



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

HELD AT MANZINI

SWMZ 277/10

In the matter between:-

KWANELE MAGAGULA

APPLICANT

And

DUPS HOLDINGS (PTY) LTD

RESPONDENT

CORAM:

Arbitrator : Mthunzi Shabangu
For Applicant : In Person
For Respondent : Lwazi Mdziniso

Nature of Dispute : Unfair Dismissal

Date of Hearing : 14th October, 2010

ARBITRATION AWARD

1. DETAILS OF HEARING AND REPRESENTATION:

- 1.1 The Applicant is Kwanele Magagula, an adult male Swazi of Maliyaduma area, in the Manzini Region. His postal address is P.O. Box 6301, Manzini.
- 1.2 The Respondent is Dups Holdings (PTY) LTD, a company with limited liability duly registered according to the company laws of Swaziland, with its registered offices situate at Manzini in the Manzini Region. Its postal address is P.O. Box 114, Manzini.
- 1.3 During the arbitration hearing, the Applicant elected to present himself though having been advised of his rights to legal representation or any representation of his own choice. The Respondent had legal representation in the person of Mr. Lwazi Mdziniso.
- 1.4 The arbitration hearing was held at CMAC – Manzini, SNAT Co-Ops Building on the 14th October, 2010 before arbitrator M. Shabangu. The process was captured both on electronic and manual records.

2 ISSUE TO BE DECIDED

2.1 The issue for determination pertains whether or not the termination of the Applicant's services by the Respondent was fair both in terms of its substance and procedure. Alternatively, whether or not the Applicant should be compensated by the Respondent for an alleged insult (defamation or *crimen injuria*) leveled against him by a co-worker whom Applicant was dismissed for having assaulted.

3 BACKGROUND TO THE ISSUE

3.1 The Applicant is an ex-employee of the Respondent, having been employed in 2003 and dismissed on the 20th April, 2010 through a written letter. He was a Mortuary Attendant earning E1 400.00 per month.

3.2 Applicant started-off by pleading and challenging the dismissal both in relation to its substance and procedural aspect but in the middle of the trial, he abandoned this line of arguments to argue that the dismissal is challenged simply because the co-worker whom he was dismissed for having assaulted was not called into the disciplinary hearing to explain the reasons culminating to the assault, in particular that he had insulted the Applicant by calling him a mad or insane person.

3.3 The Respondent, whereas admitting as to the fact of the employment relationship between the parties, its duration, the Applicant's capacity and monthly wage, however, denied the alleged unfairness of the Applicant's dismissal in all aspects whatsoever. The Respondent's application, therefore, was that the Applicant's application be dismissed in its entirety.

4 SUMMARY OF THE EVIDENCE AND ARGUMENTS

The Applicant's Version;

4.1 The Applicant testified under oath to the fact that he was dismissed on the 20th April, 2010 following a disciplinary hearing that had been held on the 16th April, 2010 at the Respondent's business premises situate at Manzini. The misconduct for which he was dismissed was the assault of a co-worker-one Mr. Kenneth Simelane, an offence he had committed on the 9th April, 2010 at the work place and during working hours.

4.2 The charge sheet tabulating the misconduct had been delivered to the Applicant on the 12th April, 2010. During the disciplinary hearing, which was chaired by an independent person, the Applicant testified that he

pleaded guilty to the alleged misconduct. He was eventually found guilty on his own plea and a verdict of dismissal was meted against him through a written letter delivered to him on the 20th April, 2010.

- 4.3 He was given an opportunity to appeal this decision, something which he did through a written letter on the 27th April, 2010. His appeal was duly prosecuted and the dismissal verdict was upheld.
- 4.4 The Applicant confirmed even during his evidence in this arbitration that he did in fact assault Mr. Kenneth Simelane, his co-worker. He further admitted that that was wrongful conduct on his part as they (employees) had been warned against violence against each other at work and that such conduct amounts to a dismissal. The Applicant further admitted that fair disciplinary procedure was followed in lieu of his dismissal.
- 4.5 His eventual gripe with the dismissal was the non-attendance of the assaulted employee during the disciplinary hearing to explain the reasons for the assault. The Applicant's argument was that inasmuch as Mr. Simelane's presence during the disciplinary hearing would not have changed the outcome of the hearing, but would have helped in that the employer

would have got to know that Mr. Simelane was assaulted for having said the Applicant was mad or insane.

The Respondent's Version;

4.6 The Respondent, through the testimony of Ms Precious Naude, its operations' Supervisor, gave evidence to the fact that true the Applicant was dismissed but for the correct reason, being acts of violence against Mr. Kenneth Simelane (a co-worker) and, pursuant to a fair disciplinary procedure in that a fair disciplinary hearing and an appeal hearing were afforded to the Applicant.

4.7 She testified that following the violent conduct of the Applicant against Simelane on the 9th April, 2010 Applicant was suspended and advised to collect a charge sheet on the 12th April, 2010 something which he did. The disciplinary hearing was held on the 16th April, 2010 before an independent chairperson as he was not part of the Respondent Company. An opportunity to appeal the Chairperson's decision was afforded and an appeal was held on the 12th May, 2010. The appeal hearing was also chaired by an independent third party who was not an employee of the Company.

4.8 The Applicant did not pose even a single question in cross-examining this witness. When quizzed if he is sure that he would not want to ask not even one question from the witness pertaining to her evidence, the Applicant instead confirmed that Ms. Naude's evidence is in fact correct and truthful in its entirety.

4.9 Therefore, the Respondent's submission was that the burden of proving the fairness of the Applicant's dismissal in terms of Section 42 (2) of the Employment Act, 1980 has been successfully discharged warranting a dismissal of the application.

5 ANALYSIS OF THE EVIDENCE AND ARGUMENTS

5.1 The Applicant's claim against the Respondent is for compensation pursuant to an alleged unfair dismissal. The Certificate of Unresolved Dispute lists, amongst other issues in dispute, an issue pertaining to injury on duty. It was agreed as between the parties during a pre-arbitration hearing that this issue be removed from being in dispute since same is being pursued through the department of Labour under the Ministry of Labour and Social Security.

- 5.2 It is common cause that the Applicant was an employee to whom Section 35 of the Employment Act, 1980, applied. Consequently, for his dismissal to be said to be fair, it should be for one of the fair reasons for termination of employment listed in Section 36 of the Employment Act.
- 5.3 It is common cause further that the Applicant was dismissed for acts of violence against a co-worker, named Kenneth Simelane whom he physical assaulted on the 9th April, 2010 at the Respondent's business premises situate at Manzini.
- 5.4 It is further common cause that consequent to this act of misconduct, disciplinary charges were preferred against the Applicant and disciplinary proceedings were conducted which culminated to his dismissal.
- 5.5 Now, the challenge of both the reason and the pre-dismissal procedure was abandoned by the Applicant in the middle of the arbitration proceedings. The Applicant changed tune and argued that the only challenge against the dismissal pertained the non-attendance by the assaulted employee during the disciplinary hearing. The argument was that Mr. Simelane had to be present during the disciplinary

hearing so as to explain to the employer the reason why he was assaulted, being that he had insulted the Applicant by calling him a mad or insane person. The Applicant, however, submitted that this explanation would not have changed the outcome or verdict of the disciplinary hearing, just that the employer would, at least, have known that the assault was not just spontaneous and/or erratic.

5.6 The foregoing submission by the Applicant is indeed confusing. In fact, as soon as the Applicant changed tune and unequivocally admitted that both the reason and the pre-dismissal procedure was not in issue, I completely lost track of the Applicant's story. Nonetheless I tried to nurse the situation and nicely probed the Applicant as to why has he reported a dispute to the Commission. Lo and behold that is when I discovered that the Applicant in fact wanted compensation for the alleged insults by the victim of the assault. He was of the view that he was defamed by Mr. Simelane and that the employer, by not calling him to testify as to the reasons for the assault was siding with him and thus the Company should therefore compensate him (Applicant) for the defamation.

- 5.7 This is clearly a case of a misdirected claim. The Applicant sought to claim for delictual damages for defamation or *crimen injuria* resultant from the alleged insults by the victim of the assault – Mr. Kenneth Simelane, who had allegedly said the Applicant is mad or insane. Instead of seeking for proper advice as to how can he file that claim for defamation he filed a claim against his ex-employer for unfair dismissal. For that reason, the Applicant’s application ought to fail for being frivolous, vexatious and time wasting.
- 5.8 A claim for defamation cannot be brought before the Commission or the Industrial Court against the Respondent for a delictual offence allegedly committed by one of its employees as against the Applicant. Such a claim is beyond the remedial powers of the Commission as captured in **Section 17** of **The Industrial Relations Act, 2000** (as amended), read together with **Section 16** of the same **Act**.
- 5.9 The compensation referred to in **Section 16(1)(c)** is consequent to a dismissal of an employee that has been found by a Court or an Arbitrator to be unfair, not consequent to a finding based on defamation or delict. Further, compensation has been described by the Labour Court in the decided case of **FAWU & Others**

vs. SA Breweries (2004) 25 ILJ 1979 (LC) as a solatium or payment for the anxiety and hurt suffered by the employee as a consequence of being unfairly dismissed [not defamed]. Van Niekerk on **Law At Work (2008 edition)** says:

“Another way of viewing the purpose of compensation is as a penalty imposed on the employer for effecting an unfair dismissal as opposed to the restitution of financial loss.” (At page 294). (My emphasis)

5.10 In the foregoing regard, the Applicant’s claim is accordingly found to be frivolous and vexatious.

5.11 The evidence presented before the Commission coupled with the Applicant’s own admission discharged the onus placed on the Respondent in terms of Section 42 (2) (a) in showing that the Applicant was dismissed for an offence permitted by Section 36 of the Employment Act. In the Commission’s view the Respondent discharged the onus on a balance of probabilities if not beyond reasonable doubt in light of the Applicant’s unequivocal admission.

6 AWARD

6.1 It is thereby ordered that the Applicant's claim be and is hereby dismissed.

6.2 I make no order as to costs.

DATED AT MANZINI ON THEDAY OF DECEMBER, 2010.

**MTHUNZI SHABANGU
CMAC COMMISSIONER**