



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

HELD AT SITEKI

REF: SIM 018/10

In the matter between:-

SUSAN MAGONGO

APPLICANT

And

MANANGA COUNTRY CLUB

RESPONDENT

CORAM:

ARBITRATOR

: MTHUNZI SHABANGU

FOR APPLICANT

: IN PERSON

FOR RESPONDENT

: Ms HILLARY MASFEN

NATURE OF DISPUTE

: UNFAIR DISMISSAL

DATE OF HEARING

: 7TH JULY, 2010

ARBITRATION AWARD

1. DETAILS OF HEARING AND REPRESENTATION

- 1.1 The arbitration was held at CMAC offices, Simunye on the 7th July, 2010. The proceedings were captured on electronic and manual records.
- 1.2 The Applicant is Susan Magongo, an adult female Swazi of Nkambeni area, Hhohho Region.
- 1.3 The Respondent is Mananga Country Club, a body corporate conducting its business at Mananga, Hhohho region. Its postal address is P. O. Box 1, Tjaneni.
- 1.4 During the Arbitration process, the Applicant appeared personally representing herself and yet the Respondent was represented by its manageress–Ms Hillary Masfen.

2. ISSUE TO BE DECIDED

- 2.1 The issue to be decided pertains whether or not the Applicant's services with the Respondent were fairly terminated on the 2nd February, 2010.
- 2.2 Applicant claims that she was unfairly dismissed insofar as there was no disciplinary enquiry held before her dismissal, i.e. procedural unfairness.
- 2.3 She is claiming compensation for unfair dismissal.

3. BACKGROUND TO THE ISSUE

3.1 The Applicant was employed by the respondent on the 1st October, 2009 as a cook, earning E1 681-95 per month. She was based at Mananga Country Club, at Mananga. She was dismissed on the 2nd February, 2010 through a written letter drafted by the Respondent's manageress, after having worked for the Respondent for a period of four months.

3.2 The Respondent, Mananga Country Club, is the ex-employer of the Applicant. The Respondent is involved in the business of accommodation, catering and fast foods trades. It is under the ownership of Inyoni Yami Swaziland Irrigation Scheme(IYSIS). The Respondent confirms the employment relationship between the parties, but denies that the Applicant was unfairly dismissed. It alleges that there was no need to hold a disciplinary hearing as the applicant had unlawfully absented herself from duty for four consecutive days.

4. SURVEY OF EVIDENCE AND ARGUMENTS

The Applicant's Version;

- 4.1 Under oath, the Applicant testified that she is aged 41 years. She is a single parent for one child(22). She is a professional or qualified cook as she possesses a certificate in Hotel and Catering obtained from the Swaziland College of Technology (SCOT).
- 4.2 The Applicant gave evidence as to how she did not report for duty for a period of four consecutive days, beginning from the 28th January, 2010 up to and including the 31st January, 2010.
- 4.3 She says on waking up on the 28th January, 2010 she observed that her left eye was swollen. She called on her immediate neighbour and co-worker, one Nompumelelo Dlamini, to inspect the eye with a view of ascertaining the cause of the infection. Nompumelelo could not be successful in getting to the cause of the bulging of the eye. The latter subsequently left the Applicant and reported for work.
- 4.4 The Applicant decided to report at Hospital for treatment. She went to Matsenjeni Health Center where she was examined, treated and given some three (3) days off duty. She produced a sick sheet to that effect annexed on the Report of Dispute

Form bearing the hospital's official stamp and signed by a doctor.

- 4.5 According to the sick sheet, the three days off duty was with effect from the 28th January, 2010; which means the Applicant had to report for work on the 31st January, 2010. The Applicant argued that inasmuch as she did not report for work Sunday the 31st January, 2010, she was going to apply for that day to be incorporated into her official leave days.
- 4.6 The Applicant testified that on Mondays she is usually off-duty and that before she could get to work on Tuesday the 2nd February, 2010 she met her co-worker, Nompumelelo Dlamini, who gave her a letter from her employer. This happened to be the very letter that set these unfair dismissal proceedings in motion.
- 4.7 The Applicant is aggrieved with the manner her services were terminated insofar as she was not afforded an opportunity to explain her absence from work and is thus crying procedural unfairness of the dismissal.
- 4.8 She testified that Ms Hillary, the Respondent's Manageress, got know that the Applicant was in

fact in possession of some sick sheet on the 17th February, 2010 when she even made copies thereof.

The Respondent's Version;

4.9 Ms Hillary Masfen who gave evidence for and on behalf of the Respondent as its Manageress, confirmed the employment contract between the parties. She further confirmed the Applicant's job designation, her monthly wage as well as the fact of her dismissal. She confirmed being the author of the dismissal letter dated 2nd February, 2010.

4.10 Ms Masfen confirmed that the Applicant was dismissed for an unreported absence from work for four consecutive days spanning from the 28th to the 31st January, 2010.

4.11 She sought to justify the failure to subject the Applicant to disciplinary proceedings in lieu of the dismissal by arguing that she was under the impression that an employer is absolved from the need to hold a disciplinary enquiry in respect of an employee who absents herself without explanation for three consecutive days. Ms Masfen argued that there is, in fact, a legal

gazette to this effect and undertook to furnish me with same in due course, but failed to bring it.

5. ANALYSIS OF THE EVIDENCE AND ARGUMENTS

- 5.1 When dismissed the Applicant had completed her three months probationary period. She was thus an employee to whom section 35 of the Employment Act, 1980 applied which demands that she could only be dismissed for one of the fair reasons of termination of employment tabulated in Section 36 of the Employment Act.
- 5.2 Consequently in terms of Section 42 (2) of the Employment Act, the duty or onus of proving that the Applicant's services were fairly terminated was upon the employer. It is now left to be seen if the employer has been able to discharge this onus on a balance of probabilities, i.e. by tendering evidence that is more probable or believable than that of the applicant.
- 5.3 Section 36 (f) of the Employment Act provides that it shall be fair for an employer to terminate the services of an employee:

“(f) because the employee has absented himself from work for more than a total of

three working 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.” (My emphasis)

5.4 In this case, it is common cause that the Applicant had not obtained any prior permission from the Respondent for the absence. Therefore this absence falls within the second category, which requires that the Applicant had to provide a medical certificate to justify her absence. The Applicant was, however, deprived of the right to defend or explain her absence in that she was dismissed without having been afforded an opportunity to be heard. This fact is also common cause.

5.5 Denying the Applicant an opportunity to be heard in a disciplinary hearing offended against the principle of natural justice of *audi alteram partem* – which literally means hear the other side. This is a well established principle in our law and has been followed consistently by the Industrial Court.

5.6 For instance, in the decided case of **Mphikeleli Sifani Shongwe vs The Principal Secretary, Ministry of Education and 3 Others** –

Industrial Court Case No: 207/2006
(unreported) the Industrial Court held as follows:

“It is now a well-established principle of labour relations that an employee who faces dismissal for alleged misconduct should be given the opportunity to state his case and to answer the charges against him. The requirement of a fair disciplinary hearing is so fundamental in the context of labour relations that it will be enforced by the Industrial Court as a matter of policy, even where the case against the employee appears to be unanswerable”. (at page 8 thereof, paragraph 27)

5.7 In **Phillip Tsabedze vs. Swaziland Breweries Limited t/a Swaziland Beverages, Industrial Court Case No: 99/2003** (unreported), where an employee had been absent from work from mid June, 2002 till he was served with a letter of dismissal on the 9th October, 2002 (about four months absence) the court held that :

“It was clearly unprocedural for the Respondent to simply serve the Applicant with a letter of dismissal accusing him of desertion without first laying a charge

against the Applicant whose whereabouts were known to the Respondent. Even in situations where management is convinced of the guilt of the employee, it is still obliged to ensure that a fair disciplinary process is observed.

5.8 In the case of **Alpheous Thobela Dlamini vs Dalcrue Agricultural Holdings (PTY) Ltd, Industrial Court Case No: 123/2005** the Court observed that:

“An employee who is dismissed without a fair disciplinary process is likely to feel aggrieved, no matter how fair and reasonable the grounds may be for his dismissal. His fellow employees may perceive the dismissal as arbitrary. Such dismissals reinforce the perception of the subordination of labour to the whims of management. They create discontent and disharmony at the workplace, and spawn unnecessary labour disputes and litigation.”

5.9 It is therefore clear that violation of the rules of natural justice makes the decisions void for being outside the jurisdiction of the decision making authority. ***“An Administration act must be***

subject to the requirements of natural justice because it affects rights or interests and therefore involves a duty to act judiciously. Refer to **Futhi P. Dlamini vs Teaching Service Commission and 3 others, Case No: 34/2002 (IC)** (unreported) (at page 6 thereof).

See also: **Swaziland United Bakeries vs Armstrong Dlamini, Appeal case No: 117/94; Nkosinathi Ndzimandze and Another vs Ubombo Sugar Limited, Case No: 476/2005 (IC).**

5.10 In the foregoing regard, a finding is hereby made to the effect that the Applicant's dismissal was procedurally unfair.

5.11 The Applicant is not seeking re-instatement. Section 16 (4) Of the Industrial Relations act, 2000 (as amended) provides that:

"If a dismissal is unfair only because the employer did not follow a fair procedure, compensation payable may be varied as the Court deems just and equitable..." (My emphasis).

5.12 The Applicant is a qualified cook; she is only 41 years of age and has a 22 year old child. When dismissed she was in possession of a medical certificate to justify her absence from work for the first three days, with the exception of the fourth day. She perhaps could have been found guilty for the fourth day if a disciplinary hearing had been held, but that conviction could not have culminated to a dismissal in terms of section 36 (f) of the Employment Act, 1980. She had not committed any act of misconduct to warrant the unprecedented termination of her employment contract. Her employment record has now been tainted with the stigma of this dismissal.

5.13 In the circumstances, I consider that eight months' salary amounting to E13 455-60 would constitute a fair and equitable compensation for this unfair dismissal.

6. AWARD

- 6.1 In the premises, I make the following order:
- 6.2 The applicant's services were unfairly terminated by the Respondent, for want of a pre-dismissal disciplinary hearing.

6.3 The Respondent is ordered to pay the Applicant the following monies:-

a) Notice pay =	E1 681.95
b) Outstanding leave pay (As per agreement during pre-arbitration)=	E 795-00
c) 8 Months compensation for unfair dismissal=	<u>E13 455-</u>
<u>60</u>	
TOTAL	= E15 932-65

6.4 The above sum of E15 932-65 should be paid at CMAC- Simunye office on or before the 30th September, 2010.

6.5 I make no order as to costs.

DATED AT SIMUNYE THIS.....DAY OF AUGUST, 2010.

MTHUNZI SHABANGU
COMMISSIONER -CMAC