charged with misappropriation of the said company vehicle in that on the same day, he was suspected of having diverted or used the motor vehicle in pursuit of his own errands (The underlined is my emphasis). It is common cause that the Applicant was found guilty as charged on count one, and not guilty on count two.

5.9 The rest of the relevant issues which fall for determination are contested. The Applicant during his evidence-in-chief, denied that he pleaded guilty to charge /count one (1). However, on the other hand, the Respondent maintains that the Applicant pleaded guilty to count one (1) and not guilty to count two (2). Consequently, he was found guilty as charged on count one (1), and not guilty on count two (2) and as a result he was summarily dismissed. As I

-15-

have already mentioned in the foregoing paragraphs, the Applicant submits that the Respondent failed to adduce evidence to prove that he committed count one (1). It is alleged that the Respondent relied on what the police told Mr Fred Nhlabatsi, that he was drunk. The Applicant argues that this is hearsay evidence, and therefore it is not admissible. I will deal with this issue or allegation later on in my conclusion.

5.10 Another contested issue, is the Applicant's right to representation during the disciplinary proceedings. The Applicant alleges that he never chose Mr Michael (alias Micah) Dlamini to be his representative. I entirely reject the Applicant's contention that Michael (alias Micah) Dlamini was chosen by Fred Nhlabatsi. There is clear evidence that Mr Nhlabatsi only suggested to the Applicant that he could engage Mr Michael Dlamini as his representative, due to Mr Dlamini's experience, since the offence or misconduct he was charged with is serious as it was a dismissible offence/ misconduct. Nothing was shown by the Applicant to the contrary and or that he did not want to be represented by Michael Dlamini, and that as a result his right to representation was in the process violated. In a nutshell, the Applicant failed to show that there was a procedural defect which emanated from such

representation. In this regard, the Applicant's contention is rejected.

5.11 With regard to the allegation that English language was used during the disciplinary hearing, in my view this allegation does not hold water; it is baseless and further from the truth. The Applicant admitted during cross examination that both English and Siswati were used. The Respondent's contention, as per RW2's evidence

-16-

is that the disciplinary proceedings were conducted in Siswati and that the minutes were translated to the Applicant in Siswati. I am inclined to believe the Respondent's version herein.

6. CONCLUSION

6.1 The main issue which falls for determination herein is whether or not the Applicant's dismissal was fair and reasonable as per the dictates of Section 42 (2) read together with Section 36 of the Employment Act 1980 (As amended).

6.2 In terms of Section 42 of the Employment Act 1980 (as amended), the Respondent bears the burden or onus to prove that the Applicant's dismissal was fair and reasonable, regard being had to all the circumstances of this case. On the other hand, the Applicant is required to prove that at the time of his dismissal he was an employee to whom Section 35 of the Employment Act 1980 (as amended) applied.

6.3 In the present case, it is common cause that the Applicant was an employee to whom section 35 of the Employment Act 1980 (as amended) applied. Section 42 stipulates that. "The services of an employee shall not be considered to have been fairly terminated unless the employer proves:-

- (a) That the reason for 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".

-17-

6.4 The Respondent, in its endeavour to discharge the onus of proof placed on it by the aforesaid section 42 of the Employment Act, led the evidence of two witnesses namely; Fred Nhlabatsi (RW1) and Jerome Mathe (RW2). Both RW1 and RW2 testified that during the disciplinary hearing the Applicant pleaded guilty to count one. In other words he admitted that he drove the company car while he was under the influence of alcohol during working hours.

6.5 It appears from the minutes of the disciplinary hearing that the Applicant pleaded guilty to count one. Since the Applicant pleaded guilty, there was no need for the Respondent to lead further evidence. Therefore, the Applicant's denial that he did not plead guilty is bare; and this is an after thought.

6.6 Besides the fact that the Applicant pleaded guilty, the surrounding circumstances of the case clearly show that the Applicant was drunk on the day in question, and as a result the police arrested and detained him. He was taken to court where he pleaded guilty to the charge of drink-driving. Therefore, the Applicant can not now claim that he is innocent. If the Applicant was innocent he should have pleaded not guilty to the charge in question before the magistrate's court.

6.7 It is my conclusion that the Respondent was able to discharge the onus placed on it by section 42 of the Employment Act 1980 (As amended). The Respondent has established that the reason for the Applicant's termination was permitted by section 36 (L) of the Employment Act 1980. It cannot be overemphasized that

-18-

driving a motor vehicle while one is drunk or under the influence of alcohol or liquor and or any other intoxicating substance or drugs is a very serious offence.

6.8 The Respondent has also shown that, taking into account all the circumstances of the case, it was reasonable to dismiss the Applicant. It is the Respondent's case that the Applicant breached a workplace rule or code of misconduct which prohibits the consumption of alcohol, drugs or intoxicating liquor. Section F of the Respondent's disciplinary code and procedures (code of misconduct) deals with alcohol/drugs. In terms of this rule, a recommended sanction for count one (driving while under the influence of liquor or alcohol), for a driver if found guilty is a dismissal (even if he is the first offender).

6.9 The Applicant was aware of this rule, but notwithstanding that, he drank alcohol during working hours and got behind the steering wheel, knowing very well that this was a dismissible offence. This often times lead to road accidents and loss of lives of other road users and even innocent pedestrians (children alike). The company car, if it were to be involved in an accident due to Applicant's state of sobriety would be damaged. There would be far-reaching consequences as a result of the Applicant's misconduct. In light of the foregoing, it was reasonable in the circumstances of the case to terminate the Applicant's services. Overall, it is my conclusion that the Applicant's dismissal was both procedurally and substantively fair.

-19-

7. AWARD

Pursuant to my foregoing findings or conclusion herein, it is my decision that the Applicant's application should be dismissed in its entirety. Therefore, the Applicant is not entitled to any relief sought herein.

DATED AT MANZINI ON THIS 7TH DAY MAY, 2010

ROBERT S. MHLANGA

CMAC COMMISSIONER

-20-