

**IN THE HIGH COURT OF SWAZILAND**

HELD AT MBABANE In  
the matter between:

CIVIL CASE NO. 2612/06

**TYRES IN MOTION AND GARAGE (PTY) LTD**

and

**BONGANI S. DLAMINI N.O.  
CONCILIATION MEDIATION &  
ARBITRATION COMMISSION  
ELIZABETH MSIMANGO**

**1<sup>st</sup> RESPONDENT**

**2<sup>nd</sup> RESPONDENT**

**3<sup>rd</sup> RESPONDENT**

CORAM

FOR THE APPLICANT

FOR THE 3<sup>rd</sup> RESPONDENT

FOR 1<sup>st</sup> AND 2<sup>nd</sup> RESPONDENTS

Q.M. MABUZA - JUDGE MR.

M. SIBANDZE MR. S.

MADZINANE NO

APPEARANCE

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**JUDGMENT 1/6/07**

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[1] This application seeks an order in the following terms:

(1) That the arbitration Award of the 1<sup>st</sup> Respondent, awarded on the 26<sup>th</sup> April 2006 be and is hereby-reviewed corrected or set aside.

(2) Costs of this application.

[2] The Applicant carries on business in Nhlangano and is engaged in the business of retailers of petroleum and petroleum products.

[3] The background of the matter is that the Applicant terminated the services of 3<sup>rd</sup> Respondent on the 4<sup>th</sup> July 2005.

She then reported a dispute on the 19<sup>th</sup> October 2005 to the 2<sup>nd</sup> Respondent (CMAC) wherein she challenged the fairness of the termination. She also claimed compensation and various terminal benefits.

[4] Thereafter the Applicant and the 3<sup>rd</sup> Respondent consented to arbitration of their dispute by and under the auspices of the 2<sup>nd</sup> Respondent.

[5] The 2<sup>nd</sup> Respondent appointed the 1<sup>st</sup> Respondent to arbitrate on the matter which was duly heard. The 1

Respondent issued an arbitration award on the 27<sup>th</sup> April 2006.

[6] The 1<sup>st</sup> Respondent found the termination of the 3<sup>rd</sup> Respondent both procedurally and substantially unfair and awarded the 3<sup>rd</sup> Respondent compensation and terminal benefits.

[7] It is this decision which is sought to reviewed and set aside.

[8] The bone of contention is the "rolling over" of cash which the employees of the Applicant were engaged in, in order to cover cash shortages.

[9] This practice of "rolling over" cash is where employees receiving cash on behalf of their employer will either experience shortages or themselves indulge in theft of moneys received on a particular day and then use the money from the next day's takings to cover the previous day's shortage.

[10] It is alleged that in the Applicant's business the 3<sup>rd</sup> Respondent and some of her colleagues concealed shortages by moving cash from person to person, one employee paying for another employee's previous days

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shortage, resulting in a shortage of that employees takings for that particular day, which would in turn be covered by another employee the next day.

[11] This so Applicant states amounts to an act of dishonesty in that employees receiving cash are obliged to hand over all cash received to the Applicant daily and to record their own takings correctly and not as the takings of other employees.

[12] The 3<sup>rd</sup> Respondent denies that her act of "rolling over cash" was an act of dishonesty but was used to cover shortages pursuant to a credit privilege (policy) that was extended to certain customers of the Applicant pending payment by that customer. She also states that this practice was done with the approval of the supervisors at Applicants undertakings. She also says that this practice had been in existence from the time of her employment on the 23/8/2003 and throughout her employment.

[13] The 3<sup>rd</sup> Respondent's case seems to revolve around the fact that Hlobile Dlamini a supervisor of the Applicant should have been called to give evidence at the arbitration proceedings. I agree, including herself. She could have requested the 1<sup>st</sup> Respondent to call him if she feared being rebuffed by him.

[14] It is difficult for me to make a finding on the status of the minutes of the disciplinary meeting as they are not "a question and answer" record. However my view is that had the 3<sup>rd</sup> Respondent made a strong issue of the instruction from Hlobile Dlamini, this would have been apparent ex-facie the minutes. The 3<sup>rd</sup> Respondent and her representative seemed to have taken a complacent attitude and did not challenge Hlobile Dlamini strongly about his instruction. A reasonable conclusion is that there was no such instruction or if there was the 3<sup>rd</sup> Respondent knew that it was patently wrong. The finding of the 1<sup>st</sup> Respondent should have been likewise.

[15] The issue that this court has been asked to decide is whether or not the Applicant was given a fair hearing by the 1<sup>st</sup> Respondent.

[16] The 1<sup>st</sup> Respondent was tasked with the mandate to decide whether or not the 3<sup>rd</sup> Respondent was unfairly dismissed. In arriving at a decision he took into account irrelevant considerations which had the effect of reviewing the disciplinary proceedings.

[17] He should have applied his mind on considerations relating

considerations are found in Section 36 (b) of the Employment Act 1980 which states that:

***"... it shall be fair for an employer to terminate the services of an employee for any of the following reasons ... because the employee is guilty of a dishonest act".***(emphasis added)

[18] The major consideration *in casu* relating to dishonesty is that involving the practice of "**rolling of cash**". Is it a

dishonest act or not in terms of the above cited section? If it was dishonest the next inquiry would have been did the Applicant act reasonably in terminating the 3<sup>rd</sup> Respondent's services?

[19] In determining the above the 1<sup>st</sup> Respondent did not take into account the provisions of Section 11 (1) of the Industrial Relations Act 1/2000 (as amended) which provides that the court shall not be bound by the rules of evidence or procedure which apply in civil proceedings.

[20] In the event I find that the 1<sup>st</sup> Respondent failed to apply his mind to this matter and the result thereof was that the Applicant was not given a proper hearing

[21] The order of this court is:

(a) The arbitration award of the 1<sup>st</sup> Respondent awarded on the 26<sup>th</sup> April 2006 is hereby set aside and the matter is referred back to CM AC.

(b)CMAC is hereby directed to appoint a senior attorney or counsel qualified to act as a judge of the Industrial Court of Swaziland to arbitrate in this matter.

(c)The 3<sup>rd</sup> Respondent is hereby ordered to pay the applicants costs herein.

  
J. MABUZA-JUDGE