



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

HELD AT MANZINI

CMAC REF: NO: MNZ664/07

In the matter between:

DUMSANI DLAMINI

APPLICANT

AND

SWAZI FOUNTAIN (PTY) LTD
T/A ETETENI FILLING STATION RESPONDENT

CORAM

ARBITRATOR:

VELAPHI DLAMINI

FOR APPLICANT:

EPHRAIM DLAMINI

FOR RESPONDENT:

THULI MLOTSA/
BONGANI SIMELANE

DATE(S) OF ARBITRATION:

28TH APRIL, 28TH AUGUST
AND 24TH SEPTEMBER
2008

ARBITRATION AWARD

1. DETAILS OF HEARING AND REPRESENTATION

1.1 The hearing of this matter was held on different dates between the 28th April to 24th September 2008 at the Conciliation, Mediation and Arbitration Commission (CMAC or Commission) offices, situated at 4th Floor, SNAT Cooperatives Building, in the Manzini district of Manzini.

1.2 The Applicant is Dumsani Dlamini, an adult Swazi male of P. O. Box A281, Swazi Plaza, Mbabane. He was represented at the hearing by Mr. Ephraim Dlamini, a labour consultant.

1.3 The Respondent is Swazi Fountain (Pty) Limited trading as Eteteni Filling Station, a limited company with its principal place of business at Matsapha in the district of Manzini. Eteteni was represented by Ms Thuli Mlotsa and later by Mr. Bongani Simelane both from Maduduza Zwane Labour Consultants.

2. BACKGROUND FACTS OF THE DISPUTE

2.1 The Applicant reported a dispute at the commission's offices at Enguleni building in Manzini on the 27th September 2007. According to paragraph 5.1 of the

report of dispute, CMAC Form 1, the nature of dispute was recorded as underpayments and unfair dismissal.

2.2 In terms of the report, the date when the dispute first arose was on the 15th May 2007. The issues in dispute were that the dismissal was allegedly procedurally unfair because Applicant was denied an opportunity to state his case during the disciplinary hearing. Further, Dumsani alleged that the dismissal was substantively unfair on the grounds that he did not commit any offence that warranted termination.

2.3 The outcome Applicant required from conciliation was that Respondent reinstate him or alternatively pay him the following;

(a) Notice pay	E1 016.00
(b) Leave pay (14 days)	E 576.00
(c) Underpayments (9 months)	E 288.00
(d) Additional notice	E 384.00
(e) Severance pay	E960.00
(f) Maximum compensation	E12 192.00

Total **E15 416.00**

2.4 A Commissioner was appointed by the commission to conciliate the dispute. On the 11th December 2007,

the parties held a conciliation meeting which could not resolve the dispute hence the Commissioner appointed to conciliate issued a Certificate of Unresolved Dispute on the 17th December 2007.

2.5 The parties requested on the 11th December 2007 that the matter be resolved through arbitration in terms of Section 85(2) and (3) of the Industrial Relations Act 2000 as amended. The undersigned Commissioner was subsequently appointed by the commission to determine the dispute through arbitration.

2.6 A pre-arbitration conference was held wherein the following issues were discussed and agreed upon by the parties;

(a) All disputed and admitted issues remain so disputed and admitted respectively.

(b) The Rules of the commission would apply together with common law rules of evidence with such modification as the exigencies of the arbitration demand.

(c) Documents to be adduced as evidence were exchanged by the parties.

(d) The services of an interpreter were required.

(e) There was no objection with my appointment as Arbitrator.

3. CERTIFICATE OF UNRESOLVED DISPUTE

3.1 Paragraph two sub-titled “Issue(s) in Dispute” pronounce the following issues as those that remain in dispute following conciliation;

- (a) reinstatement or alternatively
- (b) notice pay
- (c) additional notice
- (d) severance allowance
- (e) maximum compensation

3.2 The reasons for certifying the dispute as unresolved were that on the one hand, the Applicant alleged that his dismissal was both substantively and procedurally unfair. Further that the termination was procedurally unfair because the disciplinary hearing was held in his absence, inspite of Applicant raising a point of law which was that, the Respondent was not entitled to hold a hearing since 30 days had lapsed within which it was supposed to hold same. Dumsani

alleged that he was therefore denied his right to be heard.

3.3 Further Applicant alleged that his dismissal was substantively unfair on the grounds that he did not commit any offence, which would warrant a dismissal in the circumstances.

3.4 On the contrary, the Respondent denied Dumsani's allegations and asserted that Applicant's services were terminated fairly both substantively and procedurally. It contented therefore that it was not obliged to reinstate nor pay Applicant any terminal benefits as claimed.

3.5 In determining the dispute, I shall only deal with the issues that were recorded as unresolved in terms of the certificate.

4. ARBITRATION PROCEEDINGS

4.1 Applicant representatives opening statement was a repetition of what is contained in the report of dispute as well as the certificate of unresolved

dispute. I shall not unduly burden the award by repeating such averments.

4.2 The Respondent's opening statements was to the effect that Dumsani Dlamini was dismissed for gross misconduct which involved dishonesty in that he falsified records. On the 17th March 2007 whilst on duty as a petrol attendant, Applicant exchanged slips in respect of monies received. Following an investigation, Dlamini was charged with dishonesty and a disciplinary hearing was held on the 30th April 2007 whereat he was found guilty and subsequently dismissed.

4.3 The Applicant did appeal against the dismissal to the General Manager on the 11th July 2007, however the appeal Chairman upheld the verdict of the disciplinary hearing Chairperson. The Respondent's disciplinary code made any form of misconduct a dismissible offence. The Respondent maintained that the Applicant's dismissal was substantively and procedurally fair. Witnesses would testify that Applicant not only exchanged receipts but also proceeded to take cash such that there was a shortage on the night's takings.

5. APPLICANT'S EVIDENCE

- 5.1** Only one witness testified for and on behalf of the Applicant, it was Dumsani Dlamini, the Applicant. He stated that Respondent employed him as a petrol attendant on the 5th February 2004. At the time of his dismissal he was earning E968.00 (Nine Hundred and Sixty Eight Emalangen) per month as wages. Dumsani testified that he was dismissed on the 15th May 2007.
- 5.2** It was Dlamini's evidence that he had no knowledge of the charges preferred against him, but Respondent claimed that Applicant had stolen money by exchanging receipts. He was never informed how much money was allegedly stolen by him.
- 5.3** What transpired on the 17th March 2007 is that whilst he was on duty on a night shift, Applicant collected cash from customers who were mainly public transport operators, otherwise known as kombis and retained the money after furnishing the customer with a receipt. It was his evidence that the customer would hand over to him cash for filling in petrol and Dlamini in turn pays the money to a cashier and requests two receipts for the same transaction from the cashier, one to be deposited in a coin bag, the other given to the customer.

- 5.4** The cash and receipts for the same transaction were deposited into one money bag. At the end of the shift, the cash in the bag is counted to ascertain the money collected by the petrol attendant from the customers during that shift and it is reconciled with the receipts.
- 5.5** There was an erroneous exchange of cash receipt which was caused by the fact that at that time business was at a peak as the kombis were filing in at the end of the working hours in readiness for the following morning. Applicant notified the cashier about the receipt that had been mistakenly exchanged and the correct receipt was to and timeously which he deposited into the bag, destroying the wrong one she was satisfied with his explanation.
- 5.6** At the end of the shift, Dlamini had an opportunity to then count the cash in the money bag and discovered that the cash was over meaning that the amounts recorded in the receipts were less than the cash deposited in the bags. Applicant declared the over, to the cashier and in addition submitted all the cash, including the surplus to her.

5.7 Dumsani testified that he was shocked to then receive charges and suspension in respect of the events of the night shift of the 17th March 2007, on the 23rd March 2007. His suspension was without pay pending the holding of a disciplinary hearing. As far as he was concerned, when Applicant handed over the cash and receipts of the collection of that night to the cashier, she had not raised any complaint to him and she had earlier on accepted that receipts in respect of one transaction was mistakenly exchanged during the peak business hours.

5.8 Even though he was served with a letter of suspension and charges, Applicant stated that he did not sign the notice to acknowledge receipt as the letter did not advise of the date of the disciplinary hearing. Dumsani did however attend a disciplinary hearing which was postponed the first time on the direction of the Chairpersons on the 26th April 2007.

5.9 Dlamini again attended a disciplinary hearing on the 30th April 2007. The charges he faced were namely; dishonesty in that he is alleged to have stolen cash on the 17th March 2007 thereby causing a shortage in the cash collections of that night shift and participating in an illegal picket.

5.10 At the commencement of the proceedings on the 30th April 2007, he raised a point of law to the effect that more than 30 days had elapsed since he was suspended without pay and Respondent had failed to hold a hearing. It was further Applicant's evidence that he was advised by his lawyer not to participate in the disciplinary hearing since Respondent had failed to hold a hearing within a period of 30 days.

5.11 Dumsani testified that the Chairperson requested him to excuse the disciplinary hearing if he refused to participate and he then left. The hearing was held in his absence.

5.12 On or about the 15th May 2007, Applicant received a letter terminating his services with the Respondent for having been found guilty of a dishonest act and participating in an illegal picket.

5.13 Dumsani did appeal against his dismissal to the General Manager on the grounds that the hearing was held after 30 days had lapsed following his suspension without pay and secondly, the charge sheet did not specify how much was stolen.

5.14 The appeal Chairperson upheld the verdict of the disciplinary hearing Chairperson, the effect of which was that Dumsani remained dismissed.

5.15 The Applicant then went on at length to testify about another incident pertaining him being accused of theft of a sum of E1 000.00 (One Thousand Emalangeni). Quite frankly, the facts in connection with this incident were irrelevant to the issues for determination before me, I therefore see no point in stating in detail the narrative of Applicant pertaining same.

5.16 As Applicant regarded his dismissal as procedurally and substantively unfair, as relief, Dumsani was seeking reinstatement or alternatively payment of terminal benefits and compensation for unfair dismissal.

5.17 Regarding his personal circumstances, he was 26 years old, unmarried but had two children, one was attending school. At the time of the arbitration, he was unemployed.

6. UNDER CROSS EXAMINATION

- 6.1** During cross examination by Ms Mlotsa, Applicant testified that he could not recall the name of the cashier who was on duty on the 17th March 2007. Further Dlamini could not remember by how much money the collections of that night were over.
- 6.2** Dumsani stated that he could easily determine that there was an over or short fall of the cash collections because it was the business practice that for each transaction, the cash register produces two receipts, one is given to the customer, the other deposited into the money bag. The cash received from the customer is handed to the cashier. The money is short if the cash in the bag is less than the receipts.
- 6.3** Applicant when pushed by Mlotsa to estimate the amount of cash over on that night, he maintained that he could not remember.
- 6.4** With respect to the events of the 30th April 2007, the day of the disciplinary hearing, Applicant maintained that Mr. Maduduza Zwane, the chairperson advised him to leave the hearing if he was not going to participate.
- 6.5** Dlamini was also cross examined concerning the other charges which evidence in my view was not

related to the dishonest charge laid against him as a result of which he was dismissed. I will not state that evidence therefore.

6.6 In respect of the incident which was cited by the Applicant alleging that Respondent accused him of theft of E1 000.00 (One Thousand Emalangeni), when questioned by the Respondent's representative as to the name of the employee who was his colleague, who had informed Dumsani that the money was eventually recovered, the Applicant stated that he could not recall it. It was further his evidence that regarding this matter, notwithstanding that he had been interrogated by the Royal Swaziland Police, based at Matsapha police station, the Respondent never preferred charges against him.

6.7 Finally, Applicant admitted that even though the disciplinary hearing was held in his absence, during the appeal hearing, he was represented by Mr. Ephraim Dlamini wherein Respondent reheard the case.

6.8 After the Applicant had been cross examined, his representative closed his case.

7. RESPONDENT'S EVIDENCE

- 7.1** Ms Thuli Mlotsa then opened the Respondent's case by calling two witnesses to give oral evidence.
- 7.2** The first witness was Nomkhosi Mkhonta who testified that she was currently employed by the Respondent as a cashier having been employed on the 9th February 2007. She knew Dumsani Dlamini, the Applicant who is a former employee of the company.
- 7.3** Pertaining the events of the 17th March 2007, her evidence was that she was on night shift on a Saturday. It was a busy night as kombis were filling petrol. Whilst she was on duty, Nomkhosi was approached by a colleague one Sibusiso, who alerted her to beware of the Applicant when he brought his money bags because he was up to some mischief.
- 7.4** According to Nomkhosi, Sibusiso advised her not to give the cash receipts to the petrol attendants especially Dumsani, but to hand it directly to the customer. The procedure was that for one transaction, two receipts were produced by the cash register. As a cashier, she would give one to a petrol attendant to in turn hand over to the customer, the

other was deposited in the money bag and the cash would be counted at the end of the shift.

7.5 Dumsani later came to hand over a money bag containing the receipts inside. The Applicant in her presence tore a receipt and alleged that it was not for a certain transaction and instead deposited a receipt which he picked from the ground in the same bag, stating that it fell during the busy working hours when the kombis were filling up petrol.

7.6 Later on again, Dumsani came to Nomkhosi to hand over cash in a bag which was over by E10.00 (Ten Emalangeni). This witness informed Applicant of the surplus. After the kombis were filled with petrol, the cash in Dumsani's bags was counted and it was discovered that the cash was over. She concluded that perhaps the customer had been cheated, Dumsani took the money. Sibusiso came back to her to enquire what had transpired during the counting, Nomkhosi informed him that the cash was over.

7.7 When Ms Mlotsa asked Nomkhosi if she noticed any shortages on the 17th March 2007, her response was to the affirmative and even stated that the shortage was E1 200.00 (One Thousand Two Hundred Emalangeni). Nomkhosi testified that the shortage

was from Dumsani and another colleague called Yende as they were the ones who were counting on that night shift.

7.8 Mkhonta said the practice and/or procedure when she discovered a shortage was the petrol attendant was caused to sign the receipt and then hand over to management. However, on this day, she deviated from the procedure and instead wrote a report to Management wherein she reported the shortage and attributed it to the two employees, Dumsani and Yende.

7.9 She was aware that Management took disciplinary measures by suspending the two.

7.10 Nomnkhosi's evidence was that Respondent never called her to give any evidence during Applicant's disciplinary hearing. Management was supposed to call her, however, she was informed by the company that there were challenges being encountered by the Management and Dumsani, such that she ended up not being called.

8. UNDER CROSS EXAMINATION

- 8.1** During cross examination, Nomkhosi maintained that Dumsani took cash that was a surplus after the reconciliation. However, she did not count the money, but counted only the receipts.
- 8.2** This witness testified that she believed that Dumsani contributed to a shortage in her cash collections because firstly, he was exchanging receipts, throwing away genuine receipts and deposited false ones.
- 8.3** When questioned why she gave Dumsani the money that belonged to Respondent, Nomkhosi said Applicant had argued that the money belonged to the customer, for example, in one case, the customer filled petrol with E100.00 (One Hundred Emalangeni), but the money in the bag was E110.00 (One Hundred and Ten Emalangeni), Dumsani took the E10.00 (Ten Emalangeni) extra.
- 8.4** She maintained that Respondent never called her as a witness to testify during the Applicant's disciplinary hearing. On this aspect Nomkhosi could not be swayed even during re-examination.
- 8.5** Then Ms Mlotsa called Mr. Maduduza Zwane to the witness stand, who testified about his vast experience and competence in labour relations. He

was operating consultancy known as Maduduza Zwane Labour Law Consultants.

- 8.6** He remembered the Applicant as one of the employees for whom he was appointed by the Respondent to chair their disciplinary hearings. Dumsani was invited by the Respondent to attend a hearing on the 26th April 2007, however, due to the fact that he had been served with the notice of the 25th April 2007, he felt that the Applicant had not been given enough time to prepare for the case, the Chairperson *mero motu* postponed the hearing to the 30th April 2007.
- 8.7** Mr. Zwane testified that on the 30th April 2007, Applicant raised a preliminary point of law regarding the lapse of 30 days since Applicant was suspended without pay and Respondent having failed to hold a disciplinary hearing within that period of suspension. According to the chairman Dumsani stated that he was not going to say anything because he was strongly advised against doing so.
- 8.8** Mr. Zwane explained to the Applicant the implications of his refusal to defend himself. He informed the Applicant that such conduct amounted to waiving his right to state his side of the story.

Further that the hearing would proceed in his absence. After the chairman explained the repercussions of Applicant's election not to attend the disciplinary hearing, the Applicant simply left the hearing.

8.9 When all the above transpired, the employer's representative was present and later a witness was brought in to testify. After the Applicant left, Mr. Zwane ordered the employer to present its case. The witness who testified on behalf of the Respondent was Nomkhosi Mkhonta.

8.10 When all the evidence was presented and the Respondent's representative had closed the case, he found the Applicant guilty and recommended a dismissal. He advised that Applicant had a right to appeal to Mr. Robert Dlamini, the General Manager as per company procedure. His findings and recommendations were in written format. These were served on both parties.

8.11 According to Mr. Zwane, the hearing was conducted fairly because if there was any irregularity, management would have called him during the appeal hearing.

8.12 He would not have disallowed the Applicant to present his defence as that would have been contrary to the principles he was encouraging during his training of Industrial relations stake holders.

8.13 Finally, Mr. Zwane handed his findings and recommendation to the arbitration hearing, as per of his evidence which was marked exhibit “R1”.

9. UNDER CROSS EXAMINATION

9.1 The witness maintained that he used his discretion to postpone the hearing on the 26th April 2007, to 30th April 2007, otherwise the employer wanted to proceed with the matter.

9.2 Mr. Zwane denied that on the 30th April 2007 Applicant had moved an application for a postponement after raising the point of law ***in limine***.

9.3 The disciplinary hearing Chairperson testified that Nomkhosi lied under oath when she denied that she gave oral evidence during Dumsani’s hearing. He did not fabricate that there was a witness who testified on behalf of the Respondent whose name was

Nomkhosi, after all he did not know the people involved in the disciplinary.

9.4 This was as far as Mr. Ephraim Dlamini could take his cross examination. After that Ms Mlotsa re-examined the witness who confirmed that Nomkhosi was called as a witness.

9.5 Respondent's representative then closed the case.

10. CLOSING SUBMISSIONS

10.1 By agreement, the parties elected to file written final submissions which were both received by the commission by the 13th October 2008.

10.2 Basically, the Applicant's representative submitted that Dumsani's dismissal was procedurally unfair. Firstly, because the disciplinary hearing Chairman was biased in that he unilaterally postponed the hearing without any application being moved by the parties. He later refused to grant Applicant a postponement but elected to hear the case in Dumsani's absence.

10.3 Secondly, Respondent failed to prove that the Applicant was properly advised before the hearing

that the enquiry would proceed in his absence if he elected to leave.

10.4 Thirdly, the chairman was willing to proceed with the case and advised that Applicant would appeal, instead of allowing Dumsani the opportunity to consult again with his Attorneys.

10.5 Fourthly, the charges did not specifically state how much money was dishonestly taken by the Applicant.

10.6 Substantively, the dismissal was unfair because the evidence before the Chairman never at any point stated the amount of the incorrect slips that was exchanged by the Applicant.

10.7 The Chairman based his findings and decision on the hearsay evidence of Mr. Kunene as Respondent's witness Nomkhosi Mkhonta denied giving testimony at the Applicant's disciplinary hearing.

10.8 It was Applicant's submission that Nomkhosi had helped herself to the cash collections of the 17th March 2007 that were over and resorted to pushing the blame on Applicant.

10.9 The fact that the normal practice of deducting from an employees wages, if there was a shortage was not effected on Applicant because there was no shortage on this particular night.

10.10 Having submitted that Respondent failed to prove that the Applicant's dismissal was for a reason permitted by Section 36, and taking into account all the circumstances of the case unreasonable, Dumsani was praying for the relief as prayed for in his opening statement.

10.11 The Respondent countered the Applicant's submission by arguing that there was evidence that Applicant committed a dishonest act for which he was found guilty and dismissed.

10.12 Dumsani waived his right to present his defence as there was no legal basis for refusing to participate in the disciplinary hearing. Taking into account all the circumstances of the case, it was reasonable for Respondent to terminate Applicant's services. Dumsani's services were terminated in accordance with Section 36 (b) of the Employment Act 1980.

10.13 Respondent referred the arbitrator to four judgments of the Industrial Court of Swaziland, the

Industrial Court of Appeal and the South African Labour Appeal Court respectively. I will return later to the comments attributed to the Learned Judges in these cases during my analysis, it suffices to state that Respondent was relying on these authorities in support of the decision it took to terminate the services of the Applicant.

10.14 Mr Simelane who was now acting for the Respondent finally prayed that the Applicant's claim be dismissed with costs and the arbitrator rule in her favour.

11. ANALYSIS AND THE LAW

11.1 It is common cause that the Applicant was employed by the Respondent as a petrol attendant on the 5th February 2004 and that he is an employee to whom Section 35 of the Employment Act 1980 applied.

11.2 The parties are also in agreement that the Applicant was suspended without pay on the 23rd March 2007 pending investigations linking him to the offence of; falsifying records on the 17th March 2007 nightshift; dishonesty concerning work done and insulting/bad behavior or refusal to obey a lawful instruction.

11.3 There is also consensus that Applicant entered his place of employment on the 29th March 2007 inspite of an instruction not to do so.

11.4 Further it is not in dispute that following Applicant's alleged unlawful entry at his place of employment on the 29th March 2007, charges were preferred against him, where he was served with revised and amended charges.

11.5 These charges were namely; dishonesty, participating in an illegal picket; putting the name of the business into dispute and failure to observe the conditions of suspension.

11.6 It will not be necessary to particularize all the other charges except for the offence of dishonesty, because it is this that consequently led to Applicant's dismissal from employment. For the others, he was given a final warning and he has not challenged the warnings.

11.7 Further, there is no dispute that Applicant was notified of a disciplinary hearing on the 25th April 2007 to be held on the 26th April 2007.

11.8 There is consensus that the disciplinary hearing Chairperson *mero motu* postponed the hearing to the 30th April 2007.

11.9 It is common cause that on the 30th April 2007, Applicant raised a point *in limine* that the disciplinary hearing was out of time because 30 days had lapsed since he was suspended without pay and therefore he was advised not to participate in the hearing should the Chairperson proceed with same.

11.10 The parties are in agreement that the Chairperson dismissed the point *in limine* after which the Applicant left, resulting in the hearing being held in his absence.

11.11 There is no dispute that Applicant was found guilty as charged on all counts and dismissed for the offence of dishonesty.

11.12 The parties are in agreement that as per the advice of the Chairperson at the disciplinary hearing in his verdict and recommendations, Applicant appealed to the General Manager, who re-heard the matter and upheld the decision to terminate Dumsani's services.

11.13 It is in dispute that the dismissal was unfair both procedurally and substantively.

11.14 The Applicant was charged with the offence of dishonesty in that on or about the 17th March 2007 during the night shift, he exchanged customer receipt such that they reflected smaller amount.

11.15 In terms of Section 42 (2) of the **Employment Act 1980**, the burden of proof is imposed on the Respondent on a balance of probabilities to prove that the reason for termination of the Applicant's services was fair.

11.16 Section 42 (2) provides;

“The services of an employee shall not be considered as having been fairly terminated unless the employer proves-

(a) the reason for the 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 service of the employee”.

11.17 In determining whether the employer has discharged the onus cast upon it by Section 42 (2) of the Employment Act, I do not just decide whether the decision of the disciplinary hearing and the appeal hearing were fair and reasonable on the basis of the facts and evidence before these enquiries at the time. As an arbitrator, I must make my own determination on the facts and evidence led before me. I also have to consider the evidence led during the disciplinary process.

See the cases of **MSHAYELI SIBIYA V CARGO CARRIERS (PTY) LTD I C CASE NO: 282/03; ALPHEUS THOBELA DLAMINI V DALCRUE AGRICULTURAL HOLDINGS (PTY) LTD I C CASE NO: 123/05; THE CENTRAL BANK OF SWAZILAND V MEMORY MATIWANE ICA CASE NO/: 110/93.**

11.18 In the **MSHAYELI** case, citing with approval the cases of **SWAZILAND UNITED BAKERIES V ARMSTRONG DLAMINI (ICA CASE NO: 117/1994)** and **THE CENTRAL BANK OF SWAZILAND** matter, the President made these comments at page 8 paragraph 19;

“the Industrial Court does not merely decide whether the decision of the disciplinary enquiry and the appeal enquiry were fair and reasonable on the basis of the facts and evidence before these enquiries at the time. The Court must arrive at its own decision on the facts and to that end must have regard to the evidence led during the disciplinary process as well as fresh evidence led before Court”.

11.19 On the authority of Section 4 of the **Industrial Relations (amendment) Act, 2005**, as an arbitrator, I have the same powers as the Industrial Court in the determination of disputes referred to the Commission by the President of the Court or any other provision of the Act.

11.20 The Replacement Section 17 (1) provides;

“in hearing and determining any matter referred to arbitration whether by the President of the Court in terms of Section 8 (8) or of any other provisions of this Act, an Arbitrator shall have all the remedial powers of the Court referred to in Section 16”.

11.21 I now turn to assess the evidence led by the Respondent before me and also consider the facts and evidence led during the disciplinary process.

11.22 The evidence of Nomkhosi Mkhonta was that she heard from a colleague, Sibusiso on the night shift of the 17th March 2007 that Applicant was breaching procedure and she should beware. Nomkhosi observed Dumsani throw away a receipt and deposit another one in the coin bag. When she confronted him he said it was not the correct receipt for that transaction, whose cash was in the bag.

11.23 Further she testified that Dumsani approached her to hand over a money bag and on counting Nomkhosi found that the cash was over by E10.00 (Ten Emalangeni) which Applicant took to give to the customer. It was her evidence that the cash was over in all the collections brought by Dumsani.

11.24 Nomkhosi deviated from normal procedure when she failed to make Dumsani sign all the queried receipts and instead elected to write a report about the events of the 17th March 2007.

11.25 As a result of her report which she alleged implicated Dumsani and another employee called

Yende, of acts of dishonesty on that night, the Applicant was charged with dishonesty and suspended pending a disciplinary enquiry.

11.26 Nomkhosi said there was a shortage from her collections as a result of the Applicant's exchanging receipts on that night shift such that an amount of E1 200.00 (One Thousand Two Hundred Emalangeni) was unaccounted for.

11.27 This witness stated that she did not testify during the disciplinary enquiry and the appeal enquiry.

11.28 In my view, Nomkhosi's evidence is unreliable, even though she was firm on her answers.

11.29 Firstly, none of the receipts the Applicant was alleged to have exchanged were produced during the arbitration hearing or even at the disciplinary hearing and appeal hearing. I make this remark because upon reading the verdict and recommendations, the Chairperson does not refer to any receipt or document for that matter being produced.

11.30 Nomkhosi also failed to produce the report that she made on the night of the 17th March 2007. There

is also no mention of this report in the recommendations of the Chairperson.

11.31 During her evidence-in-Chief at first she said they counted the cash in the bags and there was a surplus in the collections for which Dumsani was responsible. However, even though there was no objection by Applicant's representative, Ms Mlota towards the end of Nomkhosi's testimony asked a leading question when she; "asked if there was a shortage in her cash collections, she responded that that there was, in the sum of E1 200.00 (One Thousand Two Hundred Emalangeni).

11.32 When Nomkhosi was cross examined, she admitted that she never counted all the cash collections of the night. This answer was consistent with Mr. Junior Kunene's evidence during the disciplinary hearing. Mr. Kunene said Nomkhosi had said to him if there were shortages in the cash collections of the night, Dumsani and Yende would be the ones responsible. Indeed, Mr. Kunene counted and found that there was a shortage of E1 200.00 (One Thousand Two Hundred Emalangeni) which he informed Nomkhosi about.

11.33 Even though the truthfulness of what she said to Kunene cannot be relied upon because what the verdict and recommendations mentioned as being said to her by Kunene is hearsay. It is nevertheless of circumstantial value which is relevant to the issues before me. See **ZEPHANIA NGWENYA V ROYAL SWAZI SUGAR CORPORATION I C CASE NO: 262/01.**

11.34 Nomkhosi did not personally know how much the shortage was; the only inference to be drawn is that she must have been told by Mr. Kunene. It damaged her credibility therefore to claim to have knowledge of the amount of the cash deficit.

11.35 Her evidence took a turn for the worst when she denied that she testified during the disciplinary hearing. According to the Chairperson, she did testify and the findings reflect that Nomkhosi testified. Mr. Zwane told the arbitration that she was telling an untruth when she denied attending the hearing as a witness.

11.36 Even though she was firm that she never attended any disciplinary hearing, I believe Mr. Zwane who appeared to be an honest witness.

11.37 An observation may also be made that it cannot avail the Applicant to argue vehemently that Nomkhosi never attended the disciplinary hearing, because Dumsani was not in attendance during the leading of her evidence.

11.38 The inference I draw on the totality of her evidence is that she had something to hide. No explanation was given by her at the hearing and during arbitration why she failed to cause Dumsani to sign all those dubious receipts upon hand over. She also failed to give an explanation as to what prevented her from counting the cash collections of that night. Her conduct gives credence to Dumsani's accusation that the cash he handed to her was over, if there were shortages later, then Nomkhosi must have committed theft.

11.39 The Respondent's second witness's evidence was reliable. Mr. Zwane's testimony has already been narrated above. He stated that on the evidence led before him, he came to the conclusion that Applicant had committed a dishonest act and recommended his dismissal because the offence for which Dumsani was charged was a dismissible charge according to the Respondent's disciplinary code.

11.40 In my view, the finding of the Chairperson are not supported by the facts and evidence on these grounds; Mr. Kunene the employee representative testified at the disciplinary hearing that a report was made by the cashier implicating Dumsani in acts of dishonesty in that, he had tempered with receipts resulting in distortion of the cash collected as per the receipts and the money counted at the end of the shift. This report and receipts were never produced before the Chairperson for him to properly investigate and assess if indeed there was a shortage of cash in that right of the collections of the 17th March 2007.

11.41 Even though Nomkhosi testified at the hearing to corroborate Kunene, according to the record of proceedings as captured in the findings, Nomkhosi was informed by Kunene how much was the shortage, she did not do the counting herself. The only way she came to know that there was a shortage was by hearsay. Respondent did not produce the receipts for her to identify and confirm as being those of the 17th March 2007 which the Applicant handed over to her.

11.42 As I have already remarked that on the authority of the cases of **THE CENTRAL BANK OF**

SWAZILAND V MEMORY MATIWANE and
**SWAZILAND UNITED BAKERIES V ARMSTRONG
DLAMINI**, I am not sitting as a Court of Appeal, I
have to make my own assessment of the facts and
evidence led before me during the arbitration.

11.43 The Respondent failed to call Mr. Junior Kunene who presumably counted the cash collections on the 17th March 2007. He is the same employee who received a report from Nomkhosi Mkhonta.

11.44 The report she made was not produced before me, neither were the receipts of the night of the 17th March 2007. On the totality of the evidence before me, there is no proof that Respondent suffered a loss of E1 200.00 (One Thousand Two Hundred Emalangeni) or any amount of cash for that matter.

11.45 The fact that Applicant admitted throwing away a receipt and depositing another in the coin bag was not an admission of dishonesty in my view. He explained that because business was so busy that night he mistakenly deposited the wrong receipt and upon realizing that the correct one had fallen, he exchanged it and destroyed the wrong one. This explanation may be open to some doubt. However, the onus of proving the shortages and theft of cash

by the Applicant rests with the Respondent. This onus cannot be discharged simply because it is shown that Applicant lied. See **MSHAYELI SIBIYA V CARGO CARRIERS.**

11.46 The Applicant has denied any wrong doing, he stated that on the 17th March 2007, at the end of the shift he handed over the coin bags after counting cash. He discovered that there cash was over, even though he could not recall by how much. The fact that there was cash surplus was confirmed by Nomkhosi before she was led to confirm that there were shortages by Respondent's representative.

11.47 Dumsani stated that he handed over the cash to Nomkhosi who did not make him sign any of the receipts signifying that business was normal.

11.48 This evidence is found to be true when compared with the admitted facts as stated by Nomkhosi. I cannot make an adverse finding against the Applicant simply because he damaged his credibility when narrating the events pertaining the loss of E1 000.00 (One Thousand Emalangi) by the Respondent. When asked who was the colleague who informed him that the E1 000.00 (One Thousand Emalangi) has been found, Dumsani said he could

not recall. How come he narrated in detail about this event, but had amnesia when it came to the name of the employee.

11.49 In my view, on the evidence before me, I find on balance of probabilities that the Respondent has failed to prove that the reason for terminating the services of the Applicant was fair.

11.50 Taking into account all the circumstances of the case, the Applicant's dismissal was substantively unfair and unreasonable.

11.51 Even though I embrace the comments attributed to their Lordships in the cases cited by Respondent as being authority in matters of dishonesty. I cannot apply them *in casu* because the Respondent has failed to make a case of a fair reason for dismissing the Applicant.

12. PROCEDURAL FAIRNESS

12.1 The Applicant has argued that the dismissal was procedurally unfair because; the disciplinary hearing Chairperson refused to postpone the hearing and allow the Applicant legal representation. He also decided to continue with the hearing inspite of the

fact that 30 days had lapsed since the Applicant was suspended without pay, the Chairperson held a disciplinary hearing in his absence, and that Respondent failed to state in the charge sheet how much money was stolen.

12.2 There is absolutely no merit in all the points of law raised by the Applicant, I shall deal with them ***ad seriatum***.

12.3 Regarding the first point at the hearing and during arbitration, the Applicant did not state that he applied for a postponement to secure the services of a representative. His argument was, 30 days had lapsed since he was suspended without pay, he had been advised that the proceedings ought to be permanently stayed and the charged quashed.

12.4 On a reading of the findings, the Chairman considered the issue and found that the delay in prosecuting the disciplinary enquiry was caused by the Applicant; the Respondent was entitled to prosecute therefore. In my view, it was not even necessary to review those facts notwithstanding that the ruling to continue with the hearing was correct.

12.5 Section 39 (1) and (2) of the **Employment Act 1980** provides;

“an employer may suspend an employee for his or her employment without pay where the employee is -

(a) remanded in custody; or

(b) has or is suspected of having committed an act which, if proven, would justify dismissal or disciplinary action.

(2) If the employee is suspended under subsection (2) (b), the suspension without pay shall not exceed a period of one month”.

12.6 Applicant must be relying on Section 39 (2) of the Employment Act. There is no provision in that Section nor in the Employment Act permitting a permanent stay of disciplinary proceedings if an employer fails to institute disciplinary proceedings within 30 days of suspension without pay of that employee.

12.7 There may be collective agreements that prohibit the institution of disciplinary proceedings against an employee after 30 days. The employer became

aware of the offence being committed by that employee. However, Applicant is not relying on a collective agreement or disciplinary code as a basis for raising the point.

12.8 My conclusion on this point is supported by the following authorities; **NKOSINGIPHILE SIMELANE V SPECTRUM (PTY) LTD T/A MASTER HARDWARE IC CASE NO:681/06; SHOBANE DUBE AND OTHERS V IMVUNULO RETAIL GROUP (PTY) LTD T/A SNEAKERS IC CASE NO: 579/01** and **MTHUNZI SIBANDZE V SINKHWA SEMASWATI T/A MISTER BREAD BAKERY IC CASE NO: 45/07.**

12.9 The Industrial Court has remarked that it cannot lightly interfere with the prerogative of the employer to discipline its workforce, provided that the hearing is conducted within a reasonable period. If it should transpire that a month lapses before disciplinary proceedings are commenced against an employee who is on suspension without pay, then the employer should lift the suspension without pay and remunerate the employee pending the commencement of those disciplinary proceedings. Applicant was suspended on the 23rd March 2007 and the hearing was held on the 30th April 2007. It is my

opinion that the hearing was held within a reasonable period, in the circumstances of this case.

12.10 Since I have already dealt with the second point raised in my analysis of the legislation and case law, I will deal with the third point. The Applicant argued that the hearing was held in his absence. I am satisfied that the Chairperson explained the consequences of the Applicant leaving the hearing after explaining that even if the Chairperson dismissed his point of law, Dumsani could still appeal and raise these points with the appeal Chairperson. In spite of this advice, the Applicant elected to leave, the result of which was that the hearing was held in his absence.

12.11 In my view, Mr Zwane acted reasonably in the circumstances. The Applicant as I have already stated, was ill advised regarding the legality of the disciplinary enquiry. In my opinion, the Applicant acted unreasonably when he refused to be present during the disciplinary hearing.

12.12 GROGAN, DISMISSAL 2nd Ed (2004) at 143 comments that an employer is entitled to proceed in the absence of the employee if that employee

unreasonably refuses to attend or participate in the hearing without good cause.

12.13 Even if it may be found that the employee had shown good cause, the employer offered an opportunity to Applicant when he appeared before an appeal hearing where he was present together with his representative Mr Ephraim Dlamini, where the matter was re-heard as it were. The employer therefore rectified the omission, if there was ever any. See **TRANSPORT AND GENERAL WORKERS UNION AND ANOTHER V INTERSTATE BUS LINES (PTY) LTD (1988) 9 ILJ 877 (IC)**

12.14 Concerning the last point of law, the Applicant was charged with dishonesty in that he was responsible for causing a shortfall of cash collection of the night shift of 17th March 2007. All Respondent had to prove was a cash shortfall then link the Applicant to that. Even if the charge sheet did not state the amount lost, the evidence would have cured that defect. However, I have already found that the reason for the Applicant's termination was unfair, because no direct or indirect evidence was led before me to prove the Applicant committed the alleged act of dishonesty. This point falls away in any event.

13. CONCLUSION

13.1 In conclusion, I find that the Applicant's disciplinary enquiry was procedurally fair. However, the reason for the termination of Applicant's services was unfair and taking into account all the circumstances of the case unreasonable and substantively unfair.

13.2 I now turn to the relief claimed by the Applicant. Dumsani has claimed the following;

- (a) Reinstatement; or alternatively
- (b) Notice pay
- (c) Additional notice
- (d) Severance pay
- (e) Maximum compensation for unfair dismissal

13.3 Applicant's evidence was that he was earning the sum of E968.00 (Nine Hundred and Sixty Eight Emalangi) per month. On his personal circumstances Dumsani said he was 26 years old, unmarried, but had two minor children one was in school already. Applicant was at the time of the arbitration still unemployed. In my view ten months compensation is fair in the circumstances.

13.4The Applicant's first prayer was for reinstatement. In my view, however, notwithstanding that I have found that the dismissal was substantively unfair; the circumstances surrounding the dismissal are such that a continued employment relationship would not be tolerable. I say this in as much as Mr Junior Kunene was reported to have left the employ of the Respondent. No evidence was led to show that Respondent is a sizeable entity such that the return of the Applicant would not affect the other staff members and supervisors, who were in employment at the time he was dismissed.

13.5In the premises, an order for payment of terminal benefits and compensation by the Respondent to the Applicant is equitable in the circumstances.

13.6The following order is made.

14. AWARD

14.1Judgment is entered in favour of the Applicant against the Respondent as follows;

14.2Respondent shall pay Applicant the following;

(a)	notice pay	E968.00
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(b)	additional notice	E148.92
(c)	severance pay	E372.30
(d)	10 months compensation for unfair dismissal (10 x E968.00)	E9 680.00
	TOTAL	<u>E11 169.22</u>

14.3 No order as to costs.

14.4 Respondent is ordered to pay the sum of E11 169.22 (Eleven Thousand One Hundred and Sixty Nine Emalangeni) within twenty one (21) days of service of this award upon her.

DATED AT MANZINI ON THIS DAY OF DECEMBER
2008

VELAPHI DLAMINI
ARBITRATOR