IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

HELD AT SITEKI CMAC REF NO: STK 080/06

In the matter between:

PHILLIP MKHWANAZI APPLICANT

AND

UMBULUZI GAME RESERVE RESPONDENT

CORAM

ARBITRATOR : VELAPHI DLAMINI

FOR APPLICANT : CHRISTOPHER MAHLALELA

FOR RESPONDENT : NKULULEKO J. HLOPHE

NATURE OF DISPUTE : UNFAIR DISMISSAL

DATE(S) OF ARBITRATION : 21ST JULY, 20TH AUGUST AND 10TH SEPTEMBER 2008

ARBITRATION AWARD 18/03/09

V 1. DETAILS OF HEARING AND REPRESENTATION

1.1 This matter was heard on various dates from the 21st July to the 10th September 2008 at the Conciliation, Mediation and Arbitration Commission Offices (hereinafter referred to as CMAC or Commission), situated at 1st Floor Government Complex, Siteki and Simunye Plaza, Simunye, both in the district of Lubombo.

1.2 The Applicant is Phillip Mkhwanazi, an adult Swazi male of P. O. Box 38 Mpaka. During the arbitration he was represented by Mr Christopher Mahlalela of the Swaziland Agriculture and Plantations Workers Union (SAPWU) Tambankulu branch.

1.3 The Respondent is Umbuluzi Game Reserve, an organization capable of being sued and can sue in its own name, having its principal place of business between Simunye, Tambankulu and Maphiveni in the district of Lubombo. Umbuluzi was represented at the hearing by Mr Nkululeko J. Hlophe, an Attorney from Magagula & Hlophe Attorneys.

2. BACKGROUND FACTS OF THE DISPUTE

2.1 The Applicant reported a dispute of unfair dismissal at the Commission's offices at Siteki on the 24th May 2006.

2.2 Mkhwanazi stated in his report that he was dismissed on the 19th January 2006, however, the dispute first arose on the 27th December 2005.

2.3 The Applicant summarized the particulars of all the facts that gave rise to the dispute by recording that he was unfairly dismissed on the allegation of negligence. The sanction that was passed by Respondent was inappropriate for the alleged offence.

2.4 It was Phillip's statement on the report that the dismissal was procedurally unfair because the Respondent failed to take into account that the Applicant did not have a valid written warning. Further he had voluntarily reported the event that led to his being charged; Mkhwanazi also wrote in

the report that the witnesses and the Manager had

ganged up against him and falsified the evidence to ensure that he was found guilty.

2.5 It was Applicant's contention that substantively, the dismissal was unfair on the grounds that the charges did not warrant a summary termination of his services.

2.6 Still on the Report of Dispute, the relief Phillip was claiming was reinstatement or alternatively, 12 months maximum compensation for unfair dismissal, notice pay, additional notice pay, severance allowance and any other competent relief.

2.7 My brother, Commissioner Mr Thutani Dlamini conciliated the dispute on the 14th August 2006 however, the dispute remained unresolved such that a Certificate of Unresolved Dispute was issued on the same day.

2.8 Save for the relief under the head "any other competent relief", the rest of the issues have been recorded as unresolved in the certificate.

2.9 On the 14th August 2006, the parties requested that the dispute be resolved through arbitration in terms of Section 85 (2) of the Industrial Relations Act 2000 as amended. On the 5th June 2007, I was appointed by the Commission to determine the dispute by means of arbitration.

3. A pre-arbitration conference was held in terms of which the parties discussed and agreed to the following issues;

(a) The positions of the parties during conciliation have not changed. In other words, there was no consensus on all the contentious issues.
(b) (b) All documentary evidence intended to be tendered during arbitration was exchanged by the parties.
(c) The Rules of the Commission, the common law rules of evidence with such modification, were all adopted to be applied during the arbitration.

(d) The services of an interpreter were required.
(e) (e) There was no objection to my appointment as Arbitrator.

4. ARBITRATION PROCEEDINGS

4.1 Mr Mahlalela in his opening statement on behalf of the Applicant simply repeated what was recorded in the Report of Dispute, including the relief claimed. I shall not repeat such averments.

4.2 On the other hand, Mr Hlophe for the Respondent submitted that the Applicant's dismissal was on grounds contemplated by Section 36 of the Employment Act 1980 and the Respondent's disciplinary code. Taking into account all the circumstances of the matter, the termination of Mkhwanazi's services was fair and reasonable. When the offence was committed by Phillip, he was in a position of trust.

4.3 The Respondent's Attorney went on to remark that Mkhwanazi being in a position of trust abused the trust by committing offences which in terms of the disciplinary code were dismissible. At the time of the commission of the offences, Respondent's assets were left under the care of the Applicant, who was instructed not to do specific acts. However, the Applicant defied those instructions when he committed the offences.

4.4 Mr Hlophe further stated in his opening address that Phillip was charged with the following offences.

(a) (a) driving a company vehicle without permission;
(b) negligence resulting in the damage of company property;
(c) failure to carry out the duties on his position of responsibility, resulting in a lack of adherence to company policy;

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(d) withholding and failing to volunteer information affecting the interest of the company;
(e) fabricating false information, with the result of the company being misled.

4.5 It was the Respondent's view that the last three offences had in their characteristic dishonesty as an element. Dishonesty is one of the lawful grounds for terminating the services of an employee. It may not matter the issue or item, but trust was a bedrock of the employment relationship.

5. APPLICANTS EVIDENCE

5.1 Phillip Mkhwanazi testified under oath as a sole witness for the Applicant's case by stating that he was employed by the Respondent in 1991 as a Sergeant of the Game Rangers. He was taken for training in Natal in 1993 which lasted for one and a half months.

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5.2 It was Mkhwanazi's evidence that the training entailed elementary courses in animal husbandry, especially of wildlife and how to give evidence in a Court of law.

5.3 Applicant told the arbitration that he was charged with the offence of driving a company motor vehicle without the permission of his supervisors in the absence of Mr McGinn the Manager between the 22nd to the 26th December 2005.

5.4 It was Phillip's testimony that on the 25th December 2005, he received information from an informer that there was a suspected poacher within the vicinity of Maphiveni area. He then drove the company vehicle to Maphiveni in order to have a rendezvous with the informer. Upon his return at the Game Reserve entry, he opened the boom gate, a padlock fell and hit the motor vehicle's windscreen, which was damaged.

5.5 Mkhwanazi's evidence was that he reported this incident to Mr McGinn upon his return from leave. Mr McGinn then inspected the motor vehicle.

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5.6 The Applicant stated that following the report he made to McGinn, he later conducted investigations which entailed interviewing other staff members including Mkhwanazi at the main office in the presence of the Reserve Director. Applicant was later called and made to sign a notice to attend a disciplinary hearing which was held on another day.

5.7 Phillip's testimony was that the other rangers who were interviewed were Nimrod Maseko, Aury Khumalo, Vusi Dlamini and Thembisa Ernest Mkhabela.

5.8 During the disciplinary hearing, Applicant testified that the offences were added to include a charge of negligence in that he damaged the motor vehicle's windscreen. He was found guilty by the chairperson and inspite of mitigating; it was recommended that he be summarily dismissed.

5.9 Mkhwanazi's evidence was to the effect that the Chairperson ought not to have found him guilty on the other count; it was procedure that permission should be sought for driving the company motor vehicles, provided that the destination is outside the

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Game Reserve and in excess of a radius of ten kilometers

5.10 Applicant felt that the sanction was harsh especially on the charge of negligence, because he reported the broken windscreen to the Manager and this incident had occurred whilst performing his duties.

5.11 Mkhwanazi had pleaded guilty only to one charge and not guilty to the rest. He could not recall all the offences except for the two which he alluded to during his evidence-in-chief.

5.12 On his personal circumstances, he testified that he was unemployed and in fact, not employable because he was injured on duty on his right arm whilst still working for the Respondent.

6. CROSS EXAMINATION

6.1 Mr Hlophe for the Respondent then cross examined the Applicant at length. Under cross examination, Mkhwanazi admitted that he was charged with five charges of misconduct, namely; driving a company vehicle without permission; negligence resulting in the damage of company property; failure to carry

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out the duties on his position of responsibility, resulting in a lack of adherence to company policy; withholding and failing to volunteer information to the company and fabricating false information with the result of the company being misled.

6.2 Applicant admitted that the charges all emanated from the events that transpired from Thursday 22nd December 2005 to Monday 26th December 2005, pertaining the use of the company motor vehicle SD 271 OL.

6.3 The specific details of the events Phillip admitted under cross examination were as follows;

6.3.1 He had given the motor vehicle to Aury Khumalo, his junior to drive and that, Mr White or Mr Rautenbach's permission had not been sought.

6.3.2 Applicant had also given the motor vehicle to Thembisa and Lucky, also junior colleagues to purchase medication for Lucky's friend without requesting for permission to do so.

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6.3.3 He further admitted that he drove the motor vehicle to Maphiveni in the company of Aury, Mandlenkosi and Nimrod.

6.3.4 Phillip admitted that it was misconduct to drive the motor vehicle whilst drunk and without a valid driver's licence.

6.3.5 Mkhwanazi admitted that none of these trips were recorded in the motor vehicle log book by either himself or the other drivers as per procedure.

6.3.6 Applicant admitted that it was misconduct not to record the use of the motor vehicle in the log book.

6.3.7 Phillip also admitted that the charges he was facing were all dismissible offences, even for first offenders.

6.4 Notwithstanding that Applicant admitted some of the events that occurred during the 23rd to 26th December 2005; he tried to justify the reason for his non adherence to the rules.

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6.5 Applicant denied that Aury was drunk or unlicenced when he allowed him to drive the motor

vehicle.

6.6 He further persisted that he permitted Thembisa and Vusi to drive the motor vehicle to buy the medication; because he wanted them to return quickly so that they have enough man power in case there was a report of poachers in the Reserve.

6.7 Phillip denied that the numerous trips from the Reserve to Maphiveni were personal, for instance, buying drinks, transporting his family, drinking at La Masiya's shebeen. He however stated that as the period was during Christmas, as rangers they were patrolling in search of would be poachers in preparation of an ambuscade and having rendezvous with informers.

6.8 Applicant denied that he had instructed Nimrod Maseko to drive the motor vehicle from the Reserve to Maphiveni to fetch him. He admitted though that later he became a passenger on this vehicle when Nimrod drove it back.

6.9 Applicant denied that he did not act against Nimrod following the latter driving the motor vehicle. It was

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his evidence that after they arrived at the camp, he charged him. He admitted though that he never voluntarily brought this incident to Mr McGinn's

attention.

6.10 Phillip denied that the Manager had specifically instructed him not to allow the other rangers to drive the motor vehicle because they were drunk and did not possess valid driver's licenses.

6.11 Finally, he stated that all the incidents that culminated in the charges were a fabrication brought about following a conspiracy between the Manager and the other rangers whose names were mentioned above.

6.12 Mr Mahlalela then closed the Applicant's case at this stage.

7. RESPONDENT'S EVIDENCE

7.1 Mr Hlophe called three witnesses to testify during the Respondent's case, namely; Matthew McGinn, Mandlenkosi Motsa and Thembisa Mkhabela in that order.

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8. TESTIMONY OF MATTHEW MCGINN

8.1 Matthew McGinn testified that he was the Manager of Umbuluzi Game Reserve and therefore Applicant's supervisor.

8.2 It was his evidence that during the period 22nd December 2005 to 26th December 2005 he was away on leave. It so transpired that on the 22nd December 2005, there had been a staff Christmas party and the rangers had been drinking alcoholic beverages.

8.3 The Manager's evidence is that he called Mkhwanazi and gave him specific instructions that he should not allow the other rangers to drive the motor vehicle, as they had been drinking heavily during the Christmas party. Further that the motor vehicle should not be driven without the permission of Mr White and or Mr Rautenbach.

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8.4 Mr McGinn's testimony was that he left the instructions with Mkhwanazi because he was senior to the other rangers as Sergeant and he was what he would term "second in command: his

"eyes" and "ears".

8.5 It was his evidence that upon his return, Applicant informed him that the motor vehicle's windscreen was damaged. As Manager, he wanted to know the circumstances surrounding the broken windscreen. Mkhwanazi disclosed to him that the boom gate padlock fell on the windscreen whilst he was opening the gate. When this incident occurred, he was with Nimrod Maseko.

8.6 The Manager stated that what Applicant reported was odd because if Mkhwanazi was with Nimrod at that time, then it should have been Nimrod who opened the gate as a passenger not Applicant as driver. This then made McGinn suspicious and led him to commence his own investigation.

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8.7 McGinn's testimony was that he began interviewing Nimrod whose name was mentioned by Mkhwanazi. Nimrod denied that he was with Mkhwanazi when the windscreen was damaged. Nimrod's denial only strengthened his suspicions such that he intensified his investigation.

8.8 The Manager eventually interviewed the other rangers and it was during the process of these interviews that more incidents of breach of company procedure and practice by the Applicant and the others were revealed. These reports were described by other sources other than Mkhwanazi, who failed to make disclosure of pertinent events.

8.9 According to this witness, Applicant was then charged with the offences already alluded to above. He was brought before a disciplinary hearing whereat Mkhwanazi pleaded guilty to the negligent charge and not guilty to the rest.

8.10 The Manager's evidence is that at the disciplinary hearing which was held on the 5th and 10th January 2006, three witnesses were called to support the allegations against Mkhwanazi namely; Nimrod

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Maseko, Aury Khumalo and Mandlenkosi Motsa. He was the complainant/initiator. The chairman was an independent person from outside the management of the Reserve. The Applicant was represented by a certain Mr E. Mabila, a shop steward.

8.11 McGinn stated that Mkhwanazi was afforded the opportunity to cross examine the witnesses and to state his case in defence. Finally, he was found guilty on all counts and after Applicant mitigated, he was given a sanction, a summary dismissal as from the date of delivery of the sentence.

8.12 The witness testified that Mkhwanazi was in a position of trust when he was given those instructions and left in charge. When he let all these irregularities occurr under his watch and some of them committed by him, he had abdicated his responsibilities. Mkhwanazi's failure to disclose all these incidents and fabricating false information destroyed all the trust that Respondent had reposed on him. It was therefore fair and reasonable in the circumstances that Applicant was dismissed.

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8.13 The Manager referred to a series of documents and notices which were marked as exhibit "R1" to "R12". These were respectively; the notice of a disciplinary hearing; minutes of the hearing held on the 5th January 2006; minutes of the continuation of the hearing held on the 10th January 2006; the disciplinary hearing sentence, the Report of Dispute; a letter from Alexander Forbes on Sibaya Provident Fund payment to Applicant; Respondent's disciplinary code; cheque requisition; tax directive from the Commissioner of Taxes; a Court order; notes for disciplinary hearing and finally an extract from the log book.

8.14 It was McGinn's evidence that inspite of the summary termination of Mkhwanazi's services; the latter was paid severance allowance by the Respondent. The amount was E3 955.20 (Three

Thousand Nine Hundred and Fifty Five Emalangeni Twenty Cents), El 305.15 (One Thousand Three Hundred and Five Emalangeni Fifteen Cents) was applied to tax and E2 053.00 (Two Thousand and Fifty Three Emalangeni) was applied to a garnishee order. In the end, Applicant was paid E597.05 (Five

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Hundred and Ninety Seven Emalangeni Five Cent) as a residual sum.

8.15 The Manager stated that Mkhwanazi was also paid the sum of E21 946.25 (Twenty One Thousand Nine Hundred and Forty Six Emalangeni Twenty Five Cents) as benefits payable from the Sibaya Provident Fund, representing his own and the employer's contribution, inspite of being dimissed for misconduct.

8.16 Mr Mahlalela then cross examined the Manager, it was put to the witness that there was a conspiracy against Mkhwanazi by himself and the Applicant's colleagues. That was denied.
8.17 It was further put to McGinn that he no longer needed the services of the Applicant and this he had disclosed during the disciplinary hearing and also during conversation he had with Mkhwanazi in the presence of Mr George White. The Manager denied that he did not require the services of the Applicant. He however admitted that without any malice, it was suggested to Mkhwanazi if he would consider voluntary exit in view of his injury and this

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conversation occurred some time prior to Mkhwanazi committing these acts of misconduct.

8.18 Then Mandlenkosi Motsa testified briefly to the effect that whilst he was at the camp office, Nimrod informed him that Mkhwanazi had instructed Nimrod to fetch him at Maphiveni. This witness stated further that later that evening he saw Mkhwanazi being chauffeured by Nimrod, an unlicensed driver into the camp.

8.19 Mr Mahlalela's cross examination of this witness was centered on his testimony during the disciplinary hearing; Mandlenkosi stated that he was only asked a question that required a yes or no response. He denied that he was now changing his evidence.

9. TESTIMONY OF THEMBISA MKHABELA

9.1 The last witness for the Respondent, Thembisa Mkhabela testified that he recalled the events of the 26th December 2005. What transpired is that Mkhwanazi authorized him to use the company motor vehicle, a Toyota Hilux, which was usually used in operations, to go to Maphiveni together with Lucky. He was not aware if the Applicant had

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obtained permission before giving them the motor vehicle.

10. CROSS EXAMINATION

10.1 During cross examination, this witness stated that it was Lucky who drove the motor vehicle, he did not know if Lucky had asked for permission. He had worked with Mkhwanazi for 16 years and he knew Applicant to be a trustworthy person. He could not be swayed under re-examination.

10.2 After this witness, the Respondent closed its case. The parties elected to prepare written final submission and to make brief address to emphasize and highlight crucial issues. The 10th September 2008 was set aside for these oral and written final submissions.

11. FINAL SUBMISSIONS

11.1 APPLICANTS

11.2 Mr Mahlalela submitted that Mkhwanazi's dismissal was unfair because Mr McGinn and Mr White had a preconceived plan to get rid of him prior to the

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disciplinary hearing when he was persistently requested by the two to resign.

11.3 The Applicant's representative argued that it was untrue that Mr McGinn was happy to work with the Applicant, as he had suggested before the hearing, in view of the pressure Mr McGinn brought to bear on Mkhwanazi to resign from the Reserve.

11.4 It was Mkhwanazi's argument that Mr McGinn should not only have lost trust in him, but also his colleagues Aury Khumalo, Nimrod Maseko, Thembisa Mkhabela and Mandlenkosi Motsa, because these were all adults who should have been responsible. The rules of the Reserve also applied in equal measure to these colleagues. When he was punished for offences committed by the others and let them off the hook, the Respondent was not applying the rules consistently.

11.5 Mr Mahlalela submitted that all the rangers had to be responsible and protect the company property against abuse by anyone. As adults none of them could be forced to carry out unlawful and unreasonable instructions.

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11.6 It was Applicant's arguments that the rangers especially Aury Khumalo, Mandlenkhosi Motsa and Nimrod Maseko Ned during the disciplinary hearing when they testified that during the 22nd to the 26th December 2005, they were not patrolling or performing official work, but ran Mkhwanazi's personal errands. These rangers were part of a larger conspiracy to force Applicant out of the Reserve.

11.7 Mkhwanazi's representative submitted that the Applicant reported the broken windscreen to McGinn and this should have heavily weighed in his favour when the sanction was passed.

11.8 The Applicant finally submitted that he viewed the dismissal as unfair and was praying for the following relief;

(a) 12 months maximum compensation for unfair dismissal
(b) Notice pay
(c) Additional notice

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(d) Any other competent relief

Applicant had worked for Respondent for a period of six years and was remorseful during the trial.

12. RESPONDENT'S

12.1 Mr Hlophe submitted that Mkhwanazi was dismissed following his being charged with various offences and found guilty by a disciplinary inquiry. The offences with which he was charged were all dismissible in terms of the disciplinary code read together with Section 36 of the Employment Act. Taking into account all the circumstances of the matter, it was fair and reasonable to terminate the Applicant's services.

12.2 The Respondent argued that it had the duty to prove on a balance of probabilities that the Applicant had committed dismissible offences in terms of both the company's disciplinary code and Section 36 of the Employment Act and taking into account all the circumstances, it was fair and reasonable to dismiss the Applicant. The Respondent discharged that duty.

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12.3 It was Respondent's contention that the evidence revealed issues that were common cause namely; that there was a staff party on the 22nd December 2005, whereat one Aury Khumalo was seen drinking alcoholic beverages; during the party Mkhwanazi was called by Mr McGinn and instructed to be responsible for all assets of the business as the Manager was going on leave; Mkhwanazi was warned not to allow the motor vehicle to be driven by the other employees who had been drinking alcohol; the motor vehicle should only be used for business purposes; if it so happened that the vehicle was needed to be used for private errands, then the permission of Mr Rautenbach or Mr White had to be sought and obtained.

12.4 Mr Hlophe submitted that in defiance of the Manager's instructions, the following occurred on the 25th December 2005; the motor vehicle was driven to Maphiveni for a private matter and Mr White's or Mr Rautenbach's permission were never sought. The company was misled when this trip was disguised as a patrol drive, which act was dishonest and had an adverse effect on the trust required to sustain the employment relationship; Mkhwanazi permitted Aury Khumalo to drive the

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motor vehicle on his personnel errand, without the permission of Mr Rautenbach and notwithstanding that Aury was drunk.

12.5 It was further submitted that the above offence indicated dishonesty in that this information was not disclosed to the Manager upon his return. The failure to disclose this contravention affected the trust bestowed on the Applicant by Respondent.

12.6 Further Respondent submitted that Nimrod Maseko who was not in possession of a valid drivers license, was permitted to drive the motor vehicle on a public road between the camp and Maphiveni; during working hours on the 25th December 2005, the Applicant was found drinking alcoholic beverages and was with his family members; the motor vehicle was driven back to the camp by Nimrod whilst Applicant was a passenger.

12.7 The Respondent argued that the usage of the motor vehicle was for a personal errand and no permission was obtained; furthermore this usage was never voluntarily disclosed to the Respondent by the Applicant. No disciplinary action was taken against Nimrod which then drew the inference that Maseko

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had Mkhwanazi's approval to drive the company vehicle.

12.8 Mr Hlophe continued to submit that on the 26th December 2005, the Applicant allowed Thembisa and Lucky to drive the company vehicle to Maphiveni to purchase medication for Thembisa's friend without Respondent's permission.

12.9 Further it was Respondent's submission that the entire usage of the motor vehicle in the absence of Mr McGinn was not recorded in the motor vehicle log book. These occurrences were not volunteered to the Manager, but the latter had to carry out an extensive investigation to uncover same. The concealment of the said incidents was dishonest in nature since Applicant was duty bound to disclose them to the Respondent.

12.10 It was submitted that owing to Applicant's involvement in the foregoing violation of company rules and instructions, he was charged with the offence already mentioned in this award. Mkhwanazi was aware of the disciplinary code as he had been furnished on engagement as a ranger and whilst he was an employee of Tambankulu Estates,

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since the two companies use the same disciplinary code owing to the fact that Tambankulu has a management contract with Umbuluzi Game Reserve.

12.11 Mr Hlophe further submitted that given the seriousness of the charges faced by the

Applicant and Respondent's practice in similar matters, it was fair and reasonable to terminate Mkhwanazi's services.

12.12 Finally, Mr Hlophe referred me to the following legal authorities;

Royal Swaziland Sugar Corporation V Paul Mavundla - ICA Case No: 5/06;
Anglo American Farms t/a Boschendal Restraurant V Konjwayo (1992) 13 ILJ 573 (Lac)
John Grogan, Dismissal 2004 At P. 116

He prayed that the application be dismissed.

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13. ANALYSIS AND THE LAW

13.1 The Employment Act 1980 imposes a duty on both the Applicant and the Respondent to prove certain facts where the fairness and reasonableness of a dismissal is in issue.

13.2 According to Section 42 (1) of the Employment Act, the Applicant has a duty to prove that he was an employee who was not on probation; a casual; a member of the immediate family of the employer and not employed on a fixed term contract whose term had expired. In other words, he must establish that he was an employee to whom Section 35 applied.

13.3 Section 42 (2) then imposes a duty on the Employer (Respondent) to prove that the reason for the termination was one permitted by Section 36 and taking into account all the circumstances of the case, it was reasonable to terminate the service of the employee.

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13.4 I now turn to evaluate the evidence led before me in order to determine if the parties have discharged the different burdens of proof.

13.5 It is common cause that the Applicant worked for the Respondent in a permanent and pensionable position of a game ranger for a continuous period of six years. He has therefore discharged his onus.

13.6 Regarding the Respondent's onus, it requires a more elaborate and or detailed analysis. The Respondent led the evidence of three key witnessess, namely Matthew McGinn, Mandlenkosi Motsa and Thembisa Mkhabela to prove that the dismissal was fair and reasonable in the circumstance and that the reason for such termination was permitted by the disciplinary code and Section 36 of the Employment Act.

13.7 Further Respondent produced a notice of a disciplinary hearing, the disciplinary code, minutes of the disciplinary hearing and an extract from the log book as documentary evidence in support of the testimonies of the aforesaid witnesses.

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13.8 To make a proper and judicious determination of whether or not the employer has discharged the onus imposed upon her by Section 42 (2) of the Employment Act, I am not sitting as a Court of Appeal against the decision of the disciplinary hearing, I have to make my own assessment of the facts and evidence led before me during the arbitration and also consider the evidence led during the disciplinary inquiry.

See Swaziland United Bakeries V Armstrong Dlamini IC Case No: 117/1994; The Central Bank Of Swaziland ICA Case No: 110/93 and Mshayeli Sibiya v Cargo Carriers (Pty) Ltd IC Case No: 282/02

13.9 In the MSHAYELI case, the President cited with approval the Swaziland United Bakeries and Central Bank Of Swaziland cases and made the following comments at page 8 of the judgment;

"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

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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"

3.10 On the authority of Section 4 of the Industrial Relations (amendment) Act, 2005, it is my view that I have similar powers as the Industrial Court in the determination of disputes referred to the Commission either by the President or by any other provision of the Act.

3.11 The Applicant denied that the instructions Mr McGinn gave him entailed that, he should not allow the other employers who were drunk and had no drivers licence to drive the company motor vehicle. He admitted that he was given instructions that involved a general scope of responsibilities over the company's assets and staff discipline during the absence of the Manager.

3.12 Notwithstanding the denial of the specific instructions, Mkhwanazi conceded that he was aware that it was an offence for an employee to

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drive the company motor vehicle without a valid licence and driving under the influence of intoxicating liquor.

3.13 On the other hand, Applicant admitted that he was left in a position of responsibility by the Manager, but his representative denied that he was the "eyes" and "ears" of Matthew McGinn. Infact, it was contended by Mr Mahlalela that no ranger was responsible for the others during the absence of the Manager. Simply put every worker did as he pleased at that time.

3.14 In my view, I find it difficult to comprehend that the Applicant, who admitted that he was the most senior employee and that the Manager called him privately to give him instructions, which entailed certain responsibilities, lacked authority to manage and control the affairs of his employer during the absence of Mr McGinn. I reject as contrived and an afterthought the assertion that during McGinn's absence, all the rangers had similar responsibilities.

3.15 The assertion that Mkhwanazi was not given any instructions to be responsible over his colleagues, flies against the Applicant's own admission during

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his cross examination by Mr Hlophe. When Mr Mahlalela suggested to Mr McGinn that the Applicant was not given any responsibilities, therefore not placed in a position of trust, that suggestion was inconsistent with Mkhwanazi's own admission under oath.

3.16 The Applicant only denied specific instructions, namely that McGinn had instructed him not to permit the motor vehicle to be driven by his drunk colleagues or allow unlicenced rangers to drive the company vehicle.

3.17 Regarding this aspect, it is my view that Mkhwanazi was instructed not to give the motor vehicle to unlicenced and drunk junior colleagues. I hold this view on account of his credibility that became doubtful during his testimony during his cross examination, as it will be shown below.

3.18 I now turn to consider in chronological order whether the events that are alleged to have happened were proved as facts.

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3.19 On the 22nd December 2005, during the Christmas party, one Aury Khumalo is said to have been permitted by the Applicant to drive the motor vehicle when Khumalo had been drinking

alcoholic beverages.

3.20 Aury Khumalo was called during the disciplinary hearing, however, he did not testify during the arbitration because he could not be located, having left the Respondent's employ at the time of this hearing. I need to have recourse to the minutes of the disciplinary hearing.
3.21 The evidence of Aury Khumalo recorded in the minutes of the disciplinary hearing, unless repeated at the arbitration, remains hearsay because it cannot be tested by cross examination. It is inadmissible to prove the truth of the facts stated by Aury at the hearing. It is however of certain circumstantial value taking into account the issues before this arbitration. See 2EPHANIA NGWENYA V RSSC IC CASE NO: 262/01 at page 8.

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13.22 However, the Applicant admitted giving Aury Khumalo the motor vehicle to attend to a personal errand which involved a sick relative. Mkhwanazi denied though that when he permitted Aury to drive the company motor vehicle he was drunk. Applicant further admitted that the use of the motor vehicle was not sanctioned by Mr Rautenbach nor was the trip recorded in the vehicle log book. In these circumstances, despite the inadmissible nature of hearsay, what Aury is recorded to have said is consistent with the facts admitted by Applicant. There would be no prejudice therefore in treating Aury's evidence as factual in view of Applicant's own corroboration of Aury's evidence. See Hilton Dlamini V TSC and another IC Case No: 62/03.

13.23 Still on the 22nd December 2005, Mkhwanazi is alleged to have driven the motor vehicle to Maphiveni area for shopping, which was a private errand without the permission of Mr Rautenbach and made a false report to Mr McGinn that the trip was a patrol drive.

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13.24 Matthew McGinn did not have first hand knowledge of Mkhwanazi's alleged excesses of the 22nd December 2005; he was informed by Applicant's colleagues. In fact, Aury Khumalo testified during the disciplinary hearing confirming that Applicant drove the motor vehicle to Maphiveni for a private purpose. Aury Khumalo did not testify during the arbitration; however Mandlenkosi Motsa did and confirmed this incident.

13.25 If the trip of the 22nd December 2005 wherein Mkhwanazi drove the company vehicle was a patrol drive, then Applicant shall have volunteered that information to his Manager upon his return. Further Applicant should have recorded it in the log book as he was the driver at that time. Instead, he concealed this event until he was asked by the Manager to write a report about the trip.

13.26 Mkhwanazi's explanation regarding the trip on the 22nd December 2005 is improbable and therefore rejected. I do not believe that if the trip was a patrol drive, Mkhwanazi, an experienced ranger and a Sergeant for that matter, should have

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recorded it in the log book and also reported to Mr McGinn immediately upon his return. His explanation was an afterthought intended to exculpate himself after he was caught.

13.27 On the 25th December 2005, he is alleged to have instructed Nimrod Maseko to drive the motor vehicle to Maphiveni to pick him up; it is on this day that he was allegedly seen drinking intoxicating liquor at la Masiya's whilst on duty and also abused the company motor vehicle by conveying his family.

13.28 Nimrod Maseko was not called during the arbitration, but in the minutes, he is recorded to have testified that Mkhwanazi instructed him to drive to Maphiveni to pick him up. As I have already commented that on the authority of the ZEPHANIA NGWENYA case, statements attributed to Nimrod at the disciplinary hearing cannot be proved as the truth simply because they are in the minutes unless Nimrod is called to testify and confirm same. See Hoffman: SA Law of Evidence (2nd Ed) page 90.

13.29 To close this lacuna, the Respondent called Mandlenkosi Motsa who testified that Nimrod informed him that Mkhwanazi had instructed Nimrod to drive the motor vehicle to Maphiveni to pick him up. Motsa's statement is inadmissible to prove the truth of the fact that it was Mkhwanazi who instructed Nimrod to use the motor vehicle.

13.30 However, that is not the end of the matter; Applicant confirmed that he became a passenger in the motor vehicle driven by Nimrod Maseko, from Maphiveni back to the camp. He denied that he had instructed Nimrod to drive to Maphiveni.

13.31 Notwithstanding his denial, the fact that he let an unlicenced driver off the hook when he arrived driving the motor vehicle at Maphiveni, boarded the motor vehicle as a passenger back to the camp instead of taking control and his failure to either charge Nimrod for driving the motor vehicle without a drivers licence and without the permission of Rautenbach and lastly his failure to volunteer this incident to Mr McGinn, is a classical case of res loquitur ipsa, ludices, quae semper valet plurimum. The facts speak for themselves and a reasonable inference may be

drawn that Applicant instructed Nimrod to drive the motor vehicle to Maphiveni to pick him up.

13.32 Applicant's credibility took a tumble for the worst when he is alleged later that night of the 25th December 2005, drove the motor vehicle to Maphiveni and when he came back to the camp, Applicant opened the boom gate, the padlock fell on the windscreen and shattered it.

13.33 Mkhwanazi is alleged to have said he was with Nimrod when the motor vehicle windscreen was damaged. He did not deny that Nimrod's name came up during his meeting with the Manager, however, he tried to explain how Nimrod's name came up, but he denied that he said he was with Nimrod. Applicant's explanation was unsatisfactory and at worst, unintelligible. In my view, the explanation was a blatant lie and showed Applicant to be a dishonest witness.

13.34 I am persuaded that Mkhwanazi did state to McGinn that he was with Nimrod when the windscreen broke, in order to cover his tracks and escape another breach of the rule, which was that no one is supposed to patrol alone. If the motor

vehicle was used for a rendezvous with an informer, why did he not record that in the log book?

13.35 Suppose the windscreen was not visibly broken, would Mkhwanazi have informed McGinn about this one incident which made the Manager to be suspicious and prompt the extensive investigations? What would have happened? Then Respondent would probably not have discovered about the mischief that went on during the absence of its Manager. It may have been divine providence that the padlock fell and broke the windscreen and the damage became patent, making it impossible to conceal.

13.36 Mkhwanazi's explanation is that the various trips made from the camp to Maphiveni were for purposes of meeting informers and trap would be poachers. Applicant continued to state that his colleagues had fabricated lies as part of a wider conspiracy to dismiss him, following Mr White and Mr McGinn's failure to cause him to resign.

13.37 I have difficulty in accepting Mkhwanazi's explanation. Perhaps if he had volunteered all this information to Mr McGinn and also recorded in the log book the use of the motor vehicle, notwithstanding that it was for private use and was authorized, it would have been a different story. Instead there was a deliberate concealment of the goings on during the absence of McGinn. Mkhwanazi's statement after the Manager confronted him was merely reactionary. This amounts to dishonesty.

13.38 Mkhwanazi's defence is not that he was too drunk to appreciate the seriousness of the instructions at the time McGinn gave him instructions. After all, it was the same employer who provided alcoholic beverages to its employees, but still expected them to behave responsibly, which in my view is quite absurd. Notwithstanding the fact that no evidence was led to show how much intoxicating liquor had been imbibed by the employees, Mr McGinn himself stated that he instructed Mkhwanazi not to allow the employees to drive the motor vehicle because they had been drinking.

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It means the Manager observed that their state of sobriety was questionable.

13.39 Applicant instead admitted that he was given instructions pertaining his responsibilities during the absence of Mr McGinn, by the Manager except that he denied that McGinn ordered him not to give the vehicle to his drunk colleagues and also permission should be sought if the vehicle is to be driven for private business. Applicant stated that he was aware that it was contrary to the rules that a drunk driver be permitted to drive the motor vehicle and that permission ought to be sought if one required using it for his own private errands.

13.40 Applicant is also alleged on the 26th December 2005 to have given the motor vehicle to Vusi who drove in the company of Thembisa Mkhabela to purchase medicines for Thembisa's friend. Mkhwanazi did not deny this incident except that he said the medication was for the employees and the reason he gave was that he wanted to ensure that everyone was in the camp at all times in case there is a report of poachers in the Reserve
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13.41 Mkhwanazi's reason for permitting Vusi and Thembisa the motor vehicle may appear noble, but his failure to instruct the driver to record this trip in the log book or check thereafter if it had been recorded. In my view demonstrates that he had lost all sense of responsibility.

14. FINDINGS

14.1 It is my considered view that Phillip Mkhwanazi, as Sergeant was given responsibilities to manage and oversee the operations of the other rangers subordinate to him in rank, and these responsibilities also entailed looking after company property, by Mr McGinn, who gave him instructions to that effect.

14.2 Applicant was therefore put in a position of trust. The Concise Oxford English Dictionary 11th Ed (2004) pg 1549 defines a position of trust as; "the state of being responsible for someone or something"

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14.3 Applicant did commit dishonest acts that had the effect of undermining the trust that Respondent placed on him. In Nedcor Bank Ltd V Frank & Others (2002) 7 BLLR 600 (Lac) at 60, Justice Willis JA commented that dishonest entailed a lack of integrity, straightforwardness and in particular a willingness to steal, cheat, lie or act fraudulently. See Toyota South Africa Motors (Pty) Ltd V Radebe & others (2000) 21 1LJ 340 (LAC).

14.4 The learned author Grogan: Dismissal at pg 116

remarks that dishonesty is a generic term embracing all forms of conduct involving deception on the part on a person. He comments further that an employer has to establish that an employee acted with intent to deceive. See Nkosinathi Ndzimandze And Another V Ubombo Sugar Ltd IC Case No: 476/05 at 16

14.5 I am satisfied that Respondent did prove an intent to deceive on the part of Mkhwanazi; I have

already refereed to the instances above.

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14.6 Since I have held that Mkhwanazi, by his deception broke the trust bestowed upon him by the Respondent, I further hold that such dishonesty was calculated and therefore cut at the fabric of the employment contract. The Respondent cannot be expected to employ a person who deliberately disregards rules and procedures and lies with impunity. The length of service of the Applicant and his previous clean record cannot, in my view override the gravity of the offences he committed.

See Carter V Value Truck Rental (Pty) Ltd (2005) 1 BLLR 88 (Se); Council for Scientific and Industrial Research V Fijen 1996 (2) SA 1 (A).

14.7 The Respondent's disciplinary code provides for offences which are dismissible and those that carry a warning. The Applicant admitted that the offences with which he was charged were all dismissible. However, I make this observation according to the code that the unauthorized use of company vehicles for private purposes and giving unauthorized lifts to persons is a cautionable offence. This though does

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not assist the Applicant because he is also guilty of other more serious misconduct.

14.8 Taking into account the Respondent's code read with Section 36 of the Employment Act, I hold that the Applicant was dismissed for a fair reason. The dismissal was reasonable and substantive and procedurally fair in the circumstances.

15. SEVERANCE ALLOWANCE

15.1 There is one other issue that requires a finding. Notwithstanding that the Applicant was summarily dismissed for a reason permitted by Section 36, Respondent paid him severance allowance. However, the Respondent applied deductions to the severance package.

15.2 The total severance pay was E3 955.20 (Three Thousand Nine Hundred and Fifty Five Emalangeni Twenty Cents), El 305.15 (One Thousand Three Hundred and Five Emalangeni Fifteen Cents) was applied as income tax deduction and E2 053.00 (Two Thousand and Fifty Three Emalangeni) was a garnishee deduction.

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15.3 The Respondent exhibited Photostats of a tax directive issued by the Commissioner of Taxes and a Court order in favour of a certain Executive Financial Consultants wherein Phillip was ordered to pay the sum of E2 053.00 (Two Thousand and Fifty Three Emalangeni). The balance was E597.05 (Five Hundred and Ninety Seven Emalangeni Five Cents), which Respondent paid to Mkhwanazi.

15.4 During arbitration Mkhwanazi protested about the garnishee deduction. With respect to the tax deduction there was no complaint raised.

15.5 The Respondent contended that its deductions were lawful and in any event, Applicant was not entitled to the severance in the first place, having been dismissed for a reason permitted by Section 36 of the Employment Act.

15.6 Notwithstanding the principle that an agreement cannot be permitted to stultify legislation that otherwise prohibits that transaction. In my view what Respondent did, with full knowledge of the law, voluntarily and without duress, is an exception to the principle. Respondent did not do so negligently, it had the full knowledge. See Trust

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Bank Van Afrika Bpr V Ersteen 1964 (1) Sa 74 (N); Ed Van Der Merwee et al: Contract General Principles pp 29-33.

15.7 In my view Respondent took a conscious decision to award Applicant a severance package inspite of a statutory provision enacted for its interest, it cannot now raise estoppel on the basis that he was not entitled to it in the first place. See Levy and Others v Zalrut Investment (Pty) Ltd 1986 (4) SA 479 (w).

15.8 In now turn to consider if the deductions were lawful. Regarding a tax deduction, it has been held by the High Court of Swaziland and Industrial Court of Swaziland that once a person ceases to be an employee because of his dismissal, the former employer is not obliged or entitled to deduct any amounts from any payment made to the ex employee. See Fraser Alexander (SWD) V Jabulani Shongwe and another I C Case No: 199/2005; Andrew Mkhonta and 6 Others, Sebentile Sibandze And 4 Others V Swaziland Posts and Telecommunications I C Case No: 210/05; Lewis Stores (Pty) Ltd V Gugulethu Nsibandze And Others I C Case No: 39/04.

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15.9 The Respondent acted ultra vires the Income Tax Order 1975 by seeking the tax directive, deducting the amounts and remitting them to the Commissioner of Taxes. See Section 12 (1) (j) (iii) of the Income Tax Order, 1975 (as amended).

15.10 The Respondent may have obtained and complied with the tax directive in good faith. However, such directive was erroneous. It follows therefore that Applicant is entitled to be paid the amount deducted as tax.

15.11 Regarding to the garnishee deduction, it is my view that Respondent also erroneously applied the Court Order.

15.12 Ipssisima verba the court order provides;

"1. it is hereby ordered that the garnishee deduct the emoluments of the Judgment Debtor a sum of E205.30 (Two Hundred and Five Emalangeni Thirty Cents) per month for ten months towards the full payment of E2 053.00 (Two Thousand and Fifty Three Emalangeni)

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owed to the judgment creditor together with the costs of suit.

2. that the first payment is made on or before the 31st October 2005 and ail subsequent payments to be made on or before the last day of each and every succeeding month until the said debt has been fully paid",

15.13 As the garnishee, the Respondent was ordered to deduct from the emoluments of the Applicant. The Concise Oxford English Dictionary 11th Ed (2004) defines emoluments as;

"a salary, fee or benefit from employment or office".

15.14 Blacks Law Dictionary 8th ed 2004 defines emolument as:

"any advantage, profit, or gain received as a result of ones employment or ones holding of office".

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15.15 Firstly, when Respondent deducted from Applicant's severance package, Mkhwanazi was not in employment or office, he had already been dismissed. The deduction therefore was ultra vires the Court order.

15.16 Secondly, the order directed that an amount of E205.30 (Two Five Emalangeni Thirty Cents)

be deducted for ten months until the sum of E2 053.00 (Two Thousand and Fifty Three Emalangeni) is recovered from Applicant's salary. There is no explanation given by Respondent why it failed to commence deductions on the 31st October 2005. The deduction of the whole amount due was not in compliance with the letter of that order. In fact, there was no order authorizing the garnishee to deduct a sum of E2 053.00 (Two Thousand and Fifty Three Emalangeni) from Applicant's terminal benefits. It may have done so in good faith, but it was an error. In my view, the Applicant is also entitled to be paid this amount.

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16. CONCLUSION

16.1 I conclude that the Respondent's termination of the Applicant's services was for a reason permitted by its disciplinary code read with Section 36 of the Employment Act.
16.2 Taking into account all the circumstances of the case the dismissal was reasonable and substantively and proceduraliy fair.

16.3 The Respondent elected to pay Applicant a severance allowance in spite of the dismissal, it however made certain deductions, namely income tax and a garnishee. These deductions were both unlawful.

16.4 The following order is therefore made;

17. AWARD

17,l The application is dismissed

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17.2 Respondent is directed to pay Applicant the balance of the severance allowance within 21 days of the service of the award as follows;

(a)	deducted as per tax directive	El 305.15
(b)	deducted as per garnishee order	E2 053.00
	TOTAL	E3 358.15

17.3 No order as to costs.

DATED AT MANZINI ON THIS ....18th.. DAY OF MARCH 2009

VELAPHI DLAMINI ARBITRATOR

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