

IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION

HELD AT SITEKI CMAC REF NO: STK 029A1

In the matter between:

GABRIEL GWAMBE APPLICANT

AND
SD CITRUS (PTY) LTD RESPONDENT

Coram:

ARBITRATOR VELAPHIZ. DLAMINI

FOR APPLICANT IN PERSON
FOR RESPONDENT MR. WILLIAM MAMBA
ARBITRATION AWARD

NATURE OF DISPUTE : UNFAIR DISMISSAL DATE OF ARBITRATION : 12TM MAY 2011
VENUE : CMAC OFFICE, PROVIDENT FUND

BUILDING, SITEKI

-1-

1. DETAILS OF PARTIES AND HEARING

1.1 This arbitration hearing was held on the above date at the Conciliation, Mediation and Arbitration's office (CMAC or Commission) at the Swaziland National Provident Fund Building in Siteki.

1.2 The Applicant is Gabriel Gwambe, a Mozambican male adult of P. O. Box 46 Matata. Gwambe appeared in person to prosecute his case.

1.3 The Respondent is SD Citrus Proprietary Limited, a registered company of P. O. Box 4 Nsoko. The Company was represented by Mr. William Mamba, the Group's Human Resources Manager.

2. ISSUE(S) TO BE DECIDED

The issue for determination is whether or not the Applicant's dismissal was substantively and procedurally unfair.

3. BACKGROUND FACTS

3.1 The Respondent is an agric-business enterprise based at Nsoko that specializes in the production of citrus fruits for sale in the local and export markets.

3.2 The Applicant commenced service with the Respondent in March 2002 as a Heavy duty driver, a job he held until he was dismissed on the 6th December 2010, following allegations of wilfully damaging company property. The

-2-

Applicant was earning a sum of E1380.00 as wages per month at the time of his dismissal.

3.3 The Applicant reported a dispute for unfair dismissal to the Commission, which was conciliated,

however the dispute remained unresolved, and a Certificate of Unresolved Dispute no: 131/11 was issued. The parties referred the dispute to arbitration and I was appointed to decide same.

3.4 The Applicant is seeking the following relief: reinstatement, alternatively, notice pay (E1380.00), Additional notice (E1610.00), Severance allowance (E4025.00), Leave pay (E1380.00) and 12 months compensation (E16560.00). The total amount claimed is E24 955.00.

4. SURVEY OF EVIDENCE AND ARGUMENT

I have considered all the evidence adduced and arguments advanced by the parties, but because Section 17 (5) of the IRA 2000 (as amended) requires concise reasons, I have only referred to the evidence and arguments that I consider relevant to substantiate my findings.

4.1 APPLICANTS CASE

4.1.1 The Applicant was the only witness who testified in support of his case.

-3-

4.1.2 It was the Applicant's testimony that on the 1st October 2010, as usual he reported for duty at about 4:30 am. He inspected his truck a Mercedes Benz 1113, and like any other working day, he checked the oil and water. The Applicant filled water in the radiator, because the radiator was leaking.

4.1.3 The Applicant testified that he had reported the radiator leakage to the director Mr. Visser, and because it was not repaired, he kept on making a follow up, until Mr. Visser threatened him, by warning him that if he did not want to work, he would be dismissed.

4.1.4 The Applicant's evidence was that although the radiator was not repaired, the director bought an anti leak chemical (Bar leaks) and instructed him to pour in the radiator in order to stop the leak. However the leak did not stop, but continued unabated.

4.1.5 It was the Applicant's case that on the 1st October 2010, after checking and filling in the water, he then started the truck's engine, with the intention of fetching the company's employees from their residential quarters.

4.1.6 The Applicant stated that he then drove out of the company's premises and at the T-junction where the road connected with the Big Bend/ Lavumisa Public Road, he made a left turn towards Lavumisa. However before he

-4-

could reach Mbutfo Army Base at or near a bus stop, the truck broke down after the radiator pipe burst.

4.1.7 The Applicant testified that after the breakdown, he walked back to the company to report the breakdown. The Manager who was present then instructed a mechanic and a tractor driver to attend to the breakdown. The mechanic installed another pipe, which was smaller than the one that had burst and then filled the radiator with water. The three employees tried to start the engine again, but it failed. The truck was then towed back to the company garage.

4.1.8 It was the Applicant's testimony that, when the breakdown occurred, Mr. Visser was away. Upon his return, before he (Applicant) could report what had happened, his Supervisor had a meeting with Mr. Visser. After the meeting between the Senior officers, Mr. Visser ordered the Applicant to leave the workplace and to report when requested to do so.

4.1.9 It was the Applicant's evidence that after two (2) days Mr.

Visser sent a security guard to call him to attend a meeting. At the meeting Mr. Visser accused the Applicant of driving the truck to an unauthorized route, thus causing damage to the motor vehicle. The

Applicant denied going to Lubulini via Nsoko, but maintained that he was bound for Mbutfu when the

-5-

truck broke down at the bus stop. Finally Applicant requested Mr. Visser to call the security guards who were claiming that he went to Nsoko.

4.1.10 The Applicant testified that Mr. Visser called the Security guards, who claimed that they saw him taking the Nsoko direction instead of Mbutfu. Applicant in the presence of director, disputed the guards' version and asserted that the guards made a mistake and had confused the SD Citrus truck with the Tranship one, since the two were similar.

4.1.11 The Applicant stated that he was called to a second meeting by Mr. Visser. In this meeting he was denied representation. Mr. Visser maintained that the Applicant damaged the truck by driving to an unauthorized route. The Applicant maintained his denial that the truck broke down whilst he was on the right route. However in the end Mr. Visser dismissed him.

4.1.12 It was the Applicant's evidence that he was currently unemployed. He was married with four children all attending school. His children were all expelled from school because he could not pay their fees as a consequence of losing his job.

4.1.13 Under cross-examination, the Applicant stated that, he requested to be represented in the hearing in November 2010 in the third meeting he had with the Management.

-6-

He stated that although he came with his representative Mr. Selby Mntshali to one of the meetings, his representative was denied audience because of a misunderstanding Mntshali had with Management.

4.1.14 When it was put to the Applicant that Mntshali was denied evidence because he insulted Mr. Visser, the Applicant could not admit or deny that because he said the protagonists spoke in English and he did not understand the language.

4.1.15 When it was suggested to the Applicant that, he had wilfully damaged the company property, he refuted that and asserted that it was not possible to intentionally damage his working tool.

4.1.16 The Applicant was asked what the distance between the company premises and the point of the breakdown was, at first he said it was 25 kilometers to 30 kilometers, but upon being further pressed, he changed and said it was approximately nine (9) kilometers.

4.1.17 When the Applicant was asked if the temperature gauges were working, he stated that they were faulty.

4.1.18 It was put to the Applicant that he traveled a long distance on the truck without filling water in the radiator and that is why the engine was damage, the Applicant denied that.

-7-

4.1.19 When the Applicant was asked what his defence against the security guards version was, he stated that, at the hearing he asked the guards why he was not stopped and or reported to the Lubtilini Police, that he was traveling on an unauthorized route. According to the Applicant the guards failed to give explanations to his questions.

4.1.20 The Applicant argued that the Respondent dismissed him under the guise of wilfully damaging company property in order to evade addressing his overtime claims. At the point when he made a follow up on the overtime grievance he lodged, Mr. Visser threatened to dismiss him. When the truck broke down, Mr. Visser then saw this as an opportunity to terminate the Applicant's services in order to silence him.

4.2 RESPONDENTS CASE

4.2.1 The Respondent led the evidence of four (4) witnesses in support of its case; these were Trusty

Mhlanga, Mfanukhona Dlamini, Colani Dlamini and Petros Khumalo.

4.2.2 Trusty Mhlanga testified that her job was Office Secretary. That on the 1st October 2010, she received a report of the breakdown of the truck that was driven by the Applicant.

-8-

The nature of the report was that, the radiator pipe had burst. When the mechanic tried to repair or attended other faults caused by the burst pipe, the truck would not start. It was then towed to the workshop.

4.2.3 The secretary stated that Mr. Visser then requested the Works Council which comprised of nine (9) committee members to discuss the case. It was then that she heard from the guards that the Applicant had taken a wrong route (Nsoko), but the truck broke down at or near Ngwavuma bridge on the way to Mbutfu.

4.2.4 It was Mhlanga's evidence that several meetings were held between the Works Council and the Applicant, where the latter was requested to admit wrongdoing, but the Applicant denied committing any misconduct throughout the meetings. Eventually a disciplinary hearing was held wherein Mr. Visser was involved.

4.2.5 Trusty Mhlanga testified that the Applicant did report that the radiator had leaks.

4.2.6 The secretary testified that whilst the Applicant was under suspension he was only given his rations. He was not paid his outstanding leave pay.

4.2.7 It was Mhlanga's evidence that in all the meetings that were held with the Applicant, he was given the opportunity to mitigate. In the last meeting which was held on the 6th December 2010, the Applicant was advised that he was

-9-

charged with wilful damage of company property. He was requested to apologize but he refused.

4.2.8 Trusty Mhlanga stated that what made the Applicant's case serious was that the truck was damaged whilst he was using the Nsoko route. It was not the first time that the engine had ceased, Mr. Visser had cautioned the Applicant on the other occasions.

4.2.9 Under cross-examination, the secretary conceded that the Applicant was a dedicated and hardworking employee and as such she pleaded with him to apologize to Mr. Visser, because it would be unfortunate to see him leave the company.

4.2.10 When it was put to Mhlanga that the factory ladder that was allegedly used by the guards to survey the movements of the truck was not in existence by the 1st October 2010, she asserted that the ladder was permanently fixed and could not be removed.

4.2.11 Mfanukhona Dlamini testified that he was employed by Fecela Security Company and his working station was SD Citrus. His job title was Sergeant.

4.2.12 It was Mfanukhona Dlamini's evidence that on the 1st October 2010, he was working at SD Citrus workshop. The Applicant arrived at 0420hrs and went to his truck. He inspected the truck as usual and then started the engine and drove out.

-10-

4.2.13 Mfanukhona Dlamini's testimony was that he suspected something fishy because the Applicant usually comes to take the truck at 5:00 am, but on that day he came earlier. When the truck drove out, he decided to watch where it was going, because Management often demanded reports from him about its trips.

4.2.14 The guard stated that he then climbed on to a ladder (Jabavu) and reached a point where he could see the Big Bend / Lavumisa Public road. He observed that when the truck reached the T-junction, instead of taking the Mbutfu direction, it turned towards Nsoko. He then called another guard who was stationed at Nsoko to be on the watch for the truck.

4.2.15 It was Mfanukhona Dlamini's evidence that the SD Citrus 1113 truck was different from the Tranship 1113 truck. Firstly SD Citrus truck's registration is SD 123 FL, secondly the truck had railings at the back that protected passengers from falling off. The Tranship truck instead of railings had a fence at the back which also served a similar purpose. Thirdly the SD Citrus truck was old and the Tranship one was new. He did not investigate what the truck's destination was.

4.2.16 Mfanukhona Dlamini testified that although there were SD Citrus employees that resided at Lubulini, these were only

-11-

transported during the grapefruit season. During off season in October the truck was not authorized to use that route.

4.2.17 The guard testified that he deposed to an affidavit narrating the events of the 1st October 2010, which document was submitted during the hearing. He also gave evidence at the hearing. The Applicant had denied taking the Nsoko/Lubulini route.

4.2.18 Mfanukhona stated that he did not take note of the time the truck broke down.

4.2.19 Under cross-examination the guard admitted that he was on duty with Mbongeni Dlamini, another guard on the 1st October 2010.

4.2.20 When it was put to him that the Applicant reports for work at 4:30 am to start his shift, Mfanukhona Dlamini denied that and stated that since he (guard) started working at SD Citrus, the Applicant started his shift at 5:00 am.

4.2.21 When he was asked why he did not stop the Applicant from driving out with the truck thirty minutes before his shift, Mfanukhona Dlamini stated that it was not his responsibility to monitor the Applicant's schedule.

4.2.22 Mfanukhona Dlamini produced his affidavit and asked that it be used as part of his evidence.

4.2.23 Colani Dlamini testified that he was also employed by Fecela Security Company as a security guard. On the 1st October 2010, at around 4:25 am while stationed at Nsoko,

-12-

he was instructed by his Sergeant Mfanukhona Dlamini to be on the alert for an SD Citrus truck. He was ordered to look at what direction the truck would take.

4.2.24 It was Colani Dlamini's evidence that indeed he waited for the truck which passed Nsoko at 4:30 am. It took the Lubulini direction. He was sure that it was the SD Citrus truck because he knew it. He did not stop the driver because his sergeant did not give him that order.

4.2.25 Colani Dlamini testified that he gave evidence during the Applicant's disciplinary hearing and also submitted an affidavit narrating what he witnessed on the 1st October 2010.

4.2.26 Under cross-examination Colani Dlamini maintained that he saw the truck driven by the Applicant go to Lubulini at around 4:30 am on the 1st October 2010.

4.2.27 Petros Khumalo testified that he worked at the SD Citrus workshop/ Garage. His job was to do light service and welding of company motor vehicles and he had been performing this job since 1989.

4.2.28 It was Khumalo's evidence that he attended the breakdown. Upon arrival at the scene, he

found that the inlet water pipe had burst. He then installed another one and the Applicant filled water. He then tried to start the truck but it failed and as a result it was towed to the workshop.

-13-

4.2.29 Petros Khumalo's testimony was that he did not dismantle or strip the engine, but waited for the mechanic Mr. Bennett who inspected the engine and declared that it had ceased.

4.2.30 It was Khumalo's evidence that the mechanic's opinion was that the engine ceased because it had been driven for a long distance without water.

4.2.31 According to Khumalo the engine could not cease after being driven for a short distance such as from the workshop to the bus stop where the truck broke down, that distance was about one (1) kilometer.

4.2.32 Petros Khumalo stated that the oil and temperature gauges were functioning properly. It was only the petrol gauge that was faulty.

4.2.33 It was Khumalo's evidence that hot air from the engine probably caused the inlet pipe to burst. He suspected that the Applicant's mistake was that he may not have checked and filled the radiator with water when he drove the truck.

4.2.34 Petros Khumalo stated that he was not called to testify during the Applicant's hearing.

4.2.35 It was Khumalo's evidence that although the radiator was leaking, it was a drop, which would not drain all the water within the one (1) kilometer distance.

4.2.36 Under cross-examination Petros Khumalo maintained that the leak was small, that is why the bar leak chemical was purchased.

-14-

4.2.37 When it was put to Khumalo that he refused to weld the radiator, because he said it was made of masonite, he denied making that statement.

4.2.38 Petros Khumalo maintained that the gauges were functioning properly. If they were faulty then the Applicant is to blame because he had to report the problem.

4.2.39 When it was put to Khumalo that he was not the one who serviced the truck, but Mr. Bennett, Khumalo disputed that. He stated that Mr. Bennett would be called whenever there was a fault with the engine and braking system.

4.2.40 The Respondent's representative argued that it had proved that the Applicant had wilfully caused the damage of the engine. It was therefore substantively fair to terminate his services.

4.2.41 It was also submitted by the Respondent that a disciplinary hearing, which followed a fair procedure was held. The Applicant's dismissal was therefore procedurally fair.

5. ANALYSIS OF EVIDENCE AND ARGUMENTS

5.1 It is common cause that the Applicant was permanently employed, consequently he has proved that Section 35 of the Employment Act 1980 applies to him. He has therefore

-15-

discharged his onus in terms of Section 42 (1) of the Employment Act.

5.2 It remains for the Respondent to prove that the reason for terminating the Applicant's services was permitted by Section 36 of the Employment Act and that taking into account all the circumstances of the case, it was reasonable to dismiss him.

5.3 The Respondent terminated the Applicant's services for the reason that he wilfully damaged the engine of the Mercedes Benz truck.

5.4 John Grogan Dismissal Juta (2004) p 114, concerning misconduct of damage to property, remarks as follows;

"If an employee wilfully damages the property of the employer, dismissal is almost invariably justified. The justification in such cases flows more from the employee's malicious intent than from the actual damage caused; where intent is present, dismissal is warranted even if the employer suffered only minor loss."

5.5. In view of the fact that Grogan's (supra) exposition of wilful damage to property is brief and to the point, and because there are no reported cases in the Industrial Court and the Industrial Court of Appeal dealing with the specific misconduct, it is necessary to refer to criminal law text books. This is because these text books deal extensively with the criminal offence of malicious damage to property.

5.6. It is my holding, that save for the different standards of proof required, the elements of the offence of malicious or wilful damage to property in criminal and civil law (labour) are similar. CR SNYMAN CRIMINAL LAW (3RD ed)

-16-

Butterworths (1995) p 502, defines malicious injury to property as follows;

"A person commits malicious injury to property if he unlawfully and intentionally damages

- (a) Movable or immovable property belonging to another, or
- (b) His own insured property, intending to claim the value of the property from the insurer."

5.7 According to the Concise Oxford English Dictionary (11th Ed) (2004), the words wilful, malicious and intention are synonymous.

5.8 Snyman (supra) at p 505 remarks that it is irrelevant that the perpetrator had an improper or ulterior motive for one to prove his intent. Damaging the property need not be an offender's principal aim. It suffices if he foresees the possibility that the damage may be caused, but nonetheless proceeds with his actions.

5.9 The Respondent submitted that the fact which proved the Applicant's wilfulness was that he took an unauthorized route to Lubulini via Nsoko when he was suppose to take the Mbutfu direction.

5.10 The two Security guards, Mfanukhona Dlamini and Colani Dlamini corroborated each other by stating that the Applicant's truck took the wrong turn and traveled to Lubulini. At various hearings and during the arbitration, the Applicant denied going to Lubulini on that day (1st October 2010).

5.11 Mfanukhona Dlamini stated that he saw the truck at 4:20 am and at a distance of one (1) kilometre turning

-17-

towards Nsoko. I can take judicial notice of the fact that, although October is in summer at 4:20 am it is still dark. My holding is fortified by fact that, Colani Dlamini said that at 4:30 am, it was still dark, he was able to see the truck because there were lights at or near Nsoko Spar, where the truck passed. There was also a dispute about whether the ladder Mfanukhona used to climb still existed.

5.12 How Mfanukhona Dlamini was able to see the truck one (1) kilometer away at night, whilst it was facing forward is not clear. However it could be argued that since it was dark, the truck's head lights though pointing in the opposite direction made it easy for it to be identified as a motor vehicle. That is probably true.

5.13 To boost the version that the Applicant went to Nsoko, Colani Dlamini stated that he saw the truck pass the shops on its way to Lubulini. Apparently the truck returned after an hour.

5.14 The Applicant was not charged with using an unauthorized route. These facts were only used by the Respondent to demonstrate that the truck broke down because it traveled a long distance with insufficient water in the radiator. Indeed it was argued by the Respondent that, if the Applicant had filled water in the radiator at 4:20 am, then the water could not have leaked within one (1) kilometer and cause the radiator pipe to burst. That may be true.

5.15 The two security guards were cross-examined at length by the Applicant, both stood their grounds. The Applicant was also cross-examined by the Respondent's representative, he also could not be swayed.

-18-

5.16 The proven facts are that the truck did not breakdown between Nsoko and Lubulini, but on the other side of the T-junction towards Mbutfu (the truck's authorized route). The two security guards did not record any statement until they were allegedly advised by a Labour Official, sometime in November 2010, after the Respondent had sought advise on how to proceed against the Applicant.

5.17 Although I cannot make an adverse finding on the credibility of the two security guards, in view of the events that followed before they recorded their statements, one cannot rule out the possibility of collusion to implicate the Applicant. However that is not my finding.

5.18 It was also surprising that when Mfanukhona was asked at what time did the truck breakdown at the Ngwavuma bridge, he responded that he did not take notice. This is the same guard who took a keen interest in the truck on that day, because he suspected foul play. On the other hand Colani stated that the truck passed his station at 5:40 am. Why did Colani not call his Sergeant to advise him that the truck was coming back?

5.19 When the Applicant asked them why they did not immediately stop him or report him to the Swaziland Royal Police Lubulini Station, they said it was not within their duties. That may be so, however what would be the point of making a preliminary investigating of a possible offence, then upon establishing that it was committed, you fail to complete those investigations and immediately report same to your Superiors? It is not proper to wait until

-19-

you are approached and asked by your Superior to recount the events of a certain day.

5.20 The Respondent did not lead any evidence in the nature of tachometre readings, to prove that from 4:20 am to the time the truck stopped, it had traveled more than the one (1) kilometer.

5.21 Petros Khumalo stated that when they arrived at the scene, they did not see any pool of water to show that the radiator pipe had burst at that point. He also stated that the pipe was dry. Khumalo's observations do not make them the only reasonable inference. The water may have evaporated or leaked during that one (1) kilometer drive. After all there was a dispute concerning the extent of the leak, whether it was major or negligible,

5.22 What is more significant is that the Respondent did not lead any evidence to prove any damage in the engine. It was not proved that there was a mechanical nexis between the burst radiator pipe and the failure of the engine to start. No evidence was led to show what component of the engine was damaged as a result of the burst pipe. Nor did the Respondent show that repairs were made to the engine consequent to the breakdown and those damages were consistent with the truck being driven for a long distance without water in the radiator. The fact that a breakdown as a result of the burst pipe was proved does not necessarily infer that damage was established.

5.23 It was not proved that the engine failed to start because of the burst pipe. What Petros Khumalo was told by Mr. Bennett is inadmissible hearsay. Mr.

-20-

Bennett was not called as a witness to give evidence about his finding after examining the engine.

5.24 I find that damage to the engine or any mechanical component of the truck was not proved by the Respondent. There is therefore no question of wilfulness or negligent damage on the part of the Applicant. Whether the Applicant drove to Nsoko/ Lubulini or not does not advance the Respondent's case in the absence of evidence of damage. The Applicant was not charged with wilful damage of the pipe, but the alleged offence had to do with the failure of the engine to start.

5.25 I find that the Respondent did not have a fair reason to terminate the Applicant's services.

5.26 It is also my finding that the Applicant's dismissal was unreasonable in all the circumstances of the case for the following reasons;

- (a) Although the Respondent submitted that the Applicant was responsible for damaging the truck on numerous occasions in the past, the nature and extent of the damages were not proved nor was the evidence of Applicant's faults. The Respondent never issued any written warnings against the Applicant for the alleged offences, if they were. In fact it is common cause that the Respondent repaired the truck without attributing fault on the Applicant.
- (b) It is a proven fact that the truck was very old and had a radiator leak. Sometimes the gauges were faulty. The Respondent did not dispute the fact that when Applicant persisted that the truck be

-21-

properly maintained, he was scolded by the director and threatened with dismissal.

- (c) It is unreasonable of an employer to demand higher standards of its employees, when it fails to adhere to those standards, especially serious ones such as safety. Failure to properly maintain the truck could have led to accidents resulting in loss of life.
- (d) It is common cause that the Applicant was an industrious and dedicated employee who sometimes went beyond the call of duty.

5.27 I find that the Applicant's dismissal was substantively unfair.

5.28 The Applicant also argued that the Respondent failed to follow a fair procedure when terminating his services, because he was denied representation.

5.29 It is common cause that three hearings were held. Although the first two were investigative in nature, the Applicant did not deny that he was permitted representation throughout the hearings.

5.30 The Applicant blamed the Respondent for barring his representative, Mr. Selby Mntshali from the hearings. However the Applicant did not deny that the reason Mr. Mntshali was prevented from attending was because he allegedly insulted Mr. Visser. Although I am not making a finding of the fact that Mr. Visser was insulted by Mr. Mntshali, it would however be remiss of me to expect the Respondent to allow a person who insults him to continue to be part of the hearing. An analogy may be drawn in a scenario where an Attorney is in contempt of Court. Is the Presiding

-22-

Officer compelled to proceed with the merits of the matter with the same Attorney, before the contempt proceedings are instituted and finalised? Emphatically no.

5.31 The Applicant did not dispute the fact that the company required an apology from Mr. Mntshali and none was offered. The Applicant was not prevented from engaging another representative. Instead he dumped Mr. Mntshali and elected to conduct his own defence. There is no evidence that being without a representative materially prejudiced him in his defence.

5.32 One needs to caution himself and apply the principle enunciated in *Zephama Ngwenya v Royal Swaziland Sugar Corporation* (IC Case no: 263/2001); *Christopher H. Dlamini v Inter Africa Suppliers (SWD) LTD* (IC Case no: 55/97), that, in holding a disciplinary inquiry, an employer is not expected to observe the same standards that apply in criminal proceeding in Courts of Law. Although the Respondent did not produce a charge sheet, minutes and a written verdict, the proven facts are that the Applicant was afforded an opportunity to defend himself against the accusation of wilfully damaging the truck's engine. The disciplinary inquiry was held over a period of at least three weeks. I find that the Applicant's dismissal was procedurally fair.

-23-

6. REMEDY

6.1 In terms of Section 16 (3) of the Industrial Relations Act 2000 (as amended), I must first consider the possibility of reinstatement. Although the Applicant wishes to be reinstated,, I do not think that reinstatement is a reasonably practicable and appropriate relief in all the circumstances.

6.2 Although I have found that the Applicant's dismissal was substantively unfair, it is a fact that there is no longer any trust between the parties. The Respondent feels that the Applicant abuses the truck and the latter feels that the former exploits him because of his dedication to his job.

6.3 In view of the fact that the Respondent is a small undertaking, that is to say, the Applicant reports directly to Mr. Visser the employment relationship would not be tolerable if he were to be reinstated.

6.4 The Applicant claimed leave pay, however no evidence was led by him to prove same, this claim falls to be dismissed.

6.5 In awarding the Applicant compensation for unfair dismissal, I have taken into account the following facts;

6.5.1 The Applicant is married and has four children who were attending school at the time of his dismissal, but had to drop out.

6.5.2 The Applicant had worked for the Respondent for eight (8) years eight months before his services were terminated.

-24-

6.5.3 The Applicant is an old man and at the time of arbitration he was still unemployed.

6.6 I hold that nine (9) months wages as compensation for unfair dismissal is fair and equitable in all the circumstances.

6.7 The Applicant was summarily dismissed and was not paid any terminal benefits. I hold that the Respondent is liable to pay the Applicant's terminal benefits.

6.8 The following order is made;

7. AWARD

7.1 I find that the termination of the Applicant's services was substantively unfair, but procedurally fair.

7.2 The Respondent is ordered to pay the following claims;

(a) Notice pay	E1380.00
(b) Additional notice ay (4daysx7yrs x E53.07)	E1485.96
(c) Severance allowance (10 days x 7yrs x E53.07)	E3714.90
(d) Compensation for unfair dismissal E1380.00 x 9 months	E12 420.00
TOTAL	<u>E19 000.86</u>

-25-

7.3 The Respondent is directed to pay the Applicant the sum of E19 000.86 not later than the 14th October 2011 at the CMAC Offices in Siteki.

7.4 There is no order for costs.

DATED AT MANZINI THIS 9TH DAY OF SEPTEMBER 2011

VELAPHIZ. DLAMINI CMAC ARBITRATOR

-26-