



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

HELD AT MBABANE

SWMB56/19

In the matter between: -

MPILONHLE DLAMINI

APPLICANT

And

INTERFREIGHT (PTY) LTD

RESPONDENT

CORAM:

Arbitrator : Ms.N. Shongwe

For Applicant : In person

For Respondent : Mr. V. Dlamini

ARBITRATION AWARD

{07\10\19}

1. PARTIES AND REPRESENTATION

1.1 The Applicant herein is Mr. Mpilonhle Dlamini, a Liswatiadult male of Mbabane in the Hhohho region. The Applicant's postal address is P.O. Box 4329, Mbabane. The Applicant represented himself in these proceedings.

1.2 The Respondent is a company registered and incorporated in terms of the Company laws of the Kingdom of ESwatini. The Respondent's postal address is P.O. Box A180, Swazi Plaza. The General Manager, Mr. Veli Dlamini, represented the Respondent in these proceedings.

2. ISSUES IN DISPUTE

According to the Certificate of Unresolved Dispute, No. 167/2019; the nature of the dispute is one of alleged unfair dismissal and the Applicant claims the following:

-

2.1	Notice pay	=E3, 500.00
2.2	Maximum Compensation for Unfair dismissal	=E42, 000.00

2.3 The said certificate states that the Respondent refutes the Applicant's claims in their entirety, and maintains that the dismissal was fair in all respects.

3. **SUMMARY OF EVIDENCE AND ARGUMENTS**

3.1 I have considered all the evidence and submissions by the parties, but I have referred to the evidence and arguments I deem relevant to substantiate my findings as required by **Section 17(5) of the Industrial Relations Act, 2000 (as amended)**.

3.2 The Applicant gave oral evidence as well as submitted documentary evidence in support of his case.

3.3 The Respondent brought Mfanzile Ndzimandze and Mcolisi Maphalala as its witnesses, who both gave oral evidence. The Respondent also relied on documentary evidence as well.

4. **APPLICANT'S CASE** **THE TESTIMONY OF THE APPLICANT**

4.1. The Applicant testified under oath that he was employed on the 09th June 2017 as a Driver by the Respondent. He was earning a salary of E3, 500.00 per month, working six (6) days per week.

- 4.2. He stated that on the 09th November 2018, he was driving an Isuzu truck with registration numbers DSD 388 BH in the company of one Mcolisi Maphalala whom he had found at their Matsapha Office and had to give him a lift to Mbabane as his truck had experienced mechanical faults and had to be parked in Matsapha.
- 4.3. According to the witness, they arrived in Mbabane at around 18:00hrs and when they got there, they found Mfanzile Ndzimandze who is the Security Guard; who later joined them in the office for a chat.
- 4.4. He further stated that once in the office the Security Guard gave him some beans and further explained to him how they worked. Mr. Dlamini stated that they talked about the beans up until he decided to go, leaving both Mcolisi and the Security Guard inside the office.
- 4.5. It was Applicant's testimony that once outside, he discovered that he had left the truck running for about 30 minutes and he switched it off. He then took his belongings and put them in his car which was parked behind the Isuzu truck that he had been driving.
- 4.6. He testified further that he switched on the engine of his car, and whilst it was idling, he discovered that he

had some money in his jacket which he had collected whilst doing his deliveries and had not had the opportunity to count it. According to the Applicant, he got pre-occupied with counting this money and planning for grocery shopping thereafter that he finished and left, forgetting the keys in the truck.

4.7. It was the witness's testimony that he proceeded into town for some shopping. He later realised that his phone battery had died and he only recharged it once he got home whereupon realised that he had missed calls from Mfanzile the Security Guard.

4.8. He further stated that he then returned those calls and learnt from Mfanzile over the phone, that two batteries had been stolen in another truck (LSD 574 AH). Further in that telephone call he was instructed to bring back the batteries and he insisted that he had stolen or did he have any knowledge of the batteries.

4.9. The witness submitted that he was then suspended on the 12th November 2018 and was invited to appear for a disciplinary hearing set for the 21st November 2018; where a verdict of dismissal was issued.

4.10. Applicant disputed the accuracy of the Electronic Sheet for truck LSD 574 AH, which shows that it had ignition off at 18:48 hrs. and a power failure at 18:45hrs indicating that

the battery was removed then on the basis that it would not be possible that it could turn off the engine whilst the batteries were off. Hence there was no basis for his dismissal.

4.11. Furthermore, no witness has established that he was ever seen with the said batteries or loading them in his car boot hence, it is unfair to base his dismissal on this unsubstantiated allegation. He therefore, prays for compensation for unfair dismissal.

4.12. Under cross - examination, the Applicant confirmed that he arrived at 18:03hrs and left at around 19:00hrs.

4.13. He further conceded that he did not surrender the keys to the office when left the Respondent's premises, he stated that he had forgotten.

4.14. He also admitted that he had not seen any other person moving close to the trucks, as his attention was on the money that he was counting.

4.15. He stated that the Electronic report for truck LSD 574 AH was defective. Furthermore, that the Electronic Report for the truck he was driving (DSD 388 BH) was in order or correct.

- 4.16. The witness conceded that both reports were produced by the same service provider.
- 4.17. He further conceded that the status of 'stationary' recorded for truck DSD 388 BH, means it was idling and not moving.
- 4.18. He also conceded that for truck LSD 574 AH it was on record that the vehicle was stationary, the record reflected that the vehicle had stopped and had a power fail.
- 4.19. When it was put to the Applicant, he agreed with the report for DSD 388 BH and LSD 574 AH which indicated that it was stationary and further, that when a vehicle is stationary it means it is idling, not moving.
- 4.20. It was further put to the Applicant that it was reasonable to conclude that a driver who did not bring truck keys into the office as expected, knew that the Security Guard was busy chatting in the office instead of being outside patrolling, whose personal vehicle was parked outside the premises close to the truck, which had its batteries stolen and was well known to the Securities of the nearby businesses so could not arouse suspicions, had every opportunity to move the batteries weighing 18kg each, hence that was their case against the Applicant.

4.21. The Applicant disputed that and stated that anyone with the intention to steal can carry 36kg and that as a matter of fact, a person can carry a 50kg bag of cement.

4.22. It was further put to the Applicant that the standing order for Truck Drivers at the end of the day is to lock the truck and leave the keys in the office. His response was in the affirmative.

4.23. He was then asked why he deviated from the norm on that day, in response the witness stated that he forgot as he was busy counting money.

4.24. Under re-examination, the Applicant maintained that he did not steal the batteries and that anyone could have stolen the batteries.

5. **THE RESPONDENT'S CASE**
MFANZILE J. NDZIMANDZE(RW1)

5.1 The witness testified under oath that he is Respondent's Security Guard, employed on the 07th February 2011.

5.2 He stated that his duties entailed guarding the Company's properties i.e. cars, recording in a note book cars that come in and go out, verifying mileage recorded by the Respondent's drivers on the

- Respondent's cars and trucks; as well as being the custodian of the vehicles keys when drivers knocked off from work on a daily basis.
- 5.3 He stated that he knew the Applicant as a former employee of the Respondent, who was dismissed for stealing two batteries belonging to truck LSD 574 AH.
 - 5.4 It was Mr. Ndzimandze's testimony that on the day in question, the Applicant came to park his truck, left it running and went inside the office. He was in the company of Mcolisi Maphalala.
 - 5.5 He further testified that once inside the office, they chatted for some time and then the Applicant left him with Maphalala in the office. He stated that he had believed that the Applicant had gone to switch off the truck and would come back to drop the keys; but he did not.
 - 5.6 It was his further testimony that after some time had passed; he heard a car engine running, that is when he came out only to find that it was one of Respondent's other kombis and the Applicant had left.
 - 5.7 He further testified that he discovered that the batteries in question had been stolen when Mcolisi Maphalala wanted to drive truck LSD 574 AH, later that

same night. Mr. Maphalala had to come back later to assist in the offloading of parcels from Johannesburg. Mr. Maphalala had tried to switch on the truck but it did not start, when he went to check the batteries to see if the terminals were loose or not, he found that there were no batteries.

5.8 He further stated that they went to the neighboring companies to ask if they had seen anyone carrying the said batteries and the response was in the negative.

5.9 It was the witness's testimony that he then called the Branch Manager to report the missing or stolen batteries.

5.10 Mr. Ndzimandze submitted that upon realizing that the batteries were missing, he then thought about the Applicant who had not surrendered the truck keys to him when he left. He then called him and found that his mobile phone was off.

5.11 He further stated that when the Applicant called him later, he asked him who had switched off truck BSD 388 AH; the Applicant's response was it was him. He further asked him about the keys for this truck and the Applicant told him that he had left the keys in the truck. RW1 further submitted that he asked him why he

had left keys in the vehicle and the Applicant did not answer.

5.12 He stated that he then told him to bring the batteries when he reported for work the following day as two batteries had been stolen. It was the witness's evidence that the Applicant did not respond to his last comment on bringing the batteries.

5.13 Further, he stated that he did not see the Applicant taking the batteries but for his conduct he suspected him.

5.14 He stated that he then locked the Applicant's truck and put the key in the office. He stated that it was Applicant's first time to leave a truck unlocked and leave the keys in the truck.

5.15 Under cross - examination, the witness stated that Applicant's conduct of leaving the keys inside the truck and leaving without saying goodbye together with the fact that his car was parked right next to the truck on the day in question, made him a suspect.

5.16 The witness maintained that the Applicant did not respond to his statement that he should bring back the batteries.

5.17 The witness was asked how certain he was that the batteries were stolen while the Applicant was there. In response Mr. Ndzimandze stated that nobody left Respondent's premises after the Applicant had left.

5.18 Under re-examination, the witness maintained that the Applicant left without bidding them farewell.

MCOLISI B. MAPHALALA (RW2)

5.19 The witness testified under oath that he is employed by the Respondent as a Driver, since 07th March 2016. He stated that he knew the Applicant as a former employee of the company, who had been employed as a Driver.

5.20 He testified that on the day in question he had met with the Applicant at Respondent's Matsapha Office after the truck he was driving had had a breakdown; as a result, he was asked to hitch a ride to Mbabane with the Applicant.

5.21 He further stated that when they got to Mbabane, they parked next to truck LSD 574 AH and worth noting is that there was no driver in it.

5.22 He stated that when they alighted from the truck, they went inside the office as they both had papers to

reconcile and file; since they had made deliveries on that day.

5.23 Whilst they were doing their reconciliation the Security Guard came to tell them about a new recording book they were to use. He stated that in the mist of their chatting the Applicant then went outside.

5.24 He further stated that since the Applicant had left his truck running, he assumed that he had gone to switch it off and they heard that the engine had been switched off. He submitted that the Applicant never came back to leave the truck keys in the office.

5.25 He stated that as a matter of fact, he had wanted to ask for a lift from Applicant when he was going home.

5.26 It was the witness' testimony that when it was his time to leave, he asked the Security Guard which car he was going to use as he was supposed to come back to assist with offloading, he stated that the Security Guard instructed him to use truck LSD 574 AH.

5.27 He stated that when he tried to switch it on it did not respond, wherein the Security Guard asked him to try it again and it did not respond.

- 5.28 He submitted that Mr. Ndzimandze then went to check the battery terminals, wherein he discovered that there were no batteries, hence the truck would not start.
- 5.29 He further stated that, following this discovery he went to the neighboring establishments to ask if they had seen anyone carrying batteries and they told him that they had not seen anyone.
- 5.30 Notably, the cross-examination of this witness was mostly irrelevant to the issues at hand.
- 5.31 Under cross - examination, the witness stated that they made the discovery of the theft after the Applicant had left and before any other employee left Respondent's premises.

6. ANALYSIS OF EVIDENCE

- 6.1 In terms of **Section 42 (1) of the Employment Act 1980 (the Act)**, an employee who challenges the termination of his services, must first prove that **Section 35 of the Act applies to him**. It is common cause that the Applicant was in continuous employment for eighteen (18) months before his

services were terminated; consequently, he has discharged his onus.

6.2 **Section 42 (2) of the said Act**, provides that the Respondent bears the onus of proving that: -

6.2.1 The reasons for termination of the Applicant's services was one permitted by **Section 36 of the Employment Act**; and

6.2.2 That taking into account all the circumstances of the case, it was reasonable to terminate the services of the Applicant.

6.3 The Applicant is disputing the substantive fairness of his dismissal. Therefore, the key question that is up for determination herein is whether or not the Applicant was dismissed by the Respondent, in a manner that was substantively fair.

6.4 The Applicant's case is that his services were unfairly terminated for allegedly stealing two truck batteries on the 09th November 2018 and being dishonest.

6.5 The Applicant denied stealing the batteries, he stated that no one saw him carrying the said batteries. Furthermore, he disputed the accuracy of

the Satellite Tracking Activity Report for truck LSD 574 AH - he stated that it was faulty on one hand and on the other accepted it to be correct for DSD 388BH.

- 6.6 Whilst Respondent's case is that the Applicant was dishonest and further stole two batteries for truck LSD 574 AH belonging to the Respondent.
- 6.7 Further to that when the batteries were stolen the only person at the scene was the Applicant and no other person was seen after the Applicant disappeared mysteriously, without returning the keys or saying goodbye to his colleagues. Also, in the circumstances, he had enough time to steal the batteries as he knew the Security Guard's whereabouts.
- 6.8 Further to that, Applicant deviated from the Company's standard rule of handing over or leaving the vehicle keys with the Security Guard in the office. I have also drawn a negative inference from the fact that on the day in question, Applicant conveniently failed to execute such a duty thus breaking a set rule, which he had discharged diligently in his eighteen months since employment.

The consequence of this omission by Applicant is that his version of events is subject to being challenged.

6.9 I have to determine on the balance of probabilities the extent to which the conduct of the applicant amounted to an act of dishonesty and stealing the batteries. It was established in **Selamolele vs Makhado 1988 (2) SA 372-page 375 D- E** that:

“What is being weighed in the balance is not qualities of evidence but the probabilities arising from the evidence and all the circumstances of the case.”

6.10 The approach to circumstantial evidence has been set out in the well-known case of **R v Blom 1939 AD 188 at 202 - 203**. It follows the following cardinal principles of logic:

(i) The inference sought to be drawn must be consistent with all the proved facts.

(ii) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.

6.11 It is possible that several independent facts can separately be reconciled with innocence. It is however their combined persuasive force that should be assessed (**R v Mthembu 1950 (1) SA 670 (A) at 679 - 680**).

6.12 The facts of this case are such that it is very hard to take Applicants version as coherent and plausible. Thus, I find on a balance of probabilities that it is highly likely that Applicant stole the batteries.

6.13 It is trite that when assessing the fairness of a dismissal in misconduct cases one has to consider the following;as stated by the learned Author**J. Grogan (2010), “Dismissal”, at page 143 - essentials for misconduct cases: -**

- 1) *There must be a contravention of a workplace rule.*
- 2) *Is the rule reasonable and valid?*
- 3) *Was the employee aware of the rule, or reasonably expected to have been aware of it?*
- 4) *Was dismissal an appropriate sanction for such contravention?*

6.14 From adduced facts and evidence, it is clear that there was an established rule on where to leave vehicle keys when an employee left for the day.

6.15 The facts in *casu*, and the evidence of both the Applicant himself, and also that of the Respondent’s two witnesses point to the fact that the Applicant, was aware of the established rule on theft, dishonesty and where to leave the vehicle keys when that employee left for the day to go home.

- 6.16 This then points to the logical inference that the Applicant knew of the workplace rule that the sanctions for theft and dishonesty at first offence is summary dismissal.
- 6.17 Furthermore, he knew where to leave vehicle keys after a day's work, but on the day in question he conveniently deviated from the known set rule by leaving the keys in the truck; such conduct worsens his case.
- 6.18 Also, the fact that the Applicant did not dispute that he was the only person who left after it was discovered that the said batteries had been stolen.
- 6.19 It is a fact that such a rule was most definitely reasonable, so as to ensure that the employer's property was always accounted for, and did not disappear, especially at the hands of the employees.
- 6.20 To answer the final question of whether the dismissal was an appropriate sanction it is necessary to explore the meaning of dishonesty.
- 6.21 According to the Learned Author, ***J. Grogan (supra) at page 188***, the offence of dishonesty, in relation

to an employee need not constitute an actual criminal offence. It embraces all forms of conduct involving deception on the part of the employee.

6.22 In Labour Law, as opposed to the Criminal Law, honesty is of paramount importance; when not promoted on the part of workers it damages the trust relationship upon which the employment contract is founded.

6.23 It is trite that dishonest conduct in the workplace involves an act or an omission, which entails deception, withholding information from an employer, and even making a false statement with the intentions of deceiving the employer.

6.24 The Applicant in casu, by leaving the keys in the truck claiming he conveniently forgot them and thereafter batteries getting stolen after he mysteriously disappeared without bidding the RW1 and RW2 goodbye when he left; he clearly committed an act of dishonesty which had the effect of seriously damaging the relationship of trust and confidence between himself and his employer. It is my considered view that the dismissal was entirely reasonable under the circumstances.

6.25 This view is further supported by the case of ***Nedcor Bank Ltd v Frank & Others (2002) 23 ILJ 1243 (LAC)***, where the Court held that *dishonesty entails a lack of integrity or straight-forwardness, and in particular a willingness to steal, cheat, lie, or act fraudulently.*

6.26 On the Satellite Tracing Activity Report issue. I find that the Applicant is misguided, on one hand he relies on it, when it suits him, for the truck he was driving DSD 388 BHand reject it for the other truck (LSD 574 AH) where the batteries were stolen.

6.27 Worth noting, is the fact that under cross - examination he conceded that both reports were produced by the same company; for the particular timelines in question. Even at the Arbitration proceedings he maintained that one report was incorrect and the other was accurate.

6.28 Therefore, I find that the Applicant cannot blow hot and cold when it suits him; hence he is guilty of both charges.

6.29 Furthermore, it was reasonable for the employer to dismiss him.

6.30 In ***Zephaniah Shongwe vs Royal Swaziland Sugar Corporation (IC) Case No.262/2001*** the Court stated the factors to be considered when determining (whether taking into account all the circumstance of the case) if it was reasonable to terminate the Applicant's services amongst other things include the following;

6.30.1 The Applicant's personal circumstances and service record;

6.30.2 The nature of the Respondent's undertaking and the workplace itself;

6.30.3 The disciplinary standards set by the Respondent and contained in the Disciplinary Procedure;

6.30.4 The seriousness of the offence.

6.31 The Respondent operates a Courier service which transports and delivers parcels to its clients, thus batteries in the vehicles used to transport the parcels are a necessity.

6.32 It was put to the Applicant that the Respondent has zero tolerance towards dishonesty and theft; an issue that was not disputed by the Applicant.

6.33 It was also stated that this was a serious offence with a dismissal sanction even for first offenders and that the Applicant was fully aware of this as contained in the Disciplinary Code which the Applicant produced and submitted as evidence at Arbitration.

6.34 Thus, the reasonableness of the sanction has been established and is in line with **section 42(2) of the Act.**

6.35 In my opinion, the Applicant's dismissal was substantively fair, and was in line with **Section 36 (b) of the Employment Act, 1980** which provides that *"it shall be fair for an employer to dismiss an employee who is guilty of a dishonest act."*

6.36 Based on the above analysis, I find therefore that the Respondent has been able to prove that the Applicant was dismissed for breaching an existing rule which was well known to him.

6.37 Furthermore, I find that the Respondent has proved on a balance of probabilities that Applicant's dismissal was fair substantively.

7. AWARD

7.1 Having considered all the evidence presented during the hearing, the conclusion I make is that Applicant's dismissal was fairsubstantively;hence his claim for unfair dismissal is dismissed.

**THUS, DONE AND SIGNED AT MBABANE ON THIS
.....DAY OF OCTOBER 2019.**

**NOMCEBO SHONGWE
CMAC ARBITRATOR**