

**IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)
HELD AT MANZINI DISPUTE NO: MNZ 076/08**

In the matter between:

THEMBINKOSI SOTSHA TSABEDZE APPLICANT
AND
UNITRANS SWAZILAND LIMITED RESPONDENT

CORAM

ARBITRATOR: VELAPHI DLAMINI

APPLICANT: SIMON TSIKATI
RESPONDENT: DUMSANI NGCAMPHALALA

NATURE OF DISPUTE: UNFAIR DISMISSAL

DATE(S) OF ARBITRATION: 31ST JULY, 15TH OCTOBER AND 27TH OCTOBER 2008

ARBITRATION AWARD

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1. DETAILS OF THE HEARING AND REPRESENTATION

1.1 The arbitration was held at the Conciliation, Mediation and Arbitration Commission offices (CMAC or Commission) situated at 4th Floor, SNAT Co-operatives Building in the City of Manzini, the district of Manzini, on the 31st July to the 27th October 2008.

1.2 The Applicant is Thembinkosi Sotsha Tsabedze an adult Swazi male of P. O. Box 3362 Manzini, who was represented by Mr Simon Tsikati from the Swaziland Transport and Allied Workers Union (STAWU).

1.3 The Respondent is Unitrans Swaziland Limited, a company duly incorporated in Swaziland of P. O. Box 360 Manzini, represented by Mr Dumsani Ngcamphalala, an Attorney.

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2. BACKGROUND

2.1 The Applicant reported a dispute for "unfair dismissal" during the month of January 2008 to the Commission in Manzini.

2.2 My brethren, Commissioner Mr Thulani Dlamini was appointed by CMAC to attempt to resolve the dispute by means of conciliation, however, the dispute remained unresolved such that on the 22nd April 2008, the Commission issued a Certificate of Unresolved Dispute.

2.3 On the 17th April 2008, the parties had requested for arbitration in terms of Section 85 (2) and (3) of the Industrial Relations Act 2000 as amended, to decide the matter.

2.4 At a pre-arbitration conference prior to the hearing, the parties agreed that the nature of dispute, the issues in dispute, and the reasons that made the matter contentious had not changed since the certificate was issued. Further, it was agreed that discovery be made and the

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documents were exchanged. There was no objection to my appointment as CMAC Arbitrator. The parties requested that the services of an interpreter be used during the hearing.

3. ISSUE(S) IN DISPUTE

3.1 The following were recorded as issues in dispute;

- (a) notice pay
- (b) additional notice pay
- (c) severance allowance
- (d) leave pay
- (e) 12 months compensation for unfair dismissal

3.2 It was asserted by the Applicant that the termination of his services by the Respondent was both procedurally and substantively unfair. On the other hand, the Respondent alleged that the dismissal was fair in every material respect.

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4. SUMMARY OF EVIDENCE

4.1 APPLICANTS CASE

4.2 THEMBINKOSI SOTSHA TSABEDZE'S TESTIMONY

4.3 Thembinkosi Sotsha Tsabedze, the Applicant was the only witness called during the presentation of his case. He gave a sworn testimony.

4.4 The Applicant stated that he was employed by the Respondent on the 17th December 2005 as a truck driver. He was paid a wage of E651.84 (Six Hundred and Fifty One Emalangenzi Eighty Four Cents) per week. Thembinkosi's responsibility entailed transporting goods from suppliers to customers.

4.5 Tsabedze's evidence was that his services were terminated subsequent to a disciplinary hearing that was held on the 20th December 2007. He was charged by the Respondent for two offences emanating from two separate incidents. On the

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first charge, he was accused of insubordination and on the second, he was charged for committing an act of dishonesty/misconduct.

4.6 The Applicant testified that with respect to the charge of insubordination, he was acquitted by the Chairperson of the disciplinary hearing; however, regarding the dishonesty charge, he was found guilty and summarily dismissed.

4.7 Pertaining the charge of dishonesty/misconduct, Thembinkosi stated that the events that led to his being charged occurred on the 26th November 2007. It so happened that whilst on duty, he was given instructions to load goods at Mhlume and convey them by the truck he was driving to Durban, in the Republic of South Africa.

4.8 It was the Applicant's evidence that indeed he proceeded to Mhlume where he loaded the goods and then drove to Lavumisa border gate. Upon reaching an area called Mbutfu before Lavumisa; he had a running stomach which caused him to stop the truck and alight with the intention of relieving himself in the nearby bushes.

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4.9 Thembinkosi testified that after completing his business in the bushes, he then returned to the truck. When he attempted to start the engine in order to go, the truck could not start. During that time, he beeped his Supervisor one Zamani who called him and asked what he was doing at Mbutfu. The Applicant reported that the truck could not start.

4.10 Tsabedze asked Zamani to then give the phone to his Manager, Mr Thabo Nkambule who said the Applicant should abandon the truck and use his own means of returning to the Respondent's Matsapha depot; otherwise the Manager was sending another truck driver and a mechanic to attend

to the breakdown.

4.11 The Applicant testified that since it was already late, around 6:30 pm, he waited about an hour and then decided again to try and start the truck and this time the truck started. He then drove to Lavumisa hoping to find other drivers from Unitrans who may have airtime on their mobile phones so that he would call the office to inform

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his supervisor and manager that the truck was running. His cell-phone had run out of airtime after he had called some relatives, unfortunately he could not find any driver. The Applicant then crossed the border gate; again he tried to look for his colleagues, but could not find any driver. Thembinkosi then proceeded to Durban and came back. There was no prejudice suffered by his employer in relation to the customer who received its goods on time.

4.12 Tsabedze stated that he was sorry that he proceeded to Durban without informing his supervisor, but he had been compelled by Mr Nkambule's threats, who had said to him that he was reporting sickness and the breakdown as an excuse to avoid work and therefore he should leave the truck and see how he returns to the depot.

4.13 The Applicant testified that he viewed his dismissal as substantively unfair because there was no dishonesty in what he did. He was mindful of the fact that it was wrong for him to leave Mbutfu and Lavumisa and then proceed to Durban

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without informing his Supervisor, for that conduct he was remorseful. However, it should have counted in his favour that the goods reached the customer on time and the truck was returned to the Respondent in one piece, so to speak.

4.14 Tsabedze's evidence was that he challenged the procedural fairness of the disciplinary hearing because it was his view that the Chairperson was not impartial. The Chairperson was the one who questioned him and denied the Applicant an opportunity to question the instigator, who happened to be his manager Thabo Nkambule.

4.15 The Applicant was praying for statutory terminal benefits and 12 months compensation for unfair dismissal, as well as payment in lieu of leave.

4.16 Under cross examination, the Applicant admitted that he was a temporary employee until May 2006, when he was confirmed as being permanent. Thembinkosi also admitted that he had two written warnings, the last of which was final, prior to the alleged commission of the offences he was charged with in December 2007.

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Even though he did not know that the effective period for written warnings according to the Respondent's disciplinary code was twelve months, he could not dispute that.

4.17 Thembinkosi admitted that the previous written warnings were issued in respect of charges of insubordination and dishonesty and that the periodic intervals between these warnings were less than five months. This also applied to the offences he committed in November 2007 for which he was dismissed.

4.18 Whilst admitting that during the appeal there was a suggestion by his representative that he should be transferred to another department within the Matsapha depot, this was rejected by the Managers, because they had misgivings about his disciplinary record. He was generally regarded as an uncooperative and hostile employee. The Applicant stated that there was a frosty relationship between Thabo Nkambule and himself which was based on personal reasons.

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4.19 When it was pointed to him that he was now changing his statement regarding the sequence of events on the 26th November 2007, the Applicant admitted that what was recorded in the minutes was a true reflection of what transpired during the disciplinary hearing, but denied that he had admitted to committing a dishonest act.

5. RESPONDENT'S CASE

5.1 The Respondent called two witnesses to testify on its behalf namely; Mr Ernest Magagula and Mr Thabo Nkambule.

5.2 ERNEST MAGAGULA'S TESTIMONY

5.3 Mr Ernest Magagula was introduced as a Contracts Manager and the Chairperson of the disciplinary hearing that found the Applicant guilty and recommended his dismissal. He testified under oath.

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5.4 It was Magagula's testimony that he boasted of vast experience in chairing disciplinary hearings and of all the ones he chaired, none of the employees have ever challenged his findings, Thembinkosi's case was the first.

5.5 Coming to the hearing, it was Mr Magagula's evidence that Thabo Nkambule as the instigator presented the evidence to prove a charge of dishonesty against the Applicant. It was his finding that Sotsha had been dishonest in that he reported a breakdown and sickness, but then proceeded to drive the faulty truck whilst ill.

5.6 The Chairperson testified that it was his opinion that a truck once reported that it could not start, it is impossible for it to do so without the attention of a mechanic. Further that once an employee reports an illness, he cannot be in a position to work thereafter. It is the foregoing deductions that made Magagula to return a verdict of guilty on the charge of dishonesty.

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5.7 Mr Magagula stated that what aggravated the case against Thembinkosi was that he had a valid final written warning, where the charges had also been insubordination and dishonesty. Further that Tsabedze had exposed the company to financial prejudice because he drove a faulty truck whilst sick. He therefore deemed it fit to recommend a sanction of dismissal.

5.8 The Chairperson disputed the fact that the Applicant was denied an opportunity to question either the instigator or the company's witnesses. Further Magagula denied that he was biased in his handling of the hearing.

5.9 It was Magagula's evidence that Thembinkosi was notorious for not taking instructions and lacked discipline, such that none of the department Managers wanted to be his supervisor.

6. THE TESTIMONY OF THABO NKAMBULE

6.1 Nkambule testified under oath that he was a Manager trainee and was the instigator during the disciplinary hearing of the Applicant.

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6.2 It was Nkambule's evidence that he decided to charge Thembinkosi with two counts, the first being insubordination and the second one was dishonesty/misconduct. The two charges were not related to the same transaction as they happened on different dates.

6.3 Regarding the charge of dishonesty/misconduct for which the Applicant was dismissed, it was the instigator's evidence that on the 26th November 2007, Thembinkosi called to inform him that the truck he was driving could not start and was stuck at Mbutfu area, between Big Bend and Lavumisa.

6.4 Nkambule stated that he gave the Applicant specific instructions not to drive the motor vehicle as the Manager was sending a mechanic and a driver. He was concerned by Thembinkosi's report because firstly, he was not supposed to stop at Mbutfu and secondly, considering the urgency of the load he was conveying.

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6.5 Nkambule testified that the Applicant was not authorized to stop at Mbutfu because he had not driven two hours or at least a distance of 200 kilometers from the point of loading the goods. Sotsha was aware of this policy since he was trained.

6.6 The Manager stated that Thembinkosi's explanation for stopping was that he had gone to the toilet and when he returned the truck could not start. When the mechanic and driver reached Mbutfu they did not find Sotsha. These employees then traveled to Lavumisa border gate hoping to find Tsabedze there; however, the Applicant was not there. Thembinkosi was traced via cell-phone. At first he could not be located but eventually he was found to be in South Africa.

6.7 Nkambule testified that he charged Sotsha with dishonesty because he had claimed to be suffering from a running stomach which turned to be a false report. The company sent a mechanic at a cost because it was already after normal working hours. There was nothing wrong with the truck

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and no medical certificate was submitted by the Applicant to prove that he had been sick.

6.8 The Manager testified that the Applicant had valid written warnings; one was final involving dishonesty and insubordination. Before the commission of a dishonest act, the Applicant had been given an instruction to load goods at Ngwenya, he spent the whole day at the customers site, even then he claimed to be fatigued. When the Manager asked him about the delay, Sotsha's response was so disrespectful and insubordinate to his supervisor.

6.9 It was Nkambule's evidence that when Thembinkosi committed the offences of insubordination and dishonesty, two written warnings were still valid; because the company policy was that a warning is valid for twelve months.

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6.10 It was the Manger's testimony that the Applicant was an uncooperative, disrespectful and a generally insubordinate employee. None of the Managers wanted Sotsha to be transferred to their departments.

6.11 According to Nkambule, the Applicant's disciplinary hearing was conducted fairly and there was evidence that he had committed an act of dishonesty and insubordination.

6.12 During cross examination, Nkambule denied that when he had a conversation with Sotsha on the 26th November 2007, he told the Applicant that he was pretending to be sick, but the manager suspected that Thembinkosi wanted to claim overtime by delaying at Mbutfu.

6.13 Nkambule disputed that the evidence which was led during the disciplinary hearing did not prove dishonesty, when this was put to him by the Applicant's representative. He maintained that the charge that the Applicant faced was dishonesty and not insubordination, even though

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his conduct of the 26th November 2007 had elements of insubordination. The reason for maintaining the charge of dishonesty was that he reported a defect in the truck and sickness, which reports were all not true. He reiterated that he suspected that the Applicant wanted to claim overtime.

7. ANALYSIS AND THE LAW

7.1 The Applicant was dismissed by the Respondent for having committed an act of dishonesty/misconduct whilst on duty on the 26th November 2007.

7.2 Initially, Thembinkosi had been charged with two offences namely; insubordination and dishonesty/misconduct. On the charge of insubordination, the Applicant was not found guilty. There is little or nothing worth commenting pertaining to the insubordination charge because Tsabedze's dismissal was not in any way related to same. However, I shall revert to that charge when making certain observations

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on the procedural fairness of the termination of Applicant's services.

7.3 An employee's services shall not be considered as having been fairly terminated unless the employer proves;

- (a) that the reason for the termination was one permitted by Section 36 of the Employment Act 1980; and
- (b) that, taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee.

See Section 42 (2) of the Employment Act 1980.

8. DISHONESTY/MISCONDUCT

8.1 Mr Ernest Magagula and Mr Thabo Nkambule, who were both witnesses for the Respondent, testified that there were facts that proved that the Applicant had committed the offence of dishonesty/misconduct. These witnesses alleged

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that Thembinkosi lied and/or misrepresented the facts by claiming that he was sick, but proceeded to drive the truck. Further, the Applicant made a false report that the truck had developed a mechanical fault, but went on to drive the motor vehicle to Durban and back to Swaziland.

8.2 When pressed by the Applicant's representative to state what was dishonest about the Applicant's conduct, Mr Magagula stated that in his experience, no truck ever started once it has been reported that its engine could not start. Further according to him, it is impossible for an employee who has diarrhoea to drive a truck.

8.3 Nkambule for his part added that Thembinkosi lied or misrepresented the facts because he wanted to claim overtime.

8.4 LE GRANGE J in EX PARTE BENNET 1978 (2)

SA 380 (W) at p 384 remarks that dishonesty is normally used to describe an act where there has been some intent to deceive or cheat.

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8.5 WILLIS J. A in NEDCOR BANK LTD v FRANK & OTHERS (2002) 7 BLLR 600 (LAC) at pg 603 opined that dishonesty involves the absence of integrity or straight forwardness and in particular a willingness to steal, cheat, lie or act fraudulently.

8.6 The learned author John Grogan, Dismissal (2004) pg 116 comments that dishonesty denotes all forms of conduct involving deception on the part of an employee. The onus is on the employer to prove that the employee acted with the intention to deceive.

8.7 The Applicant denied that he acted dishonestly towards his employer when he reported that the

reason why he had stopped at Mbutfu area was because at first, he had a running stomach, then after attending to his private needs, upon returning to the truck when he started the engine, it failed.

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8.8 Thembinkosi's evidence was that following a threat by the Manager, Thabo Nkambule, he tried to start the truck again and this time the engine started, but it was after quite some time. He admitted though that it was wrong of him not to report back that the truck's engine had started and he was proceeding on his trip to Durban.

8.9 Did the Applicant's conduct of the 26th November 2007 amount to dishonesty?

8.10 In answering the foregoing question, I am bound by the principles enunciated in two cases of the Industrial Court of Appeal. In the CENTRAL BANK OF SWAZILAND v MEMORY MATIWANE (ICA Case No: 110/93) and SWAZILAND UNITED BAKERIES v ARMSTRONG DLAMINI (ICA Case No: 117/91) the Court held that in arriving at a decision in an application for the determination of an unresolved dispute, the Industrial Court must evaluate the facts and evidence placed before it and to that end have regard to the facts and evidence available during the disciplinary hearing and appeal hearing. This

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principle applies mutatis mutandis in an arbitration.

8.11 Whether the Applicant acted dishonestly, relates to his state of mind at the time he proceeded to start and drive the truck unauthorized after reporting that he had a running stomach and the truck could not start. This is a question of fact which has to be ascertained from his conduct and all the surrounding facts and circumstances.

See Nkosinathi Ndzimandze & Another v Ubombo Sugar Limited (I C Case No: 476/05).

8.12 The Applicant testified after reporting his sickness and the breakdown that, the Manager informed him in certain terms that Thembinkosi did not want to work and since that was his intention, Nkambule was dispatching a motor vehicle to transport a mechanic and another driver to the scene of the breakdown and that, the Applicant would find his own way to the Matsapha depot.

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8.13 Thabo Nkambule denied threatening the Applicant in anyway. Despite the Manager's denial, it is my view that even though he did not expressly threaten Thembinkosi, but it is more probable than not that Thabo Nkambule uttered remarks to the effect that the Applicant did not want to work and that he would find his own means of returning to the office in Matsapha once the other driver arrives, which statement was reasonably perceived as a threat by Thembinkosi.

8.14 During the disciplinary hearing, Thabo Nkambule stated that the Applicant did not qualify for resting as he had not driven for 200 kilometers or for two hours. When testifying during this arbitration, the Manager repeated this statement. It is crucial to note that these remarks were made by Thabo Nkambule over the telephone to the Applicant. Nkambule also did not deny passing the remarks attributed to him during the disciplinary hearing. The Manager had neither physically inspected the truck nor seen the physical condition of the Applicant at that time, for him to confidently make these assertions about Thembinkosi's intention.

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8.15 Thabo Nkambule's denial therefore is inconsistent with the probabilities. Further it is my view that judging from the frosty relationship between the Applicant and the Respondent Nkambule, Thembinkosi may have felt threatened or felt that reprisals will follow if he does not proceed to Durban. I mention these facts without judging the merits or demerits of the valid written warnings, because the written warnings involved the offence of insubordination.

8.16 The Applicant had been accused of not taking lawful and reasonable orders from his Superiors and which in this case was Nkambule. Thembinkosi, just before allegedly committing an act of dishonesty/misconduct, he was accused by Thabo Nkambule of falsely reporting a defect on a truck and feigning fatigue, when he was detailed to load goods from a customer at Ngwenya. There seems to have been a dispute between Thabo Nkambule and the Applicant whether he was entitled to sleep over in Mbabane, the former was saying Thembinkosi should drive after 10 pm to reach the depot, but the latter was saying he was fatigued and could not continue to drive.

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8.17 It is my opinion that Applicant's state of mind in the circumstances of this case is not consistent with that of a person who was intent on deceiving his employer. The Respondent failed to prove that the Applicant in that month or another, made an unjustified claim for overtime for the time he spent at Mbutfu. Even if he did, the Respondent would have to overcome two obstacles, firstly proving that the Applicant did not have a running stomach which forced him to stop at Mbutfu to defecate. Secondly, the Respondent would have to prove that at no point in time did the truck fail to start.

8.18 During this arbitration, the Respondent failed to lead the evidence of an expert be it a motor mechanic either from the manufacturer or its own mechanic who had expert knowledge on how the truck operates. For Mr Magagula to claim that in his experience a truck could not start after a failure to start was reported was conjecture. Magagula's experience was not relevant to this aspect, for one, he was not introduced as a mechanic, but as the chairperson of the

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Applicant's disciplinary hearing. He boasted of vast experience in the chairing of disciplinary hearings. In my view, having vast experience in the transportation industry does not necessary make one an expert on heavy duty motor vehicles.

8.19 The Respondent also claimed not to have received a certificate from a medical practitioner certifying that the Applicant was sick. There was quite a controversy surrounding this aspect where semantics were at play. The Applicant's representative arguing that Thembinkosi was not sick, but he had reported that he had a running stomach.

8.20 Mr Magagula testified that having a running stomach meant that he was sick. In my view the common usage of the terms sick or ill means not being in full health or unwell. The Applicant was therefore sick. However the established facts are that it is the Respondent's officials who called and asked the Applicant what he was doing at Mbutfu who then responded. It is not in evidence that Thembinkosi claimed to be unfit for duty. Even if

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that may have been implied, Nkambule then passed remarks that were insensitive towards the Applicant's poor state of health, who fearing repercussions might then have forced matters.

8.21 It is my opinion that on the proven facts and evidence placed before me, the Respondent has failed to prove that the reason for the termination of the Applicant's services was one permitted by Section 36 of the Employment Act, 1980 (to wit, Section 36 (b)). In other words on a balance of probabilities the Respondent did not establish that the Applicant committed an act of dishonesty/misconduct as charged.

9. REASONABLENESS OF TERMINATION

9.1 The Applicant was employed for a relatively short time. He did not have a clean disciplinary record. It is common cause that he had two previous written warnings, one of which was final. It is common cause further that these warnings were valid.

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9.2 The Respondent argued that the Applicant's misconduct was aggravated by his poor disciplinary

record and the fact that he exposed the company to a huge financial risk by driving the motor vehicle whilst sick and whilst the said truck had a defect.

9.3 While one cannot fault the Respondent on the Applicant's poor disciplinary record as an aggravating factor, the opposite is true of its other reason. The Respondent cannot run with the hare and hunt with the hounds; it cannot have it both ways. It is either the Applicant was dishonest in misrepresenting facts viz his illness and the breakdown of the truck or Thembinkosi proceeded to drive the truck when it had a defect and whilst he was sick. Both versions cannot be true because they are mutually destructive.

9.4 By drawing the foregoing conclusion, I am in no way opining that Respondent could not have charged the Applicant with the offence of insubordination, involving the driving of the truck after an instruction and or order not to do so until the mechanic and relief driver arrived at the

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scene. Applicant could also have been charged with a failure to notify his supervisors that he was leaving the point of breakdown. As to whether Thembinkosi was guilty of these offences is not for this arbitration to decide.

9.5 The Respondent's witnesses insisted that the charge for which he was dismissed was dishonesty/misconduct but not insubordination, they could not be swayed even when the Applicant's representative pointed out that in fact, the relevant offence was insubordination.

9.6 In the written verdict, the chairperson comments that Sotsha had two pending warnings, and this would be the third one. On the grounds of Section 36 (a) of the Employment Act 1980, he had the power to terminate the Applicant's services. Section 36 (a) makes it fair for an employer to terminate the services of an employee whose conduct or work performance has after written warnings, been such that the employer cannot reasonably be expected to continue to employ him.

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9.7 It was common cause that the offences, for which the Applicant had a valid final written warning was insubordination and dishonesty. On the insubordination charge, which was not related to the transaction of the 26th November 2007, the Applicant was acquitted. Now I have already found that dishonesty was not proved by the Respondent. During arbitration, that is the offence its witnesses said they relied upon for terminating Thembinkosi's services. It is not my prerogative to substitute a charge that would be relevant to the facts that have been proved in order to reach the correct result.

**See CENTRAL BANK OF SWAZILAND v MEMORY MATIWANE (SUPRA);
and WAZILAND UNITED BAKERIES v ARMSTRONG DLAMINI (SUPRA).**

9.8 In my view, taking into account all the circumstances of the case, it was unreasonable to terminate the services of the Applicant.

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10. PROCEDURAL FAIRNESS

10.1 The Applicant contended that the disciplinary chairperson was not impartial in the discharge of his duty; in particular he actively participated in the hearing by asking him questions that were supposed to be posed by the instigator, Mr Nkambule. Further Mr Magagula denied the Applicant the opportunity to pose questions to the instigator.

10.2 The Industrial Court has laid six minimum standards which must be met in order for a disciplinary hearing to qualify as procedurally fair.

10.3 Two of the six standards are relevant for purposes of this matter and they are; the Chairperson or presiding official should be impartial. He or she must weigh up the evidence presented before him or her and make an informed and thought out decision. There should be no grounds for suspecting that

his or her decision was based on erroneous factors and considerations. The employee must be given ample opportunity to

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present his or her case in rebuttal of the charge or charges preferred against him or her and to challenge the assertion of his or her accusers.

See CHRISTOPHER H. DLAMINI V INTER AFRICA SUPPLIERS (SWD) LIMITED (IC CASE NO: 55/97) and OSCAR MAMBA V SWAZI BANK (I C CASE NO: 81/96).

See also JOHN GROGAN'S REIKERT'S BASIC EMPLOYMENT LAW 2ND EDITION PP 102-103

10.4 The Respondent has denied that the chairperson was biased and that he denied the Applicant the opportunity to challenge his accusers. The record of the disciplinary hearing may be of assistance to establish if indeed the Applicant's assertions on the procedure have merit.

10.5 According to the minutes of the disciplinary hearing of Sotsha Tsabedze held on the 20th December 2007, those present were E. Magagula as Chairman, T. Nkambule as instigator; S. Lushaba as Applicant's representative; S.

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Tsabedze as the accused and finally S. Langwenya as the scribe.

10.6 It is common cause that the minutes were a true reflection of what transpired during the hearing. Further it was common cause that the initials E. M. referred to Ernest Magagula, T. IN referred to Thabo Nkambule, S. T to Sotsha Tsabedze and S. L to S. Lushaba.

10.7 After Thabo Nkambule had elaborated on the charge of dishonesty, the chairman Ernest Magagula asked the Applicant to give his side of the story. Following the narration of his story by the Applicant the chairperson then asked the Applicant questions and made the remarks that are the cause of complaint. The following is the passage in issue;

"E. M you were told not to drive the truck, and then tell me where you (sic) going because you were given an instruction?"

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S.T I was given an instruction, but I didn't know I was breaking an instruction by proceeding to Durban.

S. L Sotsha was made to continue, because he was threatened by Mr Nkambule's statement.

E. M this man said he had a running stomach, how could he be trusted with a truck to Durban. He should have logged (sic) a grievance concerning Thabo statement, anything more to say gentlemen.

S.L he did wrong but he was scared because he was told he did not want to work. If I was told to drive a truck by supervisor, I would even if (sic) knew it was wrong.

E. M please be informed that we don't allow unsafe procedure in this company. Every driver is taken for

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training and this is covered, so there is no excuse in engaging in hazardous practice".

10.8 During this exchange, not even once did the chairperson enquire from Thabo Nkambule if he did threaten the Applicant. Mr Magagula was the one questioning the Applicant instead of Nkambule as the instigator.

10.9 In my view, the requirement that the chairperson should be impartial also entails that he does not

descend and play an inquisitorial role when our legal system is adversarial, meaning that the instigator and accused should challenge each other's assertions. In this case it is my opinion that Mr Magagula as chairman descended into the arena of conflict and made comments and posed questions that created a reasonable suspicion that he had predetermined the matter and failed to weigh up the evidence presented before him or failed to make an informed and thought-out decision.

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10.10 With respect to the fact that the Applicant was denied the right to challenge the instigator, the Respondent denied that and referred me to the minutes in particular the portion relating to the charge of insubordination where the Applicant's representative had asked questions. However, the Applicant's representative in the arbitration said this pertained the first charge and not the dishonesty charge as a result of which his services were terminated.

10.11 There is no merit in this ground. I am in agreement with the Respondent that if the Applicant and his representative could ask questions during the hearing of the first charge, what prevented them from continuing to cross examine the instigator during the case involving dishonesty.

10.12 In the minutes, there is nothing to suggest that the chairperson discouraged the Applicant or his representative from posing questions to the instigator. In fact, it is recorded that he asked if there was anything more to add on their

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statements. The fact that the chairman's comments grounded a suspicion that he was biased does not automatically translate into a denial of the Applicant of his right to challenge the instigator.

10.13 There is yet another disquieting feature about the procedure followed by the chairperson during the Applicant's disciplinary hearing. It is common cause that during the disciplinary hearing, the only person who testified in support of both charges was the instigator. This is also supported by the minutes.

10.14 On the 4th January 2008, when Mr Magagula delivered his verdict on both counts, he made the following remarks;

"E.M first charge Sotsha is found not guilty. I consulted the driver instructor and he told me he would take 2 hours to reach the depot; that would be after 10 pm. The (sic) was no arrangement done by Thabo for Sotsha to continue driving

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after 10 pm. The truck also had defects; I spoke to the said mechanic".

10.15 The chairperson communicated with these persons outside of the confines of the disciplinary hearing, denying the Applicant the opportunity to challenge their statements. The fact that these employees made statements which were favorable and which caused the acquittal of the Applicant on the first charge does not make an otherwise grossly irregular procedure fair.

10.16 Suppose the driver -instructor and mechanic disputed the assertion made by the Applicant during the disciplinary hearing; would the chairperson have disclosed that he had consulted these employees? In my view I am not unreasonable if I were to infer that the chairperson might have done the same consultation in relation to the second charge except that for obvious reasons, he did not disclose such.

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10.17 In my view, the procedure followed during the disciplinary hearing was so procedurally flawed and grossly irregular so as to render the Applicant's dismissal procedurally unfair.

11. CONCLUSION

11.1 In conclusion, the Applicant's services was terminated for a reason not permitted by Section 36 of the Employment Act and taking into account all the circumstances of the case, it was unreasonable for the Respondent to dismiss the Applicant.

11.2 The Applicant's disciplinary hearing where the decision to dismiss was taken was procedurally irregular and unfair.

11.3 In the premises, it is my finding that the dismissal of the Applicant was substantively and procedurally unfair.

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11.4 Despite having made the foregoing finding, I cannot order a reinstatement because the Applicant does not wish to be reinstated.

11.5 The Applicant claimed the following relief;

- (a) notice pay E2 822.47
- (b) additional notice E 434.24
- (c) severance pay E 1 085.60
- (d) 12 months compensation for unfair dismissal E33 869.64 TOTAL E38 211.95
- (e) Any other competent relief

11.6 The Applicant conceded that he was employed in May 2006 and he was dismissed in January 2008. He was therefore not entitled to additional notice and severance pay. The Applicant has only proved the statutory notice pay.

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11.7 In assessing the award for compensation, I have taken into account that the Applicant was employed by the Respondent for a short period of time, for about one year and seven months. Further, I have also taken into account that the Applicant to a large extent perpetuated the poor relationship he had with his supervisors and that his own conduct of the 26th November 2007 contributed to the misunderstandings that gave rise to the disciplinary charges against him. Nevertheless, the termination of the Applicant's services was unfair and he was unemployed. I consider that an award of six months wages is reasonable in all the circumstances.

11.8 The following order is made.

12. AWARD

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

12.2 The Respondent shall pay the Applicant the following;

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- (a) notice pay E2 607.30
- (b) six months wages as compensation for unfair dismissal E15 644.16

TOTAL E18 251.46

12.3 The Respondent is ordered to pay the sum of (E18 251.46) Eighteen Thousand, Two Hundred and Fifty One Emalangi, Forty Six Cents within twenty one days of service of this award upon her DATED AT MANZINI ON THIS 29th DAY OF APRIL 2009

VELAPHI DLAMINI

CMAC ARBITRATOR

