

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

**HELD IN MANZINI CMAC REF: SWMZ 99/09**

**In the matter between:**

**Makhosikhosi Mbonane Applicant**

**AND**

**Prime Trucking and Logistics Respondent**

**CORAM:**

**Arbitrator : Mr R. S. Mhlanga**  
**For Applicant : Mr P. K. Msibi**  
**For Respondent : Ms L. Manyatsi**

**ARBITRATOR AWARD**

**VENUE: CMAC OFFICES, ENGULENI BUILDING, GROUND FLOOR, MANZINI**

**1. DETAILS OF HEARING AND REPRESENTATION**

1.1 The Applicant is Makhosikhosi Mbonane, an adult Swazi male, who was duly represented herein by Mr Professor Msibi.

1.2 On the other hand, the Respondent is Prime Trucking and Logistics, a company registered in terms of the company laws of Swaziland, and the Respondent was represented in these proceedings by Ms Lobenguni Manyatsi.

**2. BACKGROUND OF THE DISPUTE**

2.1 The present dispute relates to unfair dismissal, it being alleged by the Applicant that he was unfairly dismissed by the Respondent.

2.2 Following the alleged dismissal, the Applicant reported a dispute to the Commission (CMAC) against the Respondent. The dispute was conciliated upon but it could not be resolved and consequently a Certificate of Unresolved Dispute was issued by the Commission. Subsequently, the parties referred the dispute to arbitration for determination hereof. On the 10<sup>th</sup> September, 2009, a pre-arbitration meeting was held, wherein the arbitration process was explained to the parties, and the parties were able to agree on the number of witnesses each party would call and the documents to be exchanged.

**3. ISSUE TO BE DECIDED**

The issue to be decided herein is whether or not the Applicant's dismissal was fair and reasonable in the circumstances of the case.

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**4. SUMMARY OF EVIDENCE 4.1 APPLICANT'S CASE MAKHOSIKHOSI MBONANE'S TESTIMONY**

4.1.1 I will refer to this witness as the Applicant, Mr Mbonane or AW1 as the case may be. The Applicant gave his evidence under oath. Briefly, the Applicant's testimony was that, he was employed by the Respondent on the 26<sup>th</sup> June, 2007, as a warehouse clerk. He stated that he was stationed at Matsapha.

4.1.2 It was the Applicant's testimony that the Respondent verbally informed him that he was being

employed on a fixed-term contract of two (2) years. The Applicant referred to a letter of appointment dated 4<sup>th</sup> July, 2007, and same is filed of record. The Applicant testified that his services were terminated by the Respondent on the 26<sup>th</sup> June, 2008, following a disciplinary enquiry which was instituted against him, by the Respondent.

4.1.3 The Applicant related the events which led to his dismissal herein. Mr. Mbonane stated that at his workplace, there was the pending issue of the contracts of employment for employees, which were being withheld by the Respondent company. He said that the employees had waited for a long time for the Respondent to give them the contracts of employment, in order to have them signed. He said that the Respondent advised the workers that the office of Maduduza Zwane, a Labour Consultant was engaged to draft the said Contracts of employment.

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4.1.4 It was Mr Mbonane's testimony that on the 23<sup>rd</sup> April, 2008, Mr Raymond Bothma (Warehouse Manager) advised the workers to pursue the issue of the contracts of employment; because his (Mr Bothman) attempts to have the contracts of employment released to them had failed. Subsequently, an Adhoc Committee was set up solely to pursue the issue of the contracts, and he was appointed as a chairman hereof.

4.1.5 The Applicant stated that as a committee, they wrote a letter to the Respondent's management, wherein they requested the management to make available to the workers the contracts of employment. Over and above the said letter, the Applicant stated that he made a follow-up on this issue with Gideon Mavimbela, but to no avail.

4.1.6 The Applicant said that he was sent by the workers to go to Maduduza Zwane's office to enquire about the contracts in question. He said that he was in the company of Eddie Thring, another member of the said Adhoc Committee. On the 15<sup>th</sup> May, 2008, he went there alone. He did not find Sesikhona Zwane in the office, but he left his Cellular Phone number and a message for Mr Zwane to call him on his return. Indeed, he called him and informed him that he (Mr Zwane) had already delivered the contracts of employment to the Respondent's office in Matsapha.

4.1.7 Mr. Mbonane said that on the 21<sup>st</sup> May, 2008, the workers were expecting the management to come to Matsapha with the contracts of employment in order to have them signed by the employees, but unfortunately the management did not show up. Subsequently, a letter was

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written to the Managing Director requesting him to come to Matsapha on the 22<sup>nd</sup> May, 2008, to address the workers about the issue of the contracts of employment, but he also failed to show up.

4.1.8 According to Mbonane, on the 28<sup>th</sup> May, 2008, during the morning hours, the workers held a meeting inside the company premises; but Ms Eve Smith (Sappi Usuthu Officer) told them that the meeting was illegal, and consequently she ordered them to leave the company premises. He said that the workers peacefully went out of the company premises and they waited outside. He stated that Ms Smith called the police, and when the police arrived they found them outside, and since the police could not witness any violence or any work disturbance, they left.

4.1.9 The Applicant testified that, on that day, the Managing Director (Mr Mabila), who was in the company of Mr Gideon Mavimbela and Mehluli Nhlabatsi came down to Matsapha to address the workers. He said that the Managing Director firstly apologized to the workers on behalf of the management, for failing to provide them with the contracts of employment.

4.1.10 The Applicant stated that the Managing Director assured the workers that their grievances, in particular the issue of the contracts of employment, would be promptly attended to.

4.1.11 The Applicant said that on the following day (29<sup>th</sup> May, 2008) he was served with a charge sheet, containing four (4) charges, by the Respondent, and subsequently he was suspended from work with immediate effect. He alleged that on the 3<sup>rd</sup>

June, 2008, he attended a disciplinary hearing to answer the following charges namely; (a) gross dishonest (b) incitement of fellow employees against the employer (c) dereliction of duty (d) illegal picketing. He said that the outcome of the disciplinary hearing was to the effect that he was found guilty as charged, but with regard to count 1 (gross dishonesty), the Chairperson recommended that he should be dismissed, and consequently he was summarily dismissed. The Applicant alleged that his services were unfairly terminated by the Respondent, because he did not commit any of the acts of misconduct he was charged with herein.

4.1.12 During cross examination the Respondent's representative asked some few questions from the Applicant; but I have only mentioned those questions, which I regard as being relevant herein.

4.1.13 Under cross examination, the Applicant was asked whether they (employees) had a permission to hold the meeting on the 28<sup>th</sup> May, 2008, inside the company premises. The Applicant's response was in the affirmative, he said that they had been authorized or permitted by Raymond Bothma (Warehouse Manager) to convene it inside the company premises.

4.1.14 The Applicant was also asked whether he had informed the Managing Director that he was already in possession of the copies of the contracts of employment during the meeting of the 28<sup>th</sup> May, 2008. The Applicant's reply was in the negative.

#### **ANDREAS SHONGWE'S TESTIMONY**

4.1.15 Andreas Shongwe gave his evidence under oath in support of the Applicant's case. I will refer to this witness as Mr Shongwe or AW2 as the case may be.

4.1.16 Mr Shongwe testified that he is currently employed by the Respondent as a forklift driver, and he is stationed in Matsapha. He said that the Applicant is his former colleague or fellow employee. He said that the Applicant was employed as Warehouse clerk.

4.1.17 It was Mr Shongwe's evidence that the purpose of the workers meeting on the 28<sup>th</sup> May, 2008, was inter alia, to discuss the pending issue of the contracts of employment. He said that he was one of the members of the Adhoc Committee which was set up to make a follow-up on the issue of the contracts of employment (which hither-to were not given to the workers to sign). AW2 (Mr Shongwe) stated that the workers had obtained a permission to convene the meeting within the company premises on the 28<sup>th</sup> May, 2008.

4.1.18 AW2 stated that it is not true that the workers were incited by the Applicant to revolt against the employer. On the other hand, AW2 testified that, the Applicant was working a nightshift on the 28<sup>th</sup> May, 2008 and that after he had knocked off on that day, he attended the aforesaid meeting. He emphasized that the aim of the meeting was to have their grievances, in particular, the issue of the contracts of employment promptly attended to by the management.

4.1.19 During cross examination AW2 testified that the workers were waiting for the Managing Director to address them during the meeting of the 28<sup>th</sup> May, 2008. He stated that the managing Director was specifically called and asked to come to Matsapha to address the workers regarding the pending issue of the contracts of employment.

#### **4.2 RESPONDENT'S CASE**

4.2.1 Three (3) witnesses testified on behalf of the Respondent herein namely; Gideon Mavimbela, Mehluli Nhlabatsi and Sesikhona Zwane.

#### **GIDEON MAVIMBELA'S TESTIMONY**

4.2.2 Gideon Mavimbela, to whom I shall refer to as Mr Mavimbela or RW1, gave his testimony under oath. He testified that he is employed by the Respondent company as the operation Manager.

4.2.3 Mr Mavimbela stated that on the 14<sup>th</sup> May, 2008, the Applicant together with Eddie Thring came to the Respondent's office at Bhunya to make inquiries about the contracts of employment for the employees. He said that they told him that they were sent by the workers to make a follow-up on the issue of the contracts of employment, which hitherto had not been given to the workers to sign. Mr Mavimbela stated that he assured them that he would attend to this issue, which he did. He said that he liaised with the Managing Director (Mr Mabila) who also acknowledged that he was aware of this issue. He stated that the Managing Director told him that this issue was being handled by Mr Dumsani Dlamini (Financial Manager), Mr Raymond

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Bothma (Warehouse Manager) and Mr Mehluli Nhlabatsi (Accountant).

4.2.4 It was Mr Mavimbela's evidence that on the 16<sup>th</sup> May, 2008, the Applicant (Mr Mbonane) called him for a progress report (feed back) on the issue at hand. He said that he informed him that this issue was handled by the aforementioned persons. He said that the Applicant accepted his explanation.

4.2.5 Mr Mavimbela testified that on the 20<sup>th</sup> May, 2008 he received a letter from the Applicant, in which letter the Applicant emphasized the importance of the contracts of employment. He said that it was stated therein that the management should furnish the workers with the contracts of employment not later than the 22<sup>nd</sup> May, 2008. He stated that the letter was given to the Warehouse Management (comprising of Raymond Bothma, Mehluli Nhlabatsi and Dumsani Dlamini).

4.2.6 RW1(Mr Mavimbela) also mentioned that the proposed meeting scheduled for the 22<sup>nd</sup> May, 2008, between the Managing Director and the Adhoc committee did not take off. With regard to the incident of the 28<sup>th</sup> May, 2008, RW1 stated that, at about 8:00am on this day, he received a phone call from Ms Eve Smith that the workers at Matsapha were not working, and that they demanded to see the Managing Director. He said that Ms Smith requested the management to come to Matsapha, as a matter of urgency, to address the workers. He then called the Managing Director and informed him about this issue. He stated that the Managing Director (Mr Mabila), Mr Raymond Bothma, Mehluli Nhlabatsi

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and himself rushed to Matsapha. Upon arrival at Matsapha, they realized that the workers were indeed not working. He said that an impromptu meeting was convened, wherein the Managing Director addressed the workers.

4.2.7 RW1 stated that the Managing Director apologized to the workers about the Management's failure to provide them with their contracts of employment. RW1 alleged that the Managing Director there and then assigned Mr Mehluli Nhlabatsi to go to Maduduza Zwane Labour Consultants to fetch the Contracts of Employment. It was RW1's evidence, that Mr Nhlabatsi reported that he was advised by Sesikhona Zwane from Maduduza Zwane Labour Law Consultants, that the Contracts of Employment were given to the Applicant.

4.2.8 It was alleged by RW1 that Sesikhona Zwane told Mr Nhlabatsi that Mr Mbonane (Applicant) told him (Mr Zwane) that he was sent by the Respondent's Management to get the contracts, hence he gave him.

4.2.9 RW1 testified that Mr Mbonane did not disclose, to the Management on the 28<sup>th</sup> May, 2008 that he was already in possession of the contracts of employment. It was RW1's testimony that, the workers (except the adhoc committee) were also not aware of the fact that the contracts were with Mr Mbonane. RW1 testified that subsequently the Applicant and all the workers who were involved in the work stoppage or sit-in strike were accordingly disciplined by the Respondent. RW1 alleged that the disciplinary hearing against the Applicant was conducted in accordance with a fair procedure.

4.2.10 During cross examination Mr Mavimbela (RW1) was subjected to a lengthy cross examination by the Applicant's representative; but I have only noted those questions and answers which in my view are relevant to the issue which falls for determination herein.

4.2.11 Under cross examination RW1 was asked whether he acknowledged the fact that the issue of the contracts of employment had been outstanding for quite sometime. In response, RW1 admitted that this issue had been pending for close to a year.

4.2.12 It was put to RW1 that the charges preferred against the Applicant were ill-founded, and that such charges were meant to get rid of the Applicant because of his active role in championing the interests of the workers, in particular, the issue of the contracts of employment, wherein he was actively involved. RW1 disagreed with this; he said that this was further from the truth.

4.2.13 RW1 was asked whether the Applicant was furnished with the company's disciplinary code and procedure. His reply was in the negative. RW1 was further asked if he noticed or witnessed any form of violence by the workers when he arrived in Matsapha on the 28<sup>th</sup> May, 2008. RW1 admitted that there was no form of violence that he noticed, but the workers were not working.

4.2.14 RW1 was further asked whether the Respondent called any witnesses(s) to substantiate the charges of illegal picketing and direction of duty during the disciplinary hearing. RW1's answer was in the

negative; he said that no witnesses were called by the Respondent to substantiate these allegations.

#### **MEHLULI NHLABATSI'S TESTIMONY**

4.2.15 I will refer to this witness as Mr Nhlabatsi or RW1 as the case may be. Mr Nhlabatsi testified under oath and he stated that he is currently employed by the Respondent as the Warehouse Manager and is now stationed in Matsapha (previously he was based in Bhunya).

Briefly, his testimony was that on the 28<sup>th</sup> May, 2008, after the meeting between the Management and the workers, the Managing Director assigned him to fetch the copies of the contracts of employment for the workers, from Maduduza Zwane's office.

4.2.17 It was RW3's testimony that indeed he went to Mr Maduduza Zwane's office, and he was attended to by Mr Sesikhona Zwane, who informed him that the contracts of employment were given to the Applicant some few days before that day. Sesikhona told him that the Applicant (Mr Mbonane) had told him that he was sent by the Respondent's management to fetch the contracts of employment, and since no foul play was suspected he gave him (Applicant) the contracts of employment. RW3 stated that Sesikhona called the Applicant in his presence to confirm that the contracts were taken by him and the Applicant confirmed over the phone that the contracts of employment were in his possession.

4.2.18 During cross examination, only few questions were asked from this witness, and most of which are not relevant for me to summarize here.

4.2.19 RW3 was asked whether he witnessed any strike action by the workers at Matsapha. RW3's answer was that, the workers were indeed engaged in a strike action because the trucks were parked and they were not loaded. RW3 was also asked as to who was the Applicant's supervisor. He said that the Applicant's supervisor was Mr Patrick Shabangu.

#### **SESIKHONA ZWANE'S TESTIMONY**

4.2.20 On the 19<sup>th</sup> November, 2009, being the last session for the hearing of oral evidence for the Respondent's case, the Commissioner was advised by Mr Mbonane (Applicant) that his

representative, Mr Professor Msibi was not in attendance. Mr Mbonane further informed the Commissioner that he and Mr Msibi had agreed that Mr Mbonane would represent himself on that day. Ms L. Manyatsi also confirmed that Mr Msibi had telephonically informed her that he would not be available, and that in his absence, the case should proceed. Therefore, Mr Mbonane appeared in person during the hearing on the day in question.

4.2.21 The last witness to be called by the Respondent was Sesikhona Zwane, to whom I shall refer as Mr Zwane or RW3. Sesikhona Zwane gave his testimony under oath; and his testimony was that, he is currently employed by Government under the department of Economic Planning.

4.2.22 He testified that he was previously employed by Maduduza Zwane Labour Law Consultants. He stated that while he was still in the employ of Maduduza Zwane Labour Law Consultants, one of his duties inter alia, was to draft contracts of

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employment on behalf of his employer's clients. Mr Zwane mentioned that he was once assigned to draft contracts of employment on behalf of Prime Trucking and Logistics (Respondent).

4.2.23 It was Mr Zwane's testimony that one day (he did not recollect the exact date) Mr Mbonane (Applicant) came to his former workplace (Maduduza Zwane Labour Law Consultants), and he (Applicant) told him that he was sent by the Respondent's management to collect the contracts of employment for the Respondent's employees. Mr Zwane said that, unfortunately the contracts were not yet ready, and so he told Mr Mbonane to come back on the following day to collect them. On the following day, Mr Mbonane came, but unfortunately, due to other work-related commitments he did not find him in the office. He said that Mr Mbonane left a message for him to the effect that he was there to collect the contracts of employment. Mr Zwane stated that upon receipt of the said message, on the same day, he rushed to Prime Trucking to deliver the contracts of employment to the Applicant.

4.2.24 Mr Zwane (RW3) testified that when he arrived at Prime Trucking, he did not find the Applicant, but he was attended to by two (2) ladies, who showed him an open office where he left the Contracts of employment. He said that there was no one in the office when he left the contracts. RW3 stated that he then called Mr Mbonane (Applicant) to confirm whether he had received the copies of the contracts of employment, and the Applicant acknowledged receipt of same.

4.2.25 RW3 alleged that, to his surprise, one day a certain gentleman (whose identity was unknown

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to him) came to him and he told him that he was also from Prime Trucking; and he informed him that he was sent by the management to fetch the same contracts of employment. RW3 stated that he told this man that the said contracts had already been delivered to the Respondent, through Mr Mbonane, who claimed to have been sent by the management to collect the contracts. He said that this gentleman insisted that he should call Mr Mbonane, in his presence, so that he could have an assurance that indeed the contracts were given to Mr Mbonane. RW3 alleged that he called Mbonane, who confirmed that, indeed the contracts were in his possession.

4.2.26 RW3 stated that the contracts in question were modified or amended at the Respondent's request. He said that, previously he had drafted the contracts, but the Respondent requested that the contracts of employment should be modified.

4.2.27 This witness (RW3) testified that the Respondent called him as its witness in a disciplinary hearing which was initiated against the Applicant, wherein he testified in relation to the issue of the contracts of employment.

4.2.28 During cross examination, the Commissioner carefully explained to Mr Mbonane the importance of cross examination. The Commissioner told Mr Mbonane that if there was any part of RW3's testimony which he believed was not true, he was expected to dispute it through cross examination. Very few questions were asked by Mr Mbonane from this witness, and most of these questions were not relevant.

4.2.29 Under cross examination, RW3 iterated that the Applicant (Mr Mbonane) told him that he was sent by the management of Prime Trucking to collect the contracts of employment. RW3 was further asked whether or not he called the management of Prime Trucking to find out if indeed he (Mr Mbonane) was sent by it to collect the contracts of employment. RW3's response was in the negative (he admitted that he did not confirm this).

4.2.30 RW3 was further asked whether or not he called the management of Prime Trucking to find out if indeed he (Mr Mbonane) was sent by it to collect the contracts of employment. RW3's answer was in the negative; he admitted that he never called the Respondent to confirm that.

## **5. ANALYSIS OF EVIDENCE AND SUBMISSIONS**

5.1 My analysis will mainly focus on the evidence presented before me, as well as the parties' respective closing submissions filed herein.

5.2 With regard to the parties closing submissions, may I point out that I have only summarized those submissions which are relevant in the determination of the issue at hand. My summary of the closing submissions hereof is mainly deductive in the sense that it is not exactly the way it was put by the parties, but it is based on my own understanding of the issue herein.

5.3 It is submitted on the Applicant's behalf, that after the Applicant had learned that the contracts of employment were taken back to Maduduza Labour Law Consultants for amendments, the Applicant became desirous of knowing the contents hereof for him to determine whether or

not the amendments were in the best interests of the employees. It is further argued that subsequently the Applicant was authorized by the workers committee (Adhoc Committee) to get the original copies of the contracts which were being amended by the aforesaid Labour Consultants.

5.4 It is further submitted herein that the Respondent's management failed to consult the employees before the intended amendments were effected, and thus the management was not transparent in that the employees were not made aware of the terms contained in the final amended draft contracts of employment. It is argued that the employer (Respondent) had embarked on a 'hide and seek game', and that when the Applicant went to Maduduza Zwane Labour Consultants without the employer's knowledge, he wanted to outsmart the employer in the said 'hide and seek game'.

5.5 It is submitted that the "Applicant was sent by his own committee to get the copies", not the management. It is said that, RW3 (Sesikhona Zwane) wrongly assumed that the (Applicant) was sent by the management. It is argued that the Applicant had no intention to defraud the Respondent herein. On the other hand, it is argued that the Applicant was not obliged to give the employer these copies of the contracts of employment because the employer had not sent him to get same, and thus there was no dishonesty on the part of the Applicant.

5.6 It is also argued herein that the three charges preferred against the Applicant were baseless and or without any substance, moreso because no evidence was led by the Respondent to prove that

the Applicant had committed any of the acts of misconduct he was accused of having committed. It is argued that these charges were meant to get rid of the Applicant due to the fact that he vocal and was actively involved in championing the interests of the workers, in his capacity as the representative of the workers.

5.7 Finally it is submitted that the Applicant's dismissal was unfair. Wherefore it is prayed that an award be issued in the Applicant's favour, directing the Respondent to pay the Applicant the relief sought herein.

5.8 On the other hand, it is submitted on behalf of the Respondent, that the Respondent was able to prove in terms of section 42 (2) of the employment act, 1980 (as amended) that the Applicant's services were fairly terminated in that:

- (a) The reason for termination was one permitted by section 36 (b) of the Employment Act, 1980;
- (b) Taking into account all the circumstances of the case, it was reasonable to terminate the services of the Applicant, because the trust between the parties had been irreparably broken down.

5.9 It is the Respondent's submission that the Applicant was charged with four (4) counts of misconduct and one of which was gross dishonesty. It is argued that the Applicant was found guilty on all the four acts of misconduct, but he was given a sanction of dismissal in respect of the count of gross misconduct.

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5.10 It is Respondent's submission that the Applicant's dismissal was justified in that he lied to Maduduza Zwane Labour Law Consultants that he was sent by the management to collect the copies of the contracts of employment, and that as a result of this misrepresentation the aforesaid Labour Consultants were induced to give him the contracts of employment.

5.11 The Respondent further submits, with regard to the same issue of gross dishonesty, that the Applicant also failed to inform the Respondent's management that he was in possession of the contracts, during the meeting of the 28<sup>th</sup> May, 2008, which was convened for purposes of resolving the issue of the contracts of employment. It is argued that the Applicant's dishonest act caused the workers to down the tools on the 28<sup>th</sup> May, 2008, yet if the Applicant had disclosed that he was now in possession of the contracts, the work stoppage or strike could have been averted.

5.12 The Respondent, with regard to dishonesty, has made reference to the work of John Grogan, titled **Dismissal Discrimination and Unfair Labour Practices** (2005), at pages 246-247, wherein it is stated that: "dishonesty' is a generic term embracing all forms of conduct involving deception on the part of employees". The author further states that, "In employment law, a premium is placed on honesty because conduct involving moral turpitude by employees damages the trust relationship on which the contract is founded."Dishonesty' can consist of any act or omission which entails deceit. This may include with holding information from the employer, or

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making false statement or misrepresentation with the intention of deceiving the employer".

5.13 The Respondent also refers to the case of Nedcor Bank Ltd v Frank and others (2002) 23 ILJ 1243 (LAC) in which the Labour Court of appeal held that, "dishonesty entails a lack of integrity or straight forwardness and in particular a willingness to steal, cheat, lie or act fraudulently".

5.14 Overall, it is the Respondent's submission that the Applicant was fairly dismissed and that it was reasonable to terminate his services, regard being had to his dishonest act of failing to disclose to the management that he already had the contracts of employment with him at the time the the workers engaged in a strike on the 28<sup>th</sup> May, 2008. It is also argued that he lied to RW3 (Sesikhona Zwane) that he was sent by the management to fetch the contracts of employment. Therefore, the Respondent argues that as a result of the aforesaid dishonest act the confidence and trust the employer had in him (Applicant) was destroyed, hence the termination of his services was reasonable in the circumstances of the case, because the employer could not have reasonably been expected to continue with the employment relationship.

5.15 In conclusion, the Respondent prays that the Applicant's application be dismissed.

5.16 In casu, the Respondent bears the onus to prove that the Applicant's dismissal was fair. On the other hand, the Applicant is required to show that at the time of his dismissal, he was an employee

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to whom section 35 of the Employment Act 1980 (As amended) applied.

5.17 In the present case, it is not in dispute that the Applicant was an employee to whom section 35 of the Employment Act, 1980 (as amended) applied. Section 42 (2) of the Employment Act 1980 (As amended) stipulates that: "The services of 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".

5.18 The question is, has the Respondent been able to discharge the onus placed on it by the aforementioned section 42 (2) of the Employment Act.

The Respondent, in its quest to discharge the onus of proof herein, led the evidence of three (3) witnesses namely, Gideon Mavimbela (RW1), Mehluli Nhlabatsi (RW2) and Sesikhona Zwane (RW3).

5.19 It is common cause that on the 28<sup>th</sup> May, 2008, the workers engaged in a sit-in-strike or work stoppage, because they demanded the Respondent's management, in particular, the Managing Director to address them about the pending issue of the contracts of employment. The workers demanded to be furnished with the

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contracts of employment by the Respondent, so that they could sign them.

5.20 It is not in dispute that the Managing Director was able to address the workers on that day and he assigned Mehluli Nhlabatsi (RW2) to fetch the contracts of employment from Maduduza Zwane Labour Law Consultants. RW2 was unable to get the said contracts. He was told by RW3 that the said contracts of employment were given to the Applicant.

5.21 It is common cause that subsequent to that, the Respondent preferred four (4) charges against the Applicant namely:

- (a) "Gross dishonest in that on or about the 28<sup>th</sup> May, 2008, you submitted you had no knowledge of the prepared contracts of employment yet you were aware that the contracts had been handed to you".
- (b) "Incitement of other fellow employees ...in that on or about the 28<sup>th</sup> May, 2008, you indirectly incited other employees to revolt against the employer..."
- (c) "Dereliction of duty in that on or about the 28<sup>th</sup> May, 2008, you failed to inform management that there was stoppage by the employees".
- (d) Illegal picketing in that on or about the 28<sup>th</sup> May, 2008 you participated in an illegal strike which cost the company".

5.22 The Applicant was found guilty of having committed all the aforesaid acts of misconduct.

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The Chairperson recommended that he should be given a written warning in respect of counts 2, 3 and 4; but he recommended a dismissal as a sanction for count 1 (gross dishonesty). Therefore, in the instant case, the emphasis is on count 1 (gross dishonesty). The Respondent has the responsibility of proving that the Applicant indeed committed the offence of gross dishonesty, and that in the circumstances of the case it was reasonable to dismiss him. The minutes of the disciplinary hearing reveal that Mr Mehluli Nhlabatsi (RW2) and Sesikhona Zwane (RW3) testified on behalf of the Respondent, while Mr Gideon Mavimbela, (RW1) was the initiator, during the disciplinary hearing.

5.23 It is also worth mentioning that, during the disciplinary hearing the Applicant failed to dispute or rebut the evidence of Mehluli Nhlabatsi and Sesikhona Zwane, regarding the charge of gross dishonesty (count 1).

5.24 Likewise, during the arbitration hearing, the Applicant failed to dispute the evidence of Sesikhona

Zwane (RW3) and Mehluli Nhlabatsi (RW2) to the effect that the Applicant was given the copies of the said contracts of employment by Sesikhona Zwane. In particular, Sesikhona Zwane testified that the Applicant came to his workplace to collect the contracts of employment, and he allegedly informed RW3 that he was sent by the Respondent's management to fetch same.

5.25 In a nutshell, I accept the evidence of all the Respondent's witnesses. The relevance of Gideon Mavimbela's (RW1) evidence was to demonstrate that the bone of contention between the management and the workers was the issue of

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the contracts of employment which the management had not issued to the workers to sign, since the contracts were still with Maduduza Zwane Labour Law Consultants for amendments or modification. His testimony was to the effect that the workers engaged on an illegal strike action or work stoppage because they wanted the management to give them their contracts of employment, yet the contracts of employment were already in the Applicant's possession at the time of the said strike. RW1 was present on the 28<sup>th</sup> May, 2008, when the managing Director assured the workers that they would get their contracts of employment; and the Managing Director assigned RW2 to fetch the contracts from Maduduza Zwane Labour Law Consultants. RW1's evidence showed that the charges preferred against the Applicant emanated from his failure to inform the management that he was in possession of the contracts of employment.

5.26 As already said above, the testimonies of all the three witnesses were not rebutted and I am inclined to accept same because they are corroborative, consistent and credible. In his closing submissions, the Applicant also admits that he went to Maduduza Zwane Labour Law Consultants without the Respondent's knowledge, and that he was not sent by the Respondent to get the contracts of employment.

## **6. CONCLUSION**

6.1 In the light of the foregoing evidence and having taken into account the entire circumstances of the case, it is my conclusion that the Respondent was

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able to discharge the onus placed on it by the aforementioned section 42 (2) of the Employment Act 1980 (As amended). It is my considered view that the Respondent was able to prove that the reason behind the Applicant's dismissal was permitted or sanctioned by section 36 (b) of the Employment Act 1980 (as amended). In my opinion the Respondent was justified to charge the Applicant with gross dishonesty, after having discovered that the Applicant had deceitfully obtained the contracts of employment from the Labour Consultants. The Applicant lied to RW3 that he was sent by the Respondent's management to collect the said contracts of employment.

6.2 Secondly, the Applicant failed to disclose to the employer (Respondent) that the contracts of employment had since been delivered to him. The evidence adduced by the Respondent also shows that the Applicant did not even disclose to the workers that he was now in possession of the contracts of employment, because if he had done so, the work stoppage or strike on the 28<sup>th</sup> May, 2008, could have been averted. In his testimony, the Applicant claimed that he was the chairman of the Adhoc committee which was set up by the workers for purposes of pursuing the issue of the contracts of employment.

6.3 As the chairman of the Adhoc Committee, who allegedly acted within the mandate given to him by the workers, he was obliged to report back to the workers that he had since secured the contracts of employment (albeit illegally obtained), but he failed to do so. Notwithstanding this, the Applicant wants me to believe that he was unfairly dismissed because all he did was in

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accordance with the instructions given to him by the workers namely; to get the contracts of employment from the Respondent. It defeats logic as to why the Applicant did not disclose to the

workers that he got the contracts of employment. In his closing submissions, the Applicant alleges that the charges preferred against him were meant to victimize him for the active role he played in championing the interests of the workers. It puzzles me as to how the Applicant could make such a daring allegation, when in fact what he did, does not show that he was advancing the interests of the workers, but his own interests.

6.4 In my view the Applicant was properly charged and his disciplinary hearing was conducted in accordance with a fair procedure and he was correctly found guilty as charged and thus he was fairly dismissed. John Grogan, in his book titled, Dismissal, Discrimination and unfair Labour Practices (2005) at pages 246-247, states that; "Dishonesty is a generic term embracing all forms of conduct involving deception on the part of employees".

6.5 The aforesaid author further states that, "...In employment law, a premium is placed on honesty because conduct involving moral turpitude by employees damages the trust relationship on which the contract is founded. Dishonesty can consist of any act or omission which entails deceit. This may include withholding information from the employer, or making false statement or misrepresentation with the intention of deceiving the employer".

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6.6 In the case of Nedcor Bank Ltd v Frank & Others (2002) 23 ILJ 1243 (LAC), the Labour Court of Appeal held that, "dishonesty entails a lack of integrity or straight forwardness and in particular a willingness to steal, cheat, lie or act fraudulently".

6.7 It is also my finding that the Applicant was able to demonstrate that it was reasonable in the circumstances of the case to dismiss the Applicant due to the fact that the Applicant's dishonest act had resulted in the breakdown of trust and confidence the employer had in him (Applicant). In the case of Nkosinathi Ndzimandze and Another v Ubombo Sugar Limited IC case No: 476/05 at page 21, the court stated that: "calculated dishonesty cuts at the root of the Employment Contract and it destroys the employment relationship".

In casu, it is my conclusion that, the Respondent proved on a balance of probabilities that the employment relationship between the parties had become intolerable, such that the Respondent could not reasonably be expected to keep the Applicant in its employ.

6.8 In casu, it is common cause that the Respondent (Prime Trucking and Logistics) has a contract with SAPPI USUTHU COMPANY, in terms of which the Respondent renders transport services. In other words, the Respondent's relationship with SAPPI Usuthu is such that the Respondent is an independent contractor. The Respondent operates within the premises of SAPPI USUTHU, both in Matsapha and Bhunya. Ms Eve Smith (Sappi Usuthu Shipping Manager) was based in Matsapha, and she is the one who called the

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Respondent's management to come to Matsapha to address the workers during the strike action or protest. So, in my opinion the Respondent was under pressure from its employer (SAPPI USUTHU), hence it found itself compelled to dismiss the Applicant in a bid to redeem itself and to restore the confidence of SAPPI USUTHU, by demonstrating that it does not condone indiscipline by its workers.

6.9 During the disciplinary hearing, the Respondent's representative pleaded for a sanction of dismissal, which would serve as a deterrence to other employees in future (not to engage in such misconduct), and to convince SAPPI USUTHU that the Respondent does not condone indiscipline from its workers.

6.10 It is my considered view that the sanction of dismissal fits the Applicant's act of misconduct. The Applicant clearly had an ulterior motive to see the Respondent's reputation tainted by portraying it as a company which fails to address the grievances of its workers promptly, hence the strike action.

6.11 It is also my considered view that the strike action or work stoppage by the workers (which was unjustified) had a potential adverse effect on the Respondent's chances of having its contract or

tender with SAPPI USUTHU renewed (after its expiry). On the other hand, may I mention that the Managing Director was belittled by the Applicant's act of misconduct in that he showed no respect for him. Through his deception the whole Managing Director was caused to put aside his other important duties or work and he was called upon to attend a meeting on the 28<sup>th</sup> May,

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2008, following the workers strike; the workers demanded him (MD) to personally address them on the issue of the contracts of employment. The workers were also abused by the Applicant to fulfill his own selfish ends in that the workers did not know that the contracts of employment were in the Applicant's possession at the time they engaged the strike action, (if they knew they would not have engaged in the illegal strike).

6.12 Clearly, the issue of the contracts was used as a smoke screen by the Applicant, seemingly he had a score to settle with the Respondent. How then could the Respondent trust the Applicant in light of the aforesaid misconduct?

## **7. AWARD**

7.1 Pursuant to my 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 22<sup>nd</sup> DAY OF APRIL, 2010

ROBERT S. MHLANGA

CMAC ARBITRATOR

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