



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

**HELD AT MANZINI**

**SWMZ 51/2012**

In the matter between:-

**BONGINKOSI SIBANDZE**

**APPLICANT**

And

**VENUS ENGINEERING (PTY) LTD**

**RESPONDENT**

CORAM:

Arbitrator	:	Mthunzi Shabangu
For the Applicant	:	Bongani Mkoko
For the Respondent	:	Mcolisi Mbuli
Nature of Dispute	:	Unfair Dismissal
Dates of hearing	:	28/06/12; 26/07/12 and 17/08/12

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**ARBITRATION AWARD**

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**DETAILS OF THE PARTIES AND REPRESENTATION**

1. Applicant is an adult male Swazi who was represented by Mr. Bongani Mkoko, a Labour Consultant, during the course of these proceedings, his right to legal representation having been duly explained to him by the Commission.
2. The Respondent is a company duly registered according to the Company laws of Swaziland, whose principal place of business is at the Matsapha Industrial site. Mr. Mcolisi Mbuli, an Attorney practicing as such from the offices of Justice M. Mavuso and Associates represented the Respondent during the course of these proceedings.
3. The arbitration hearing was held at CMAC-Manzini office on the 28<sup>th</sup> June, 2012; 26<sup>th</sup> July, 2012 and 17<sup>th</sup> August, 2012 respectively.

#### **ISSUE TO BE DECIDED**

4. The issue for determination is whether or not the Applicant's dismissal was fair.

#### **BACKGROUND TO THE ISSUE**

5. Applicant is an ex-employee of the Respondent, having been employed during February, 2000 (exact date unknown) as an Artisan, earning **E1, 150.00** per month as at the time of dismissal. There were no written particulars of employment prepared and signed for by the parties, not even the standard employment form sanctioned by **Section 22** of the **Employment Act No. 5 of 1980**. He was in continuous employment of the Respondent until he was dismissed on the 16<sup>th</sup> December, 2011.

6. The dismissal was verbal and was not preceded by a disciplinary hearing. Applicant is challenging the fairness of the dismissal on both substance and procedure and is claiming:
  - a) Notice pay = E1, 150.00
  - b) Additional notice pay = E1, 769.20
  - c) Severance pay = E4, 423.00
  - d) Leave pay = E6, 900.00
  - e) Maximum compensation = E13, 192.00
7. The application is opposed by the Respondent who contends that Applicant's dismissal was fair.
8. Three (3) witnesses were led in evidence in these proceedings, being the Applicant who sought to establish the basis of the complaint of unfair dismissal and, two witnesses for the Respondent in an attempt to prove that the dismissal was fair. A survey of their evidence is summarized herein below.

## **SUMMARY OF THE EVIDENCE**

### **The Applicant's Version**

9. The Applicant testified under oath that:
  - 9.1 His job functions as an Artisan entailed overhauling of motor vehicle cylinder heads, grinding, amongst others.
  - 9.2 On the 7<sup>th</sup> December, 2011 the Respondent's Managing Director- Mr. Amadeu Goncalves approached him and complained that he (Applicant) was slow and that the customer whose cylinder head valves they were grinding was beginning to complain. On responding that he is going to finish up, Mr. Goncalves went on

berating him for the alleged slow pace and eventually told Applicant to go home. Applicant presumed this to be a suspension though its duration was not fixed.

9.3 Applicant, on his own consideration, decided to remain at home for a week as he only reported for work on the 16<sup>th</sup> December 2011, albeit not having come to do normal work as he arrived around mid-day. That day the company was closing for the December vacation. Applicant justified the week's stay at home by saying he thought that the 'suspension' was for a week since the Respondent's Director was not new to suspending him for that long during the month of December (making reference to December 2009 and December 2010 respectively). However, for these previous suspensions, inasmuch as they were also issued verbally, their durations were specified.

9.4 It is on this date, i.e. 16<sup>th</sup> December, 2011 that the Respondent's Director made it clear that Applicant is dismissed from his employ and was told that he would get his salary for the days worked in that month at the end of December 2011, which never happened until this issue and some outstanding leave dues were settled at conciliation held at CMAC in due course. The total settlement amount was **E810.21** which was made up of **E575.00**, being in respect of accumulated leave for the year 2011 plus **E235.21**, being in respect of wages for the days worked in December, 2011. Notwithstanding, the fact that Applicant acknowledge the payment of the above sum in respect of accumulated leave, he argued that he had never taken any annual leave during the course of his employment with the Respondent.

9.5 No disciplinary charges were preferred against the Applicant nor was any disciplinary hearing held in lieu of his dismissal. It is from

this background that Applicant views his dismissal to be substantively unfair for lack of any lawful reason justifying the dismissal. Applicant further views his dismissal to be procedurally unfair in that no disciplinary hearing was held in lieu of the dismissal. When it was put to him under cross-examination that he was dismissed for theft of a customer's cylinder head, Applicant denied that and said nothing was communicated to him as being the reason for his dismissal. He only heard of that accusation for the first time when the matter was already at CMAC.

- 9.6 Applicant further denied when it was put to him that between the 8<sup>th</sup> and 16<sup>th</sup> December, 2011 he had not been suspended by the employer but had gone awol. He maintained his word that during that period he remained at home at the sole instance of the employer who had simply told him to go home without specifying for how long and without contacting him telephonically if eventually needed to report for work.

### **The Respondent's Version**

10. Two witnesses testified on behalf of the Respondent and the pertinent aspects of their evidence are herein summarized.

- 10.1 The Respondent's Director - Mr. Amadeu Goncalves, testifying as RW 1, stated that on the 7<sup>th</sup> December, 2011 whilst sitting in his office he observed the Applicant behind one of the old buses parked on the company's yard. That was around 12:50 p.m., being some ten minutes or so before everyone goes out for lunch. Mr. Goncalves approached Applicant to find out what he was doing there as it was outside the Applicant's work station, i.e. outside the workshop. Applicant first told Mr. Goncalves that he was looking for a 13<sup>th</sup> spanel. On being

probed further, he changed his story to say he was looking for a 26<sup>th</sup> spanel. These contradicting responses provoked Mr. Goncalves' curiosity on what exactly was Applicant doing behind that scrap bus.

10.2 RW 1 started to look around and in a trench behind the scrap bus where Applicant was sitting; the Director discovered a Toyota 16 valve cylinder head that had been brought to the company for attendance by one Mr. Skhumbuzo (a customer) that morning of the 7<sup>th</sup> December, 2011.

10.3 When asked as to what was the customer's cylinder head doing behind the bus Applicant failed to offer any explanation. Applicant was then instructed by RW 1 to take the cylinder head and place it next to the Director's office and further told Applicant that Police shall be called to attend to this attempted theft.

10.4 Mr. Goncalves then went into his office briefly and on coming out, he found that the Applicant had left the company without informing anybody. RW 1 says he did approach the Matsapha Police Station that day to report the matter though he did not make a formal complaint against the Applicant. The Police promised to come to the company to conduct an investigation but eventually did not come. Mr. Goncalves never made any follow-ups with the Police and offered no explanation for his failure to do so.

10.5 RW 1 further testified that the employer did not hear anything from the Applicant between that day and the 16<sup>th</sup> December, 2011. Having come mid-day on the 16<sup>th</sup> December, Applicant

was made to wait till late in the afternoon when the Director told him to come back at the end of that month for his December salary.

- 10.6 Mr. Goncalves further stated that the Applicant approached him in January, 2012 to ask for re-employment, apologizing for what happened the previous year but he did not accept his apology.
- 10.7 The Director denied that the Applicant was suspended on the 7<sup>th</sup> December, 2011 but admitted that he had verbally suspended him around December in the previous two years. He argued that those suspensions were clearly defined as their durations were specified.
- 10.8 RW 1 conceded that notwithstanding the fact that within the company employees there should have been someone who knew the Applicant's cellphone number, the employer did not make any attempt to contact the Applicant and that no disciplinary charges were preferred against him in lieu of the dismissal.
- 10.9 RW 1 confirmed that the Applicant's salary for the days worked in December, 2011 as well as some accumulated leave was duly paid to CMAC as agreed upon between the parties at conciliation in the total tune of **E810.21**. Payment was done on the 5<sup>th</sup> March, 2012 and a CMAC receipt in proof of payment was submitted as part of his evidence marked **"AG 1"**.

10.10 Mr. Mbuli also led Mrs. Anita Saete in evidence as RW2. She is under the Respondent's employ as a Secretary since 1999. Nothing much transpired from this witness's evidence save only that she corroborated RW1's testimony to the effect that Applicant left his place of employ on the 7<sup>th</sup> December, 2011 and only came back on the 16<sup>th</sup> December, 2011. A bulk of this witness's evidence was excluded for being hearsay and thus inadmissible in that much of what she sought to say was what she was told by the Director rather than what she personally observed.

10.11 With this evidence, the Respondent argued that Applicant was dismissed for the dishonest act of attempting to steal a customer's cylinder head and for the unauthorised absence from work as from the 7<sup>th</sup> December up to the 16<sup>th</sup> December, 2011.

### **ANALYSIS OF THE EVIDENCE**

11. It is common cause that at the time of dismissal, Applicant was an employee to whom the provisions of **Section 35** of the **Employment Act No. 5 of 1980** applied. Consequently, he could not be dismissed but for any of the fair reasons of termination of employment listed in **Section 36** of the Employment Act and subsequent to a properly constituted disciplinary enquiry.

12. It also common cause that Applicant's dismissal was not preceded by any disciplinary hearing. No reasons were advanced by the Respondent for its difficulty to charge the Applicant for the alleged act of dishonesty, or alternatively, for the alleged absence from work for a week without either a permission of the employer or a certificate



signed by a medical practitioner certifying that he was unfit for work on those occasions.

13. Even in his written closing submissions, which he voluntarily elected not to orally motivate in that he absconded on the day of oral arguments, Mr. Mbuli did not make even a fable attempt to justify the failure to charge the Applicant for the alleged acts of misconduct and haul him before a disciplinary enquiry in lieu of the dismissal. This gives the impression that the Respondent is oblivious of the well entrenched position of the law that a properly constituted disciplinary enquiry is a vital requirement for a fair dismissal. This is a well established legal requirement authority for which is legion.
14. In **Alpheous Thobela Dlamini vs. Dalcrue Agricultural Holdings (Pty) Ltd, Case No. 123/2005 (IC)**, his Lordship P.R Dunseith, the then Judge President of the Industrial Court, stated that:

***“Section 35 (2) of the Employment Act, 1980 provides that no employer shall terminate the services of an employee unfairly. It is well established in our labour law that this prohibition against unfair termination refers to both substance and procedural fairness...”***

15. In the case of **Nkosinathi Ndzimandze and another vs. Ubombo Sugar Limited, Case No. 476/2005 (IC)** the Industrial Court made the following observation:

***“Even in situations where management is convinced of the guilt of the employee, it is still obliged to ensure that a fair disciplinary process is observed. The disciplinary process is not merely a means to enable management to establish the facts***

***and impose an appropriate disciplinary sanction. It is also essential as a means to achieve fair and equitable labour relations. Irrespective of the merits of the disciplinary charges, the requirement of a fair hearing is an end in its own right.”***

16. In **Mphikeleli Sifani Shongwe vs. Principal Secretary - Ministry of Education and 3 others, Case No. 207/2006 (IC)**, the Industrial court cautioned that:

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

17. The following quotation from the **Alpheous Thobela Dlamini vs. Dalcrue Agricultural Holdings’ case** (supra) should form a summary of this analysis:

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

***See also: Phillip Tsabedze vs. Swaziland Breweries Ltd t/a Swaziland Beverages, case no. 99/2003 (IC).***

18. In the foregoing regard, Applicant's dismissal should be found and is hereby found to have been procedurally unfair.
19. As with regard to substantive fairness, both the Applicant and Mr. Amadeu Goncalves (RW1) presented their testimony in a forthright and convincing manner, and neither of them were materially shaken in cross-examination. Since their versions are mutually destructive, it is necessary for the Commission to ascertain whether there is any corroboratory evidence, or inherent probabilities, improbabilities or inconsistencies which weigh the scales in favour of one or other of the versions.
20. Mrs. Anita Saete, who testified as RW 2, sought to corroborate RW1's testimony but could not succeed for the reasons already stated herein above, being that her evidence was by and large hearsay and thus excluded for being inadmissible. The only material aspect of RW2's evidence is that she confirmed the fact that Applicant did not report for duty between the 7<sup>th</sup> December, 2011 and the 16<sup>th</sup> December, 2011.
21. Now, as to whether that absence was at the employer's instance or not, Mrs. Anita Saete could not tell thus leaving the Commission with the task of weighing the two contradictory versions of the Applicant and the Respondent's Director (Mr. Amadeu Goncalves) without any other independent evidence in support of either versions.
22. Neither of these two witnesses could be said were incredible witnesses. Both of them posed a stable demeanor and remained unshaken nor contradicting themselves or being evasive under cross-examination.

However, they both tendered two completely varying versions of what exactly happened between the two of them on the 7<sup>th</sup> December, 2011.

23. The Applicant talked of first being accused of being slow in doing his job on that day by Mr. Goncalves, who eventually berated and verbally suspended him. Mr. Goncalves, on the other hand, talked of sporting the Applicant working over a customer's cylinder head in an undesignated area towards lunch hour on that day and eventually disappearing from the vicinity of the company when probed and threatened with arrest for the attempted theft.
24. The Industrial Court case of **Abel Kunene vs. Swaziland Security Guards (Pty) Ltd, Case No. 280/2001** offers significant guidance on how to solve such a puzzle. Faced with a similar scenario, his lordship the then Judge President of the Industrial Court found recourse to the wisdom of the Appellate division in the case of **Nemgia vs. Gany, 1931 AD 187** at 199 where Wassels J.A enunciated as follows:

***“Where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false.”***

25. After these words of wisdom, the Judge President observed as follows [at paragraph 22]:

***“Moreover, where one party alleges that another committed conduct of a criminal nature....such conduct will not be lightly inferred or assumed.”***

26. The Judge President made the foregoing observation whilst making reference to the Appellate Division case of **Gates vs. Gates 1939 AD 150** where it was stated as follows”

***“..The reasonable mind is not so easily convinced in such cases because in a civilized community there are moral and legal sanctions against immoral and criminal conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal.”***

27. In this case, the onus of proof rests upon the Respondent. For a finding to be made that the Respondent has succeeded in discharging its onus notwithstanding the two mutually destructive versions or stories given, the Commission must be satisfied that the Respondent’s story, upon whom the onus rests, is true and the Applicant’s story is false. The alleged accusation of attempted theft by the Applicant is hard to believe in this case.
28. Mr. Goncalves testified that, consequent to him finding Applicant working on a customer’s cylinder head in an undesignated area, he highly suspected that Applicant intended to sneak out with it as it was some few minutes before lunch break at that time. He says he approached the Matsapha Police Station to report this incident but did not make a formal complaint and the Police did not take down in writing his ‘complaint’. This is where the problem starts. Why go to the Police Station if the intention was not to open a formal complaint of attempted theft against the Applicant, which would have been reduced to writing and a docket opened for it. How was the investigation supposed to be conducted then in the absence of the details of the incident?

29. That as it may, Mr. Goncalves further says the Police promised to come to his company to investigate but did not honour up till to date. This gives rise to a further question; why didn't the 'complainant' (Mr. Goncalves) made follow ups with the Police? When this question was posed to him in cross-examination, Mr. Goncalves offered no answer to it. This is how he responded to the question:

**Q. What are your reasons of not returning to the Police?**

**A. I have got no reason.**

30. Moreover, when this attempted theft story was put to Applicant in cross-examination; he vehemently denied it and stated that he first heard of this story when the matter was already at CMAC.
31. Furthermore, after Applicant had allegedly unceremoniously disappeared on the 7<sup>th</sup> December, 2011 on being threatened that the matter will be reported to the Police, that conduct should have confirmed the Managing Director's suspicion of attempted theft, giving him confidence to charge the Applicant and discipline him for an act of dishonesty. The Director admitted that within the company employees, there should have been someone who had the Applicant's contact number. It was therefore possible to call him to come and collect a disciplinary hearing notification. In fact, even if not telephonically called, same could have been personally delivered or served on Applicant on the 16<sup>th</sup> December, 2011 when he visited the company. All that was unexplainably not done and yet it was all within the prerogative of the employer.

32. The Applicant is saying he was suspended by the Managing Director on that day following being berated of sloppiness on working over a customer's cylinder head. The suspension was verbal and had no cut-off date. He says it had grown to be normal for him to be suspended around the month of December as same had happened in 2009 and 2010 respectively. These suspensions were also verbal and would last for a week. Mr. Goncalves conceded with this fact. Applicant, therefore, argued that the reason why he remained home for a week even this time around is because he reckoned that this suspension was also for a week, and that if that was not the case, the employer would have telephonically called him since they had his cell phone number.
33. I am persuaded by the Applicant's evidence and arguments as to the events of the 7<sup>th</sup> December, 2011. The probabilities presented by the totality of the evidence are such that it cannot be easily inferred that the alleged criminal conduct imputed to the Applicant really occurred as observed from the above analysis.
34. On appraising all the evidence the Commission finds it not proved, as a matter of fact, that Applicant's services were substantively terminated. This is because even the alleged unauthorized absence, if true, it should have attracted some disciplinary charges, but zilch.
35. In the final result, the Commission finds that the Respondent has failed to prove that the termination of the Applicant's services was fair both in terms of substance and procedure. He is therefore entitled to the payment of notice, additional notice, severance and compensation for the unfair dismissal.

36. The personal circumstances of the Applicant were not established in the evidence, including the fact of whether or not he had secured an alternative employment elsewhere following this dismissal. This shortfall can only be blamed to his representative. These factors are germane in the assessment of a fair and equitable award of compensation, in terms of **Section 16** of the **Industrial Relations Act, 2000 (as amended)**.
37. Regard being had to the duration of his services under the Respondent's employ, to wit, eleven (11) years and ten (10) months, the fact that the dismissal has been found to have been both substantively and procedurally unfair, as well as the obvious financial prejudice or inconvenience consequential to an abrupt termination of employment, the Commission considers that a fair award of compensation would be eight (8) months' salary.
38. As with regard to the leave claim, Mr. Mkoko had great difficulty persuading the Commission on why same should be granted. He conceded that **Section 76 (2)** of the Industrial Relations Act places a prescription period of eighteen (18) months in respect of any claim that either party within the labour market may have as against the other, i.e. between employers and employees. He further conceded that the Applicant did not lodge this claim timeously as he is claiming unpaid leave since the year 2000 (inception of the employment contract).
39. Applicant in evidence acknowledged that at conciliation, a part settlement of the dispute was reached resulting to the Respondent paying him a sum of **E575.00** in respect of accumulated leave for the year 2011. For this reason, the further claim of leave is refused.



**AWARD**

40. The Applicant is entitled to be paid the following terminal benefits as claimed by him:

a) Notice pay	=	E1, 150.00
b) Additional notice	=	E1, 769.20
c) Severance allowance	=	E4, 423.00
d) 8 months salary as compensation for the unfair dismissal	=	E9, 200.00
		<hr/>
	=	<b>E 16, 542.20</b>
		=====

41. The Respondent is ordered to effect payment of the total amount of **E16, 542.20** in three installments of **E5, 514.06**.

42. Payments are to be done at CMAC-Manzini office beginning from on or before the last day of **September, 2012** and continuing in **October, 2012** with the last installment to be made in **November, 2012** respectively.

43. There is no order as to costs.

**DATED AT MANZINI THIS..... OF SEPTEMBER, 2012**

**MTHUNZI SHABANGU**  
**ARBITRATOR - CMAC**