



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

**HELD AT MANZINI**

**STK 015/10**

In the matter between:-

**THEMBA HADEBE**

Applicant

And

**SHOPRITE CHECKERS**

Respondent

Coram:

**Arbitrator** : Ms N. Shongwe

**For Applicant** : Mr. John Dlamini

**For Respondent** : Ms Pamela Dlamini

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**ARBITRATION AWARD**

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**DETAILS OF HEARING AND REPRESENTATION**

1. The arbitration was held on the 13<sup>th</sup> and 23<sup>rd</sup> September 2010 at CMAC Offices, SNAT Building Manzini. Both parties consented that it be held in Manzini as it was more convenient venue for both parties.
2. The Applicant herein is Themba Hadebe, an adult Swazi male of Mbabane, in the district of Hhohho. Mr.

John Dlamini a Labour Consultant duly represented applicant.

3. The Respondent is Shoprite Checkers, a legal entity incorporated in terms of the company laws of Swaziland with its principal place of business at Siteki in the Lubombo district. Ms Pamela Dlamini, the Respondent's Regional Personnel / Administration Manager appeared on behalf of the company.

### **ISSUES TO BE DECIDED**

4. The issues to be decided are, whether the Applicant's dismissal was effected for a fair reason and in accordance with a fair procedure.

### **BACKGROUND TO THE ISSUE**

5. The parties herein relied on documentary and oral evidence. The Applicant and Mr. Agrippa Mkhonta were the only two witnesses called by Applicant's representative; whilst Respondent's witnesses were Mr. Bheki Shabangu and Gugu Matse.
6. It is common cause that the Applicant was employed by the Respondent on the 27<sup>th</sup> April 2007 as a General Assistant earning **E298.00** per week. It is also common cause that Applicant was on the 9<sup>th</sup> October 2009 served with a notice of suspension and a notice to attend a disciplinary hearing scheduled for the 15<sup>th</sup> October 2009. However, the hearing did not take place on the said date but was heard on the 16<sup>th</sup> October 2009. The Applicant was found guilty of gross misconduct and was subsequently dismissed.
7. The issue of leave was withdrawn after both parties signed a memorandum of agreement.

### **SURVEY OF EVIDENCE AND ARGUMENTS**

## **APPLICANT'S CASE**

### **Testimony of Mr. Themba Hadebe**

8. The applicant testified under oath that on the 16<sup>th</sup> October 2009, he went to the Respondent's place of business to submit a sick sheet dated the 14<sup>th</sup> October 2009 which booked him sick until the 16<sup>th</sup> October 2009. Upon arrival at Respondent's place of business, he was told that the hearing had been postponed to the 27<sup>th</sup> October 2009. Applicant averred that, whilst at Respondent's premises he was forced to sit for a hearing there and then.
9. Applicant alleged that since he was given a right to representation, he requested the shop steward Mr. Agrippa Mkhonta to represent him.
10. During the hearing Applicant submitted that his representative was not given an opportunity to cross examine the Respondent's witness despite requesting for an opportunity to do so from the Chairperson. The Chairperson Mr. Bheki Mkhonta who is the Administration Manager for the Respondent's Siteki branch, is said to have refused stating that it was a waste of time and more so because Applicant's Representative was not an attorney.
11. Mr. Hadebe submitted that after the hearing he was dismissed for gross misconduct. Since his dismissal was unfair, he then lodged an appeal with the Respondent by letter dated 27<sup>th</sup> November 2009 praying that; an appeal be held within seven days from the date he lodged appeal; his dismissal be set aside; and or he be reinstated to his previous employ.
12. Applicant testified that Chairman of the Appeal ordered a re-hearing, before the same Chairperson who presided over the initial disciplinary hearing. However the date of the second hearing was not set.

13. Applicant when cross examined confirmed that he had worked for the Respondent for about 2 and a half years. During the hearing, he did raise an objection but was told that the hearing would proceed with or without him. He even stated on his appeal letter that he was made to sit for a hearing that he was not prepared for and that he was not feeling well at the time.
14. Pamela made reference to the minutes of the hearing, where the Applicant was cross examining the Respondent's witness, and asked Applicant to state why he now claims he was not given an opportunity to cross examine Respondent's witness. Applicant's response was that, he was given an opportunity to cross-examine but whilst his representative was at it, the Chairperson said that there was no more time to allow him to ask the questions as the representative was not an attorney.
15. The Applicant confirmed his signature on the minutes and the contents thereof. Pamela asked Mr. Hadebe why what he was saying was not contained in the minutes. Reference was further made to the minutes, wherein Applicant confirmed that it was his representative cross-examining the Respondent's witness but stated that Chairperson intervened and said Mr. Khumalo's questions were useless. Applicant however could not answer why what he was alleging was not contained in the minutes.
16. Applicant when quizzed acknowledge receipt of letter advising him of the hearing date for the second hearing being the 26<sup>th</sup> January 2010 which he had earlier denied knowledge.
17. During re-examination, Applicant stated that he expected that the Chairperson of the appeal to either uphold or set aside his dismissal not to order a second hearing.

## **TESTIMONY OF AGRIPPA MKHONTA**

18. Mr. Mkhonta testified under oath and stated that he was Themba's representative at the hearing. Mr. Mkhonta stated that on the day in question he only called one witness, a security officer whom he could not however recall her name.
19. According to Mr. Mkhonta, the witness gave evidence which was untested because when his turn to cross examine the witness a truck arrived and the Chairperson requested an adjournment to offload the truck. When they came back from the break Mr. Mkhonta submitted that the Chairperson told them that there was no more time to waste and that he must not forget that he was not an attorney.
20. Mr. Mkhonta further testified that Themba was not the first employee to have a case and not a single employee was ever represented by an attorney.
21. During cross-examination Mr. Mkhonta confirmed the initials on the minutes as his and that he was able to ask only the two questions across his initials on the minutes after which the Chairperson told them to give him their closing statements.
22. Ms Dlamini asked Mr. Mkhonta why he failed to request for permission from the chairperson after he asked them if there were any witness they wanted call and they responded to the negative. Mr. Mkhonta's response was that, a truck came to offload stock and the Chairperson asked for an adjournment to attend to it. In as much as it is not contained in the minutes, what he was saying happened during the hearing.

### **RESPONDENT'S CASE**

### **TESTIMONY OF BHEKI SHABANGU**

23. Mr. Shabangu testified under oath that he is the Human Resources / Administration Manager for the Respondent based at Siteki branch.

24. He submitted that the Applicant was served with a notice to attend disciplinary hearing on the 15<sup>th</sup> October 2009. However, the matter was not heard on the said date, but heard on the 16<sup>th</sup> October 2009, because the Applicant submitted a sick note on the 15<sup>th</sup> and requested that the matter be heard the following day.
25. Mr. Shabangu further testified that the Applicant was lying when he stated that he was not given an opportunity to cross-examine the Respondent's witness and he never told the Applicant's representative that he would not let him ask questions since he was not an attorney.
26. He admitted that the Applicant was not paid for his leave and a memorandum was signed wherein Respondent agreed to pay the Applicant the sum of **E1, 393.15** in lieu of his outstanding leave.
27. Mr. Shabangu alleged that eating the stock is also a contributing factor to stock shrinkage, which is very high and uncontrollable such that management was even contemplating closing the shop. Themba admitted during the hearing that he was aware of the company areas designated for eating and he knew that he was not allowed to eat merchandise bought from the company that was not cancelled out with a security sticker.
28. Respondent concluded that it would be difficult for him to work with people like the Applicant as his wish would be for such people to be fired.
29. During cross-examination Mr. Shabangu was asked with reference to his job description that since his office was also to look out for the welfare of the employees, why he failed to look out for the welfare of the Applicant when he came to bring a sick note but was made to sit for a hearing? Mr. Shabangu stated that the Applicant consented to the hearing.

And at the time he made that decision he was acting in his capacity as chairperson

30. When re-examined, Mr. Shabangu stated that he respected the welfare of staff and at no point during the hearing did Applicant complain that he was not feeling well, hence the hearing proceeded.
31. The other notice of suspension dated the 27<sup>th</sup> October was to cover the date the Applicant was to get paid during his suspension.
32. Mr. Shabangu admitted that he was the one who issued the notice of suspension and the notice to attend hearing and he was also the Chairperson of the hearing. Reason being that at the time he issued the notices he had not been appointed Chairperson.

### **TESTIMONY OF GUGU MATSE**

33. She testified under oath and stated that at the time of the incident she was employed as a Security Guard by VIP Security Company based at the Respondent's Siteki shop.
34. Gugu stated that she knew the Applicant as someone who was working for the Respondent based at Siteki. She recalls the events of the 9<sup>th</sup> October 2009, she was on guard at the Respondent's bulk store room, when Mr. Hadebe entered the store room carrying a scanner. She left the scene to patrol other areas and when she came back she found Applicant standing next to the biscuits shelf eating Topper Cream biscuits. Applicant ate the one biscuit that was left in his hand.
35. She submitted that the biscuits the Applicant consumed were not paid for, as they did not have a security sticker. The Applicant begged her not to report him since he was going to be fired for something very minor, he even offered to bribe her not tell on him. She could not physically apprehend

Applicant to the Manager but called another security officer her Supervisor Musa Dlamini who saw the Applicant and advised her to report the incident. When Musa asked Themba why he was eating the biscuits, at first he denied and stated that he was eating gum, but later admitted and asked Musa not to report him. After Applicant saw that the gum had biscuits remnants, he then threw it into the garbage cage. She took the empty packet to the Manager, because she could not manhandle Themba and take him to the Manager and he consumed the last biscuit that was in his hand.

36. When Cross-examined she stated that she took the empty packet of biscuits to the Manager and that empty packet was brought in as evidence at hearing by Mr. Simelane. She revealed that she did not just stayed and watch him eat the biscuits but is was because she could not manhandle Themba, she went and called her supervisor who found Applicant with crumbs on his mouth.
37. She also stated that Musa was not called in as a witness during the hearing despite the fact that he was present when the Applicant was caught. The Applicant confessed before her and Musa that he ate the biscuit.
38. During re-examination, Gugu stated that it is not just that she stayed and watched Applicant eat the biscuit; she left the scene and went to call her supervisor since they were not allowed to use cell phones.

## CLOSING ARGUMENTS

Applicant

39. It was argued on behalf of Applicant that the presiding officer was impartial. He made reference to **Grogan: Workplace Law (9<sup>th</sup> Ed) at 96** where the



qualities of an impartial Chairperson are clearly set out and they are as follows;

- a. Must not have an interest in the matter,
- b. Must not have 1<sup>st</sup> hand information concerning, the matter,
- c. Must not be biased; and
- d. Must be neutral.

40. It was further argued that Mr. Shabangu did not qualify under any of the above qualities in that he had interest in the matter as he was the one who preferred the charges against the Applicant. Therefore, Applicant stood no chance at the hearing as the decision of his case lied with the same person who had charged him.

#### Respondent

41. It was submitted for and on behalf of Respondent that the Retail sector experiences severe stock losses through theft unauthorized removal of company property or conduct similar to the present case or negligence. In order to protect its assets it put up strict controls to be followed by employees. The company has a policies procedures and controls.
42. Rule 8 provides that eating is strictly prohibited in the work place except in areas that have been designated for that purpose like the canteen. Rule 11 on the other hand requires employees to declare all merchandise that they have purchased before they can be consumed.
43. Applicant, it was argued, was caught consuming stock in undesignated area without the item being paid for or cancelled with a security sticker and therefore acted in clear violation of the aforementioned rules.

## **ANALYSIS OF EVIDENCE AND ARGUMENTS**

44. It is trite law that the onus of proving that there was a dismissal rests on the employee and the onus of proving that the dismissal was fair on the employer. It is further trite that the standard of proof is that of balance of probabilities. The standard of proof in simple terms implies that the version by the party who bears the onus (the employer) must be probable than the version of the other party (the employee). In the absence of a rebuttal by way of evidence by the employee as in this case, the issue to be determined is whether it can be established from the employer's case alone that the dismissal was unfair.
45. According to Mr. Shabangu the Applicant was quite aware of the rule that employees were not allowed to eat anywhere inside the shop except within the area designated for eating. He even mentioned that Applicant admitted to knowledge of such rule during the hearing. Based on this unchallenged assertion I find that there was an existing rule which the Applicant was aware of.
46. It therefore remains to answer if the Applicant breached such rule. I find the testimony of Gugu Matse to be more credible. She testified that she caught the Applicant eating Topper cream biscuits at the bulk store, which were not paid for. According to her Themba pleaded with her not to report him as he was going to be fired for something minor, but she went ahead and reported the incident to the Branch Manager Mr. Simelane. This clearly indicates that the Applicant was aware that he has done something wrong and could even be fired for it.
47. The Applicant has failed to adduce evidence that lays the basis of his claim. The Applicant did not even challenge the evidence of Gugu nor deny the allegation laid against him which leaves no doubt in

my mind that the substantive aspect of his dismissal was fair.

48. On the procedural aspect of Applicant's dismissal, it was argued that Applicant and his representative were not given an opportunity to cross-examine the Respondent's witness. However, upon scrutiny of the record of the hearing there is an indication that they were both given an opportunity to cross-examine the witness and signatures of all the parties involved confirmed the minutes. Therefore, I find that this argument falls away.
49. With respect to the Applicant's contention that he was denied the right of appeal, it has been held that if an employer's disciplinary code and procedure provides for an appeal process, than it is irregular for that employer not to hold the appeal, if the employee has noted one. See **Joseph Sangweni v Swaziland Breweries (IC Case no. 17/03)**.
50. The notice of disciplinary hearing does not include the right to appeal its only in the notice of termination where it states that if Applicant wishes to appeal he should do so within seven within 7 days of the 27<sup>th</sup> October 2009. The Applicant appealed and the Respondent decided to order that a hearing be heard for the second time.
51. The chairperson of a disciplinary hearing has broad powers to ensure that the disciplinary outcome is lawful and fair. He may cure the irregularities by rehearing the matter himself (**National Parkeraad v Terblanche (1999) 20 ILJ 1520 LAC**) or he may remit the matter to the initial enquiry for rehearing. See **Grogan: Workplace Law (9<sup>th</sup> Ed) at 205**.

See also **Thoko Dlamini v. Siphon Madzinane and Another (IC Case no. 377.08)**.

52. The Chairperson was therefore not wrong in ordering a rehearing of the Applicant's case.

53. It was submitted on behalf of the Applicant that the Chairperson of the hearing had an interest in the matter as he was the one who laid charges against the Applicant and therefore had information concerning the matter. He did not come to the hearing with a clear mind. See **Grogan supra at 97**. Mr. Shabangu did not deny that he was actually that he was the one who drew up the charges and also the Chairperson. His justification for such is that when he drew up the charges he did not know that he would also be appointed. I find that there was an irregularity regarding the procedure adopted therein and the Respondent in that regard flouted procedure.

## **CONCLUSION**

54. Based on the above reasoning, it is my conclusion that the Respondent had a fair reason for terminating the Applicant's services and in the circumstances, it was reasonable for the company to do so.

55. I have further found that there was a procedural lapse by the Respondent and I will therefore exercise my discretion in line with Section 16 (4) of the **Industrial Relations Act 2000 (as amended)**, the compensation awarded herein shall be varied as the dismissal is unfair only because the employer did not follow fair procedure. I consider that compensation equivalent to 16 weeks wages would be more appropriate in the circumstances.

## **AWARD**

51. The following order is made;

51.1. The Respondent is to pay the Applicant Themba Hadebe compensation for unfair

dismissal in the sum of (16 Weeks x E298.00)  
**E 4, 768.00**

51.2. The said amount is to be paid on or before the 17<sup>th</sup> December 2010, at the CMAC Offices, 4<sup>th</sup> Floor SNAT Building Manzini.

**THUS DONE AND SIGNED AT MANZINI ON  
THIS.....DAY OF NOVEMBER, 2010**

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NONHLANHLA SHONGWE  
CMAC COMMISSIONER