



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

HELD AT SITEKI

STK 038/10

In the matter between:-

ALFRED DLAMINI

APPLICANT

And

SHOPRITE CHECKERS (PTY) LTD RESPONDENT

CORAM:

Arbitrator : Mthunzi Shabangu

For Applicant : John Mbongeni Dlamini

For Respondent : Pamela Dlamini

Nature of Dispute : UNFAIR DISMISSAL

Date of Hearing : 13th July, 2010 & 9th August,
2010

ARBITRATION AWARD (*EX PARTE*)

1. DETAILS OF HEARING AND REPRESENTATION:

- 1.1 The arbitration was held on the 13th July and 9th August, 2010 at CMAC offices, Siteki. The proceedings were captured both on electronic and manual records.
- 1.2 The Applicant is Alfred Dlamini, an adult male Swazi of Mahlangatja area, Shiselweni District, whose postal address is P.O. Box 1158, Manzini.
- 1.3 The Respondent is Shoprite Checkers (PTY) LTD, a company with limited liability duly registered according to the company laws of Swaziland, whose postal address is P.O. Box 500, Siteki.
- 1.4 During the arbitration process, the Applicant was represented by Mr John Mbongeni Dlamini whilst Ms Pamela Dlamini partially appeared for and on behalf of the Respondent, though she unceremoniously disappeared after the closure of the Applicant's case without any replacement. Her capacity in the Respondent's employ is that of Regional administrator/Personnel Officer.

2 ISSUE TO BE DECIDED

- 2.1 The issue to be decided pertains the fairness, or lack thereof, of the Applicant's dismissal from the

Respondent's employ on the 21st October, 2009.

2.2 The Applicant alleges that his dismissal was not fair both in terms of substance and procedure. He is therefore claiming re-instatement coupled with payment of the arrear wages or, alternatively, compensation for unfair dismissal coupled with the statutory ancillary reliefs.

3 BACKGROUND TO THE ISSUE

3.1 The Applicant had been under the Respondent's employ from the 27th February, 2001 as a Supervisor. He was dismissed on the 21st October, 2009 after having served the Respondent for a period of almost nine (9) years. At the time of his dismissal, he was based at Shoprite Checkers-Siteki branch and was earning a gross monthly wage amounting to E2 566-24.

3.2 His dismissal was preceded by a disciplinary hearing that was held at Shoprite-Siteki on the 8th October, 2009 the outcome whereof was issued on the 20th October, 2009. An appeal was noted on the 23rd October, 2009 though it was not prosecuted by the Respondent.

3.3 The Respondent operates shopping supermarkets within Swaziland, with one based at Siteki amongst other towns. The employment relationship between the parties together with its material terms were confirmed by the Respondent. The fact of dismissal was also confirmed. What is disputed by the Respondent is the alleged unfairness of the dismissal which is believed to be fair both in terms of substance and procedure.

3.4 The Respondent, however, denounced its legal right to defend its cause and prove the fairness of the dismissal in the middle of the arbitration, which consequently proceeded *ex parte* and /or without opposition.

4 SUMMARY OF THE EVIDENCE AND ARGUMENTS

The Applicant's Version;

4.1 The Applicant, who testified as AW1, gave evidence to the fact that whilst stationed at the Siteki branch of Shoprite Checkers Supermarkets, he was transferred from being Perishable Controller to being Front-end Controller by the branch manager, Michael Shabangu,

on the 26th June, 2007.

- 4.2 Before resumption of his duties as a Front-end Controller, the Applicant was introduced by the branch manager to one Gabsile Malaza who had been holding the reigns as the Front-end Controller. The latter took the Applicant to the front-end safe where she unilaterally counted the cash therein and, upon finishing, informed the Applicant that the total cash inside the safe was a sum of E10 000-00. She then advised the Applicant that this was the money used by the Cashiers for change. That was followed by the said Ms Malaza handing over the safe keys to the Applicant.
- 4.3 The Applicant testified that he was not involved in the counting of the cash inside the safe and could not confirm the correctness of the figure given to him by Ms Malaza.
- 4.4 He says the designation of Front-end Controller is a supervisory job, entailing maintaining operations in the front side of the supermarket, in particular on the tilling side and providing the cashiers with change from the front float safe, amongst other duties.
- 4.5 The Applicant testified that he was not offered any induction for the Front-end Controller job and when posing this question as to how was he expected to do

the work properly without having been inducted, Ms Gabsile Malaza lamely advised him to ask that from the branch manager who had effected the transfers. On approaching the branch manager, the Applicant was instructed to continue doing the work and that trainings would be conducted in due course by the Administration Manager, one Theodora Nkambule. He was further told that if there was anything he needed to understand, he could be assisted by his juniors, the Cashiers.

- 4.6 The inductions and/or trainings were never conducted up until the applicant was slapped with the charge of gross negligence for having a cash float shortage of a sum of E3100-00, for which misconduct he was eventually dismissed.
- 4.7 The Applicant did not deny that when counted in October, 2008 the safe had a shortage of the sum of E3100-00. But he sought to avoid being the one responsible for that shortage by arguing that, for one, he was not involved in the hand-over calculations between him and the previous Front-end Controller, Ms Gabsile Malaza. Hence, he could not confirm that the safe surely had the alleged sum of E10 000-00 when its keys were handed over to him. Secondly, he argued that, not only him had access to the safe, but also one

Nelsiwe Mtsetfwa was allowed access to the safe keys as she would also go to the safe to get change for the Cashiers.

- 4.8 The Applicant vehemently denied ever counting the money in the safe at any single point in time ever since he was transferred to being Front-end Controller. The argument is that such a shortage cannot be imputed to him in the absence of proof that the safe had E10 000-00 cash when its keys were handed over to him and since some other people besides him, had free access to the safe. The applicant, therefore, challenges the substantive fairness of the dismissal along these premises.
- 4.9 The Applicant also argued of his dismissal being procedurally unfair in that his appeal against the dismissal decision was not prosecuted by the Respondent, notwithstanding the fact that the letter of appeal had been timeously written and posted to the Respondent's postal address, being P. O Box 500, Siteki, albeit not through registered post. To confirm that the letter of appeal was received by the Respondent, the Respondent's branch manager, Mr Michael Shabangu, sarcastically asked the applicant when the latter had gone to the supermarket to deliver a copy of the Report of Dispute Form (CMAC Form1) as to what did he think he was doing by noting an appeal

against the decision of his dismissal, clearly demonstrating that the letter of appeal was received.

4.10 The letter of appeal was annexed on CMAC Form 1 and reflects that it was written on the 23rd October, 2009 and bears the Respondent's postal address, which is P.O. Box 500, Siteki.

4.11 AW2, one Agrippa Mkhonta, employed by the Respondent as a Blockman, testified that he is also a shop-steward in the Respondent's employ. He confirmed that the Applicant's complaints pertaining to his transfer to the Front-end Controller position coupled with the lack of any ancillary training was reported to him by the Applicant. He took these issues up with the Respondent's management, in particular, the branch Manager, Mr. Michael Shabangu, who undertook to ensure that the Applicant was afforded the requisite trainings for the job, but all in vein since none were given to him before he was charged for the gross negligence misconduct which culminated to his dismissal.

The Respondent's Version;

4.12 The Respondent abandoned its defence of the Applicant's claim in the middle of the arbitration

process, though without filing any formal notification to that effect. The Applicant's case was closed on the 13th July, 2010 after having led two witnesses who were both cross-examined by the Respondent's representative, Ms Pamela Dlamini. Since the Respondent had not brought her witnesses on that day, the matter was then adjourned to the 3rd August, 2010 at 10:00 hours for continuation, being for the Respondent's case.

4.13 Without having made any application for a postponement, the Respondent's representative did not pitch-up for the arbitration on the 3rd August, 2010. I re-scheduled the matter for continuation on the 9th August, 2010 at 11:00 hours. Invitation notices were issued on the same day, i.e. the 3rd August, 2010 by the Case Management Administrator-Siteki and faxed through to the Respondent through its telefax line, being 3436240 (fax) on the same day at 13:08 hours. The record bears proof, in the form of a telefax transmission report, that this fax mail was successful. It is of note that it was not for the first time for the Case Management Administrator to use this line to serve documents on the Respondent through fax as the record bears evidence that she had used it to send other invitation notices to the Respondent.

4.14 If regard be heard to the provisions of Rule 8(1)(b), as read together with Rule 9(1)(c) of CMAC Rules, prima facie proof of service of the invitation notice re-scheduling the matter for the 9th August, 2010 exists. The **double default** warranted the granting of the Applicant's application to have the matter eventually proceeding as an unopposed claim on the 9th August, 2010.

5 ANALYSIS OF THE EVIDENCE AND ARGUMENTS

5.1 It is common cause that the Applicant was an employee to whom section 35 of the Employment Act, 1980, applied. The burden of proof borne by the Applicant in terms of section 42 (1) of the Employment Act has therefore been successfully discharged.

5.2 Consequently, for his dismissal to be said to have been fair, the duty or onus of proof was upon the employer (Respondent) to prove that the Applicant was dismissed for one of the fair reasons of termination of a contract of employment stated in section 36 of the Employment Act. This proposition is in terms of section **42(2)** of the **Employment Act, 1980** which provision, for purposes of the nature of this award- i.e. an *ex-parte* award, I consider it to be important to be quoted

verbatim for the avoidance of any doubt:

“42(2) 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” (my emphasis).

5.3 It is trite law that burdens of proof are discharged through the evidence led and, in civil suits, the standard of proof is on a balance of probabilities. It was therefore incumbent upon the Respondent to adduce probable evidence in proof of its cause that the applicant's dismissal was fair both in terms of substance and procedure and in the whole circumstances of the case. The opening statements cannot stand in the place of evidence which is given under oath and is subject to testing or scrutiny by the other side through cross-examination.

5.4 The fact of dismissal is common cause. The Applicant disputes the fairness of the dismissal. He has led evidence in support of why he complains that the dismissal was both substantively and procedurally

unfair. I am inclined to find that his arguments in disputing the substantive and procedural fairness of the dismissal are sensible as they are not just bold and unsubstantiated allegations of unfairness. They are supported by evidence.

5.5 The Applicant's case surely warranted to be tested against the employer's evidence and arguments in proof of the fairness of the dismissal. In the absence of any such evidence from the Respondent, the Applicant's case remains completely uncontroverted whatsoever and should therefore stand.

5.6 In terms of section 42(2) of the employment Act, the Applicant does not have to prove the alleged unfairness of the dismissal. He simply had to make up a case against the Respondent regarding the unfairness of the dismissal. That case has been clearly made in this matter. After a prima facie case had been made by the Applicant, it was then upon the Respondent to adduce evidence proving that the dismissal was, both in fact and in law, fair. Such evidence has not been adduced at all, which leaves the Applicant's case uncontroverted.

5.7 Section 42(2) of the Employment Act is compatible with **Convention 158** of the **International Labour**

Organization (ILO) Conventions which requires, inter alia, that:

5.7.1 The employment of a worker should not be terminated without valid reason (**Article 4**).

5.7.2 The burden of proving the existence of a valid reason rests on the employer (**Article 9**).

See: ILO Convention 158 (Termination of Employment Convention, 1982)

5.8 The provisions of section 42(2) of the Employment Act have been strictly and consistently followed without derogations even in *ex parte* or unopposed actions at the Industrial Court of Swaziland. In a host of *ex parte* trials, the Court has consistently held that **by its default, the Respondent has failed to discharge the statutory onus resting on it in terms of section 42(2)** and consequently found in favour of the Applicants (quote not verbatim).

See: Bhekisisa H. Motsa & 2 Others vs. Cape Contracts (PTY) Ltd, Case No: 292/2001 (Industrial Court);

Sibongile Maseko vs. Meat World Butchery, Case No: 128/2003 (Industrial Court);

Dumsane Simelane & Another vs. Swaziland Brewers, Case No: 75/2004 (Industrial Court);

Albert Magagula vs. General Sales and Distributors, Case No: 103/2005 (Industrial Court);

Victor Mashinini vs. Brahbudas shandrakat, case no: 31/2005 (Industrial Court);

Mphikeleli Sifani Shongwe vs. The Principal Secretary-Ministry of Education and 3 Others, Case No: 207/2006 (Industrial Court).

5.9 I am accordingly also going to find that by its default, the Respondent has failed to discharge the onus resting upon it, of proving the fairness of the Applicant's dismissal.

5.10 The Applicant claimed re-instatement. In terms of **Section 16(1)(a)** of the **Industrial Relations Act, 2000** (as amended) re-instatement is a primary remedy if a finding has been made that an employee's dismissal was unfair. Nothing has been shown to prove that such an order may not be possible of being implemented. The Applicant believes that the parties' relationship has not been permanently damaged by this dispute. The parties had been together for about 9 years in lieu of this dispute, a relatively lengthy period. This period had not been characterized by any of such rough encounters of disciplinary enquiries. It should

therefore be possible for the parties to bury the past and expect the breaking of a new dawn.

5.11 The Applicant's claim for 18 days leave dues has not been proven through evidence and will therefore not be granted. The onus of proving this claim was upon the Applicant through evidence. This claim was only raised by the Applicant's representative during closing submissions but was not covered during the evidence stage. It should therefore fail for lack of proof.

6 AWARD

6.1 The Applicant's dismissal is declared both substantively and procedurally unfair.

6.2 The Respondent is ordered to re-instate the Applicant to the post of Supervisor or any equivalent position of similar remuneration at the Siteki branch of Shoprite Checkers Supermarkets, or any other branch as may be mutually agreed upon by the parties.

6.3 The re-instatement is with effect from the date of dismissal, i.e. 21st October, 2009 and goes together with payment of the arrear wages which should be calculated and paid with the requisite statutory income

tax deductions and Swaziland National Provident Fund (SNPF) contributions.

6.4 Payment of the arrear wages should be done on or before the last day of October, 2010.

6.5 The Applicant is directed to report for duty on the 1st day of November, 2010.

6.6 There is no order for costs.

DATED AT SITEKI ON THEDAY OF OCTOBER, 2010.

**MTHUNZI SHABANGU
CMAC COMMISSIONER**