

CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

Held at Manzini SWMZ 186/09

In the arbitration matter between: -

LUCKY MSHABI Applicant

AND

UMHLANGA MARKETING (PTY) LTD Respondent

ARBITRATION AWARD

DATE OF ARBITRATION: 6th August, 2009 and the 10th August, 2009.

CORAM:

ARBITRATOR : Commissioner B.Ngcamphalala
FOR APPLICANT : Mr. Sandile Zwane
FOR RESPONDENT : Mr. Siphon Mnisi

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1. DETAILS OF PARTIES AND REPRESENTATION

1.1 This matter was heard on various dates at the Conciliation, Mediation and Arbitration Commissions offices (herein referred to as CMAC or Commission) situated at SNAT Building, Manzini in the Manzini District.

1.2 The Applicant is Lucky Mshabi an adult Swazi male of P. O. Box 1 Ezulwini. I shall refer to the Applicant as the Applicant or Employee.

1.3 The Respondent is Umhlanga Marketing (Pty) Ltd a company duly registered and incorporated in accordance with the company laws of the Kingdom of Swaziland, having its principal place of business in Matsapha in the Manzini District. I shall refer to the Respondent as the Respondent or the Employer or the Company.

2. REPRESENTATION

2.1 During the Arbitration hearing the Applicant was represented by Mr. Sandile Zwane, a union official. The Respondent was represented by Mr. Siphon Mnisi, an Attorney from Rodriques Attorneys.

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3. BACKGROUND FACTS OF DISPUTE

3.1 On the 15th day of April, 2009, the Applicant reported a dispute at the Commission's offices in Manzini. The nature of the dispute was recorded as an unfair dismissal. The dispute is said to have arisen on the 18th March 2009, it being alleged by the Applicant that the Respondent had unfairly dismissed him.

3.2 It was alleged by the Applicant that his dismissal by the Respondent was substantively and procedurally unfair in that he was verbally dismissed by the Respondent after being arrested on charges of theft. No disciplinary hearing was afforded to him, wherein he could state his side of the story. Therefore Respondent had no valid reason to dismiss him and further failed to follow procedure when dismissing him.

3.3 The Commission then appointed a Commissioner to conciliate the dispute, however the dispute could not be resolved and a Certificate of Unresolved Dispute was issued.

3.4 In terms of the Certificate of Unresolved Dispute, the

issue (s) in dispute were recorded as;

- a) Notice Pay E1, 230.00 (one thousand two hundred and thirty Emalangeni);
- b) Additional Notice E205.00 (two hundred and five Emalangeni)
- c) Severance Allowance Pay E512.00 (five hundred and twelve Emalangeni).
- d) Twelve (12) months maximum compensation E14, 760.00 (fourteen thousand seven hundred and sixty Emalangeni)

3.5 The Applicant alleged that his dismissal was substantively and procedurally unfair whilst the Respondent on the contrary argued that the dismissal of the Applicant was both procedurally and substantively fair, taking into consideration the circumstances of the case.

3.6 As a consequence of the dispute remaining unresolved, the parties were in agreement that the matter be referred to arbitration in terms of Section 85(3) of the

Industrial Relations Act 2000 (as amended). I was accordingly appointed Arbitrator on the 5th of June, 2009.

3.7 A pre- arbitration hearing was held wherein the following issues were discussed and agreed upon. It was agreed that the position of the parties during conciliation had not changed. In other words there was no consensus on all the contentious issues. It was further agreed that the parties would exchange documents during the hearing, which documents would form part of their evidence. The parties further did not object to my appointment as Arbitrator.

4. ISSUES TO DETERMINE

4.1 The issue before me that I must determine is whether or not the dismissal of the Applicant by the Respondent was substantively and procedurally fair.

5. SUMMARY OF EVIDENCE

OPENING SUBMISSIONS BY BOTH PARTIES

5.1 Mr.Zwane for the Applicant in his opening statements stated that the Applicant was employed on the 6th March

2007 as a driver/cleaner. In August, the Applicant was promoted to the position of Assistant, and on the 15th March 2009 the Applicant was arrested, and subsequently verbally dismissed by the Respondent after having been arrested on the 18th March 2009.

5.2 It was his submission that the Applicant would give oral evidence in support of his case. In particular that he was served with his suspension and termination letter after he was verbally dismissed. Further evidence would be adduced which would show that the Applicant was not afforded the opportunity to appeal his dismissal, thus his dismissal was both procedurally and substantively unfair. The Applicant's prayer was that judgment be awarded in his favor.

5.3 The Respondent in its opening submission state that the date of employment and capacity in which the Applicant was employed were not in dispute. It was the Respondent's contention that the Applicant was dismissed in terms of the law. The Applicant was dismissed for misconduct and witnesses would be called to prove that.

5.4 Further it would be proven that a disciplinary hearing was

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held, however the Applicant waived his right to defend himself. Documentary evidence and witnesses would be called to prove this assertion. The Respondent in summary submitted that the dismissal of the Applicant by the Respondent was both substantively and procedurally fair, and prayed that the Applicant's case be dismissed.

6. THE APPLICANTS CASE

6.1 Lucky Mshabi, the Applicant was the first to give evidence in support of his case. He stated under oath that he was employed by the Respondent on the 6th March 2007. It was his testimony that he was employed as a driver/ cleaner.

6.2 It was his testimony under oath that on the 15th March 2009, he was invited to a wedding by his friends to be held at Mlilwane. He submitted that he attended the weddings after party where he was provided with meat and alcohol. At three in the morning on the Sunday, he went inside the Restaurant to use the bathroom where he found a camera. He proceeded to show the camera to one Nathi a friend of his.

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6.3 He then left with his friend after getting a lift and went home to Mvutjini where he slept. He testified that after having slept for about thirty minutes, he was awoken by Rangers who advised him that a camera had been stolen at the wedding, and they had been told that he has the camera.

6.4 He was told that he had to return back to Mlilwane with them. When they got there they found a number of individuals together with the police. The Police then told him that because the camera was found in his possession he had to accompany them to the police station.

6.5 Upon his arrival at the police station the officer advised him that they would discuss the matter when he had sobered up as he was still intoxicated. He was given an opportunity to rest, and was later interrogated by the police after he was sober, the police informed him that he was being charged with theft because the camera was found in his possession.

6.6 On the Monday in the morning he appeared before a Magistrate where he was charged with theft and fined E800.00. It was his evidence that on the Monday he

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requested to call the Respondent which permission he received, and he proceeded to call the Respondent and requested to be loaned the money required as bail. In response Mr. Reid told him not to involve him as he was not the one who had set him up and did not want to be a party to what was going on.

6.7 The Applicant went on to state that he then proceeded to loan the money from someone else, and was eventually released. On the 17th March 2009 on a Tuesday he proceeded to call one Sandile Masuku who works for the Respondent and advised him that he had been released, however he was told by Mr. Masuku that the Director was not available.

6.8 He then decided to go to the Directors house where his intention was to board the vehicle that the Respondent provides to work. It was his testimony that when he got to the house, he met Joe Shongwe the driver. He requested that he call the Director for him and advise him that he needed to talk to him.

6.9 Joe returned carrying keys, and advised that the Director was still asleep, and that he would be late as he needed

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to attend a meeting. He then proceeded to wait for the Director to wake up. When he woke up he

explained to him that he had been release. The Director asked for a further explanation which he gave. It was then that the Director told him that he understood, however he no longer had a job for him, as his services had been terminated. His services had been terminated because he was not happy about what had happened.

6.10 They were then joined by two individuals, and he was told by the Director that he would get him a lift to Matsapha so that he could pay him his dues. He was instructed not to enter the shop. It was his testimony that he advised the Director that he would not accept that. He then proceeded to the Labor Department to seek advice.

6.11 On the 19th March 2009 he went to Respondent's premises in Matsapha where he was told by the Director that his wife would pay him his dues, however he returned later and advised that she was busy and they would bring him the money at Mvutjini. On the 20th March 2009, he found a letter addressed to him from the Respondent which had been left with his child.

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6.12 When he opened the envelope he found a letter of suspension advising him that he was being suspended from the 20th to the 26th March 2009. He was also advised to attend a disciplinary hearing. On the 26th of March 2009 he decided to go to CMAC and seek assistance, it was there that he was advised to prepare an Affidavit stating that he had been dismissed, and he was also advised not to attend the hearing.

6.13 On the 26th March 2009 the date of the hearing he took the Affidavit and handed it to Joe at the bus stop at Mvutjini. He then reported his actions to the Labor Department who called the Director and invited him to a meeting.

6.14 At the meeting the Director was advised that, as an employer he only can monitor his Employees from 8:00 am to 6:00 pm on Monday to Friday, and from 8:00 am to 1:00pm on Saturdays. Anything that an employee does after those hours no longer concerns the employer.

6.15 It was his evidence that the Director then proposed that they talk, and he stated that he wished to be reinstated as he has children. Mr. Reid advised that he was no longer

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needed him hence he could not be re-instated him. The Labor Department directed that the Respondent state that in writing, and on the 31st March 2009, he received a letter of dismissal as well as his money. He was told to go to the Labor Department and told that they would meet in Court.

6.16 A letter of Appeal was written to the Respondent, however no response was received, hence the decision to report a dispute at CMAC, as he was not afforded the opportunity to appeal by the Respondent.

6.17 During cross- examination the Applicant was asked who had invited him to the party. He submitted that he had been invited by Sifiso and Nathi who he worked with at Mlilwane. He was asked who the party he attended was for. It was his evidence that he did not know who the party was for, but he was invited by his friends.

6.18 The Applicant was asked to explain what he meant when he stated that they had worked with him at Mlilwane. He testified that on the Friday of the party, they had been working at Mlilwane for the Respondent. They had been

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fixing lights at Mlilwane. It was then put to the Applicant whether Respondent would be correct in saying that he got to know of the party on the date he was on the assignment. To which he responded to the affirmative, but stated that Sifiso had called him to the party after hours.

6.19 The Applicant was asked whether Sifiso was part of management at Mlilwane or whether he was

the host of the party. The Applicant submitted that he does not know, but was aware that Sifiso was quiet senior at Mlilwane. He was asked whether it would be correct to say that Mlilwane was a client of the Respondent. He responded to the affirmative.

6.20 It was put to the Applicant that he was not telling the truth, in that Sifiso denied that he invited him to the party. The Applicant stated that Sifiso had told him that they wanted to fire him, and they had in fact fired the other individual, hence his denial.

6.21 It was put to the Applicant that he should not have been part of the party, as he was not invited by the host. The Applicant in response stated that he had been invited by

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Sifiso. The Applicant was asked whether he knew one Sandile Masuku, to which he responded to the affirmative. He was asked where he knew him from to which he replied they worked together whilst he was employed by the Respondent.

6.22 It was put to the Applicant that he had approached Sandile and requested that they attend the party. This was denied by the Applicant. It was further put to the Applicant that he was advised by this individual that he should not go to the party, because he would find himself in trouble as Mlilwane is a client of the Respondent.

6.23 The Applicant testified that he had not spoken to Sandile, he had only been with him during the day. The Applicant was then referred to the Report of Dispute and asked whether he had completed it. To which he responded to the affirmative. He was directed to page seven of the Dispute to a paragraph wherein he states that his dismissal had been in writing and not verbal.

6.24 He testified that the reason he had stated that his dismissal had been in writing is because he was eventually dismissed in writing. It was put to the

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Applicant that his whole claim was marked with several contradictions, and that he was not being honest and truthful. The Applicant stated that he did not agree with this.

6.25 It was then put to the Applicant that he was not being truthful when he said an officer of CMAC, had advised him to draft a Affidavit stating that he had been dismissed. Further no officer from CMAC would have advised him in such a manner. The Applicant stated that he had been advised by a CMAC officer. The Applicant was asked why the Affidavit was not part of his evidence. In response he stated that this was because the copy he had send to the Respondent was not signed by, however it was commissioned by a police officer.

6.26 The Applicant was asked how a police officer would commission an Affidavit without a signature. To which he stated he did not know why the police officer had done this.

6.27 The Applicant was then referred to the letter of suspension, and asked who he had received it from. He stated that he got it from his nine year old child. He was

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asked whether he could recall the date he received the letter to which he stated that it was Friday the 20th March, 2009. It was put to the Applicant that the letter had been given to his wife, and evidence of Joe would be adduced in proof of this.

6.28 The Applicant was asked who his supervisor was at Respondent's employ. To which he stated Jose Shongwe was his supervisor. He was asked why he had called Sandile when he was released when his supervisor was Joe. In response he stated that he contacted his supervisor on the site who was Sandile.

6.29 It was put to the Applicant that he never contacted his supervisor on the day he was releases, to

which he denied. The Applicant was asked why he had intruded into his employer home on the second day of his release. He stated that it was not the first time he had gone to the Directors premises and he saw nothing wrong with it.

6.30 It was put to the Applicant in closing that he had not been invited to the party. Further that when he was called at the party to return the camera, he fled into the night and disappeared, hence his arrest, which subsequently led to

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his dismissal as he had brought the name of the Respondent into disrepute. This was denied by the Applicant

6.31 The Applicant was thereafter re- examined and his representative advised that he was closing Applicant's case.

7. THE RESPONDENT'S CASE

7.1 The Respondent called three witnesses to testify on its behalf namely Mr. Mark Reid, Mr. Joe Shongwe and Mr. Sandile Masuku.

7.2 Mr. Mark Reid testified under oath that he was the Managing Director of the Respondent. He submitted that the Respondent has one branch in Matsapha. He testified that he knew the Applicant who was employed by the Respondent.

7.3 He then proceeded to narrate the events that led to the Applicant's dismissal and the case at hand. I will summarize the events narrated by this witness. It was his evidence that they were engaged by Liz Kahar Estate

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which is inside Mlilwane to carry out the repair and installation of chandeliers within the premises. This was for purposes of a wedding that was scheduled to proceed that weekend.

7.4 He submitted that himself, the Applicant and Sandile Masuku attended to the repairs and installation and completed the job, on the Friday the 13th March 2009 at 12:00 noon. They returned to the Workshop in Matsapha, and reported to Work on the 14th March 2009 as it was a usual working day.

7.5 It being a Saturday the shop closed at around 12:30 pm to 1:00pm, and all employees left for the weekend. It was his evidence that on 15th March 2009 at around 4:00 am his sleep was interrupted by a telephone call from a lady by the name of Kate Taman who was the individual that had hired the company to do work at the Estate over the week for the wedding.

7.6 She was in a state of panic and asked him where Lucky(Applicant) lives, surprised by her question he asked why she was looking for him. She stated that the Applicant had stolen a camera and when confronted had

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run away. He testified that he informed her that he did not know where he lives, but gave her the number of Joe Shongwe and Sandile Masuku who he advised would assist her with directions.

7.7 On Monday morning at around 8:30am to 9:30am he received a phone call from the Applicant advising him that he had to appear before a Magistrate on charges of theft, and was requesting him to loan him some money. Being angry and embarrassed at the time he informed the Applicant not to involve him, as he had committed the offence on his own.

7.8 He testified that he had not followed up on the matter, but on Monday he received a call from Ms. Liz Reilly, who informed him that the Applicant had been sentenced to three (3) months in prison or an

option of an E800.00 fine.

7.9 On the 18th March 2009 on a Wednesday the Applicant came to his place of residence, whilst he was drinking coffee at around 8:00am. He asked him what he was doing there and he said that he was sorry. He asked the Applicant what had happened at the wedding as he was

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still angry, and the Applicant stated that he had found a camera on the floor. When he asked whose camera it was nobody seemed to know.

7.10 He stated that he then informed him that because of what he had done it would be impossible to keep him in his employ. This was because he had caused the company great embarrassment. Whilst discussing the issue they were joined by two men, who were there to assist him, tow a vehicle at Pine Valley.

7.11 He testified that he told the Applicant to go to work and collect his money, however he should not enter the shop, as he did not want his customers to see a convicted criminal. The Applicant got a lift from one of the gentlemen that had come, Mr. Graham to Matsapha, however the Applicant had indicated that he was going to Simunye to get the bail money. He however does not know where the Applicant was dropped off by Mr. Graham.

7.12 It was his evidence that he then consulted a law book to establish how to handle the Applicant's situation. The book advised that if an employee is absent for more than

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three days without a medical certificate then he can be dismissed. The Applicant came on the third day however he did not have a medical certificate.

7.13 He dismissed the Applicant and advised him to come on the 18th March 2009 to fetch his dues. On the 18th March 2009, it was his evidence that he proceeded to CMAC with Sandile Masuku to seek guidance. A lady assisted him who advised that he has to hold a disciplinary hearing, he then prepared the letter a letter suspending his services. He then advised the Applicant to attend a hearing.

7.14 It was his testimony that the letter was delivered to the Applicant on the 19th March 2009, however the letter was backdated to the day the Applicant was convicted. Mr. Joe Shongwe who delivered the letter at the Applicant's residence, returned with an affidavit given to him by the Applicant.

7.15 It was his evidence that the Affidavit was received by him on the 20th March 2009. He stated that on the day of the hearing they proceeded with the hearing, it being conducted by Joe Shongwe and Mrs. Reid. They recommended that the Applicant be dismissed and a letter

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of termination of services was served on the Applicant. A letter of appeal was received from the Applicant, however he did not respond to it as the Applicant had failed to come to the hearing how was he then going to come to the Appeal.

7.16 The witness was asked whether he still receives work from the client at Mlilwane. It was his response that since the incident he has never received work from that client. The witness was asked whether he had attended the meeting at the Labor Department as alleged by the Applicant in his evidence in chief.

7.17 It was his evidence that he did attend the meeting, where he was told that the reason for the dismissal was fair, however he had failed to follow procedure. The officer however chased them after a misunderstanding with the Applicant.

7.18 He was then called again to the Labor Department, where he raised his concern of having been called again. He was advised that the first gentlemen that had spoken to him did not have the

authority to do so. The matter was heard by the officer and the Applicant was advised to report a

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dispute as there was no consensus.

7.19 The witness was then cross examined by the Applicant's representative. He was asked whether he had charged the Applicant with any offence. In response he submitted that he was not aware that a charge sheet had to be prepared.

7.20 The Applicant was asked why he had backdated the letter of suspension as per his evidence to the 16th March 2009 when he was convicted. He stated that the Applicant came on the 15th March 2009 and suspended on the 16th March 2009, and the letter was backdated to the 20th March 2009 and not what he was saying.

7.21 It was put to the witness that he was being dishonest, and that the drafting of the letters was merely done as a formality by the Respondent. The witness was asked why the Applicant was not afforded an appeal. It was his evidence that the Applicant had refused to come to a hearing, so he was taken aback why the Applicant had refused a hearing but was now appealing when he had an opportunity to defend himself.

7.22 The witness was asked to explain the meaning of his

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phrase during his evidence that he told the Applicant that it would be impossible to work with him. He stated that the Applicant was convicted for stealing for a client, and had caused the Respondent embarrassment, he did not know how it was going to be possible to work with him. That is what the phrase meant. The witness was then re-examined by Counsel representing him.

7.23 The next witness to give evidence was Joe Shongwe, who stated under oath, that he worked for the Respondent as a supervisor, and has worked for the Respondent since January 2006.

7.24 It was his evidence that he knew the Applicant, and he then proceeded to narrate his evidence. It was his testimony that sometime in March even though he could not state the exact date, they attended to a job at Mlilwane where they were preparing for a wedding. The Applicant was the driver assisting the Technician.

7.25 It was his evidence that the job was completed on the Friday of the week of the wedding. He proceeded to work on Saturday, and on Sunday at 4:00am he received a phone call. The individual said he has received the

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number from Mr. Reid and she wanted to know where the Applicant lives.

7.26 He stated that he then directed one Sifiso where the Applicant lives. When he asked why they were looking for him he was told they were looking for something.

7.27 Later he called the Applicant and his wife told him that he had returned in the morning. Further that he had been fetched by Rangers thereafter. He was later called by Mr. Reid who informed him what had happened. The Applicant, he was advised by Mr. Reid called on Monday requesting that he assist him with bail.

7.28 On the Tuesday whilst fetching the car from Mr. Reid's home he found the Applicant, however he does not know what happened as he left. He was then requested by Mr. Reid on Wednesday the 18th March 2009, to deliver a letter to the Applicant as he lives in Ezulwini.

7.29 It was his testimony that he did not read the letter because it was in an envelope, but proceeded to the Applicant's home and left the letter with his wife. He submitted that he did not leave the letter

with the

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Applicant's children as suggested in the Applicant's evidence.

7.30 The witness was cross examined by the Applicant's representative, and thereafter re-examined

7.31 The last witness called was Sandile Masuku. It was his evidence under oath that he was employed by the Respondent as an Electrician. He testified that they had worked together with the Applicant at the job done at Mliwane. The Applicant would on talk to the other individuals who were decorating the area, who informed him of the wedding. When the job was complete the Applicant asked whether he could attend the wedding from the other employees, and it was agreed between them the since he was working there he could attend.

7.32 The Applicant persuaded him that he should attend the wedding but he informed him the Mr. Reid would not be happy. He then advised him not to attend the wedding. That was the last they spoke, and on Monday he did not see the Applicant at work. He was later advised that the Applicant had been locked up.

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7.33 The witness was then cross examined and the Respondent closed its case.

7.34 The Applicant in closing submissions which were done orally stated that it had proven that the Applicants dismissal had been unfair both procedurally and substantively. Further that the Applicant had been dismissed without being afforded an opportunity to state his case by the Respondent. Further that the holding of a hearing after a verbally dismissing the Applicant could not cure the defect of the unfair dismissal.

7.35 The Respondent in closing stated that the Applicants dismissal had been fair both procedurally and substantively. It submitted that the Applicant had been dismissed after a fair hearing, and was dismissed for bringing the name of the Respondent to disrepute. This was after he attended a function and used the name of the Respondent to gain access. Thereafter he committed theft, and embarrassed the Respondent and caused him to lose. a client. It was the Respondent's submission that the Applicant's dismissal was fair both substantively and procedurally. It prayed that the Applicant's claim be

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dismissed.

8. ANALYSIS OF THE EVIDENCE

8.1 It is common cause that at the date of his dismissal the Applicant was an employee to whom section 35 of the Employment Act of 1980 applied. No advancements were made by the Respondent to indicate that the Applicant was not an employee to whom section 35 of the Employment Act applied. In the circumstances the Respondent bears the onus of proving;

- a) That the reason for the termination was one permitted by Section 36 of the employment Act 1980; and
- b) That, taking into account the circumstances of the case, it was reasonable to terminate the services of the employee.

See Section 42(2) of the Employment Act 1980

8.2 It is common cause that the Applicant was dismissed after having been convicted of theft outside the workplace. It is also common cause that the Applicant was called to a

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hearing, which he did not attend as he alleges that he had already been verbally dismissed. It is also common cause that despite having filed a letter of Appeal the Applicant was not afforded one.

8.3 The issue in contention is whether affording the Applicant a disciplinary hearing, after having earlier verbally dismissed him, cures the defect. Further whether the dismissal of the Applicant for a theft outside working hours, warrants dismissal, when there is no internal code/policy advising employee of such a rule.

8.4 The Applicant has advanced evidence that he was dismissed verbally after having been convicted of a theft outside working hours. He has advanced evidence in an attempt to prove that his dismissal was both substantively and procedurally unfair.

8.5 He avers that his dismissal was substantively unfair in that he was only afforded a disciplinary hearing after his dismissal. He also avers that he did not attend the hearing on the advice of a CMAC officer who advised him to merely send an affidavit. The hearing proceeded in his absence, and when the verdict came out, he Appealed

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after seeking advice from the Labor Department.

8.6 He was however not afforded an Appeal hearing, nor did he get a letter in response to his appeal. On the other hand the Respondent, who through the evidence of the first witnesses, testified that he told the Applicant that he did not think they could work together, and that he should fetch his money.

8.7 It was further his evidence that on the day the Applicant was to fetch his money, he together with the second witness, proceeded to the CMAC offices in Matsapha where he was told he should have suspended and afforded the Applicant a hearing.

8.8 He then proceeded to prepare the suspension letter which was filed by the Respondent and the Applicant as evidence. The suspension letter reads as follow;

" your employment with Umhlanga Marketing (Pty) Ltd t/a Lamps 'n Lights is suspended from today's date pending a disciplinary hearing on Thursday 26 March 2009. The reason for your suspension is due to the fact that you were convicted on a charge of

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theft and handed down a 3 months sentence....."

8.9 The Applicant failed to attend the hearing. Thus the Applicant was afforded a hearing which he refused to attend. However he was not afforded an opportunity to appeal the verdict issued in his absence despite having appealed. It was the Respondent's view that it did not understand why he was appealing having failed to attend the hearing. Hence he was not afforded one.

8.10 I will first deal with the substantive fairness of the matter at hand. The Employment Act 1980 section 39 (1) states;

"an employer may suspend an employee from his employment without pay where the employee is remanded in custody"

8.11 The Respondent therefore had the right to suspend the Applicant without pay whilst the Applicant was in custody. The question that there after arises was it fair to dismiss the Applicant for having been in custody and convicted, for an offence outside the work place.

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8.12 The Respondent argues that though it was outside working hours, the Applicant stole from its client, and further used the name of the Respondent to gain access. Hence he brought the name of

the company to disrepute and embarrassed the company.

8.13 Johan Grogan in his book Dismissal, Discrimination & Unfair Labor Practises, 2nd Edition, Juta, 2007; states that employees are duty bound to uphold their employers good name. Further states that, conduct that tends to bring the name of the employer into disrepute may therefore justify disciplinary action even if, in rare instances, such conduct cannot be classified as another recognized offence. Offensive behavior to a client fall under this hearing.

8.14 See: Concorde Plastics (Pty) Ltd v NUMSA & Others (1998) 2 BLLR 107(LAC).

8.15 In the present case the Respondent opted to take disciplinary action against the Applicant. The Applicant brought the name of the Respondent into disrepute resulting in a client being lost and causing financial loss to the company. The Respondent could no longer be

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expected to trust the Applicant in the cause of his duties, thereby rendering him untrustworthy.

8.16 It was not indicated that he had any prior /similar offence nor that he was not an upright, and diligent employee, so I am led to believe that the event was a once off incident. One of the key elements of substantive fairness is that the sanction must fit the crime, the Applicant stole from a client of the Respondent where earlier in the week he had been doing work for the Respondent.

8.17 Whether it was during working hours or not the Applicant brought the name of the Respondent into disrepute. Theft no matter how small warrants dismissal, even if the employee is a first offender. The dismissal of the Applicant, in the circumstances was substantively fair.

8.18 The same writer goes on to deal with the procedural fairness of a hearing after a dismissal. John Grogan states that the general rule held by Courts is that a hearing held after a decision is made to dismiss an employee is axiomatically unfair.

8.19 A corollary of this is that employers may not generally

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correct a procedurally unfair dismissal by holding a proper hearing later.

See: Nasionale parkeraad vs Terblanche (1999) 20 ILJ 1520(LAC)

8.20 In the case of, Semenya & Others vs CCMA & Others (2006) 27 ILJ (LAC), on appeal it was stated that an employer can cure the absence of a hearing by affording what the Court likened to private arbitration, where the decision of an outside third party binds the employer.

8.21 In the present case the hearing which was held in absentia of the Applicant were chaired by Mrs. Reid and Joe Shongwe, the wife of the director and an employee of the Respondent, no third independent individual was called to chair the hearing to ensure that whatever decision was recommended was fair and unbiased.

8.22 I am of the view that substantively the dismissal of the Applicant was fair, however he should have been afforded an opportunity to state his defense, and mitigate as he never denied that the camera was found with him. Further he never denied that he was convicted of the theft.

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8.23 The Respondents conduct of affording the Applicant a hearing was not meant to cure the earlier defect. Had it been the Respondents aim to do that, an independent person would have been called in to chair the hearing even in the absence of the Applicant. The Respondent should have afforded the Applicant the opportunity to an Appeal this is taking into consideration that he had not attended the hearing. The Appeal would attempt again to cure irregularities.

8.24 However the Respondent did not evaluate all the circumstance of the case. The question now is whether the Applicant's dismissal was substantively and procedurally fair taking into account the circumstances of the case.

8.25 Based on the evidence adduced by both parties, and taking into consideration, the evidence presented by the Respondent, has failed to prove that the Applicant's dismissal was procedurally fair.

8.26 Grogan in his book Workplace Law, 9th edition,2007 at page 122 states;

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"That a dismissal must not only be for a fair reason, but also that it must be affected in accordance with a fair procedure".

8.27 The procedural fairness and substantive fairness of a dismissal are independent criteria. A dismissal is unfair if the employer failed to follow a fair procedure, no matter how compelling the reason for the dismissal may have been. However it does not follow that a minor procedural lapse by an employer will render a dismissal procedurally unfair.

8.28 From the evidence adduced it is evidence that the Respondent dismissal of the Applicant was procedurally unfair, as it failed to follow fair procedure when dismissing the Applicant. Therefore the conduct of the Respondent of failing to conduct a proper disciplinary hearing renders the dismissal procedurally unfair.

See: Joseph Sangweni v Swaziland Breweries Industrial Court case No. 52/2003;
Mshayeli Sibiya v Cargo Carriers Industrial Court

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case No.282/03.

9. CONCLUSION

9.1 Our law on dismissal is governed by section 42 of The Employment Act of 1980 in conjunction with section 36 of the same Act. In terms of section 42(2) of the said Act, the onus to prove that an employee's services were fairly terminated rests with the employer. It does not end there but further the employer must prove that such termination is one permitted by section 36.

9.2 It is my view that in this case the termination of the Applicant's services was procedurally unfair, and that taking into account the circumstances of the case Applicants dismissal was unfair and unreasonable.

9.3 I have not been told of the Applicant personal circumstances. However in computing the compensation to be paid to the Applicant, I have also taken into account his period of service with the Respondent and his age. I consider that an award of four (4) months is reasonable in the circumstances. The Applicant is not entitled to the severance allowance as the dismissal was substantively

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fair.

10. AWARD

10.1 Judgment is accordingly entered in favor of the Applicant and against the Respondent.

10.2 The Respondent is ordered to pay the Applicant the following;

One months Notice Pay	E1, 230.00
Additional Notice	E 205 .00

Four (4) months for unfair dismissal E5, 000.00

Total Amount E6, 435.00

The Respondent is ordered to make payment within 30 days upon receipt of the award.

DATED AT MANZINI ON THIS THE 22nd DAY OF MARCH, 2010

COMMISSIONER BANELE NGCAMPHALALA

ARBITRATOR