



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

HELD AT MBABANE

SWMB116/13

In the matter between:

PATRICK SIFUNDZA

Applicant

And

BUY N' SAVE SPAR

Respondent

CORAM:

Arbitrator : Commissioner Sipho Nyoni

For Applicant : Siyabonga Dlamini

For Respondent : David Msibi

ARBITRATION AWARD

Venue : Asakhe House Mbabane

Arbitration Dates : 5th November 2014, 19th November 2014
& 3rd December 2014

Nature of Dispute : Unfair Dismissal

1. Details of Parties and Hearing

1.1 The Applicant is Patrick Sifundza an adult Swazi male of Mbabane within the district of Hhohho. Applicant was represented by lawyer Mr. Siyabonga Dlamini from the offices of Mkhwanazi Attorneys.

- 1.2 The Respondent is BUY N' SAVE SPAR a company duly incorporated in terms of the law of Swaziland and having capacity to sue and be sued in its own name. The Respondent was represented by Mr David Msibi a labour consultant.
- 1.3 The arbitration hearing was held at CMAC offices, Asakhe House Mbabane.

2. Background to the dispute:

- 2.1 The Applicant is an ex-employee of the Respondent. Applicant was dismissed by the Respondent pursuant to a disciplinary hearing.
- 2.2 Applicant avers that his dismissal was procedurally and substantively unfair. Applicant seeks compensation for the unfair termination and claims payment in lieu of the unexpired portion of his fixed term contract.
- 2.3 A dispute was reported by the Applicant to the Commission and same was conciliated upon. The dispute was certified as unresolved the certified issues in dispute which appear ex-facie the certificate of unresolved dispute are the following; payment of breach of contract 6 months E 7,932.00 (seven thousand nine hundred and thirty two Emalangeneni).
- 2.4 The dispute is brought to arbitration pursuant to a referral by the Industrial Court in terms of **Section 8(8) of The Industrial Relations Act 2000(as amended)**.

3. Issue to be decided:

3.1 The issue for determination pertains to whether the Applicant's dismissal was procedurally and substantively fair.

4. Applicant's case/version:

4.1 A summary of the most important and relevant aspects of the Applicant's evidence influencing the outcome of these proceedings is detailed herein below.

4.2 The Applicant was the only witness to testify in support of his case.

4.3 Applicant testified that he was employed by the Respondent on the 6th of January 2011. He stated that he was posted to work at the Respondent's Mbabane branch. Applicant testified further that on the 6th of June 2011 he was made to sign a fixed term contract whose duration was for 12 months.

4.4 Applicant stated that he was employed in the capacity of a baker.

4.5 Applicant narrated the events of 15th January 2013 which culminated in his eventual dismissal. He stated that on the 15th he reported to work as usual and proceeded to the bakery and that on his arrival he found his colleagues already at their work stations in the bakery. He testified that he proceeded to the table where the bread was being mixed.

4.6 Applicant testified that he then took the bread on to the trolley and proceeded take the bread into the oven. Applicant stated that he then subsequently also took the pizza which was being prepared and took it into the oven.

- 4.7** It was the Applicant's statement that when the pizza was ready he proceeded to take it out of the oven and took one slice of the pizza to taste it. Applicant stated further that because his cell phone was in the locker room he proceeded to go to locker room with the pizza that he had taken. Applicant further stated that whilst still in the locker room, his supervisor Mr Mkhumbi Thwala called him and enquired why he was eating the pizza. It was Applicant's testimony that his supervisor took the pizza he was eating and called the security officer Mr Mduduzi Masuku.
- 4.8** Applicant submitted that he was questioned in the board room and subsequently requested to write a statement.
- 4.9** Applicant testified that he was suspended on the 16th of January 2013 and informed to return on the 23rd of January for a disciplinary hearing. Applicant stated that the hearing did not proceed on the 23rd and was postponed to the 24th of January 2013.
- 4.10** In relation to the actual hearing, the Applicant stated that the charge was read out to him by Mr Mduduzi Masuku and that when the charge was read out the witnesses who were to testify were inside the hearing room.
- 4.11** Applicant testified that he did not have a representative during the hearing because he could not find a person to represent him as all his fellow colleagues refused to assist him.
- 4.12** Applicant stated that on the 9th of February 2013 he received his letter of dismissal and was informed of his right to appeal. Applicant stated that he duly noted his appeal on the 11th of

February 2013 and gave the letter of appeal to Mr Hassan Mansor who instructed him to submit the appeal at his office.

4.13 Under cross examination the Applicant was asked if anyone had given him permission to eat the pizza? The Applicant conceded that he had not been given permission to eat the pizza. Applicant was further asked if employees were allowed to eat inside the store? The Applicant again conceded that they were not allowed to eat inside the store.

4.14 Applicant was further asked if he maintained his claim that he was not given enough notice to enable him to prepare for the disciplinary hearing. Applicant responded by stating that the notice given was sufficient.

5. Respondent's version:

5.1 The Respondent led two witnesses in evidence. A summary of the witnesses' evidence influencing the outcome of these proceedings is detailed herein below.

Mduduzi Masuku RW 1:

5.2 RW 1 testified that he is employed by the Respondent as a chief security officer. He confirmed that he started working for the Respondent in August 2010. It was the witness's evidence that sometime on or about the 15th January 2013 the Applicant herein was brought to him by his supervisor Mr Mkhumbi Thwala after having been found eating a pizza without permission.

5.3 RW 1 testified further that the Applicant had written a statement wherein he had admitted being found eating a slice of pizza. RW1 stated that the Applicant wrote the statement after being requested to write same by Bheki Ndwandwe the store manager.

- 5.4** RW1 submitted a copy of the statement that had been written by the Applicant as part of the Respondent evidence against the Applicant.
- 5.5** RW 1 stated further that he was the initiator during the disciplinary hearing of the Applicant.
- 5.6** RW1 stated that the Applicant after being found guilty and subsequently dismissed submitted a letter of appeal to Mr Hassan Mansoor at the store. RW1 stated that he made a copy of the appeal letter that had been submitted by the Applicant and requested the Applicant to take the Appeal letter to the Respondent's head office in Manzini. RW 1 stated that the Applicant never objected to taking the Appeal letter to Manzini.

Mkhumbi Thwala RW2:

- 5.7** He testified that he is also employed by the Respondent. He stated that presently he worked at the Respondent's other business in Matsapha. RW 2 stated that on or about July 2011 in his capacity as supervisor for the bakery he employed the Applicant at the Respondent's Mbabane branch.
- 5.8** RW2 stated that on the 15th of January 2013 he found the Applicant eating a slice of pizza in the locker rooms. RW 2 stated that he had not given the Applicant permission to taste the pizza that had been prepared. RW2 testified that the procedure for tasting baked products was that they only tasted new products. He stated that when a product was tasted he would cut the product into pieces and would give it to each employee in the bakery to taste. RW2 stated that he was the only person authorized to taste cooked products.

5.9 RW2 stated that after having found the Applicant eating the pizza he reported him to Mr Mduduzi Masuku who is the chief security officer in the store.

6. Analysis of the evidence and arguments:

6.1 I have in this award considered all the evidence adduced by the parties. **Section 17(5) of The Industrial Relations Act 2000 (amended)** requires me to state concise reasons for my award. I therefore herein below state concise reasons to substantiate my findings.

6.2 The issues in dispute as appear ex-facie the certificate of unresolved dispute are payment of E 7,932.00(seven thousand nine hundred and thirty two Emalangen) being in lieu of the unexpired portion of the Applicant's fixed term contract which is the equivalent of six months.

6.3 Applicant's argument is to the effect that his dismissal was procedurally and substantively unfair and therefore consequently amounting to a breach of contract.

6.4 Section 42(1) of The Employment Act 1980 (as amended) places the onus upon the Applicant to show that at the time of dismissal/ termination he was an employee to whom section 35 applied. From an analysis of the evidence adduced by the Applicant it is undisputed that the Applicant's services were terminated before the tenure of the fixed term contract had lapsed. It is therefore my finding that the Applicant has discharged the onus placed by **section 42(1) Employment Act.**

6.5 The Respondent however bears the onus of proving that the termination of the Applicant's services was for a fair reason

and that it was reasonable in the circumstances of the case; see **Section 42(2) of the Employment Act 1980**.

- 6.6** The Applicant argues that his dismissal was procedurally unfair because he was denied the right to appeal and further denied the right to legal representation. I shall deal with each of the mentioned grounds first before proceeding to address the substantive element of the dismissal.
- 6.7** Applicant testified that he did not have a representative at the hearing because he could not find anyone to represent him as all his fellow colleagues refused.
- 6.8** The Applicant argues that although there is no general right to legal representation in internal disciplinary hearings same may however be permitted in exceptional cases where it will be necessary for a procedurally fair hearing, see **Ndoda Simelane vs. National Maize Corporation Industrial Court case No 453/2006**.
- 6.9** 'Whether legal representation is indispensable to ensuring a procedurally fair hearing is a discretion conferred on the chairperson of the enquiry. The chairperson must exercise that discretion judiciously having regard to all the circumstances of the particular case' see **Majola vs. MEC Department of Public Works, Northern Province & Others (2004) 25 ILJ 131 (LC)**.
- 6.10** In the present case, the chairperson was never called upon to make a determination on whether the Applicant was entitled to external representation. In fact, the evidence presented before is to the effect that the Applicant merely presented himself for the enquiry and never made any application for external representation to be allowed.

6.11 A chairperson of a disciplinary hearing is only obliged to ensure that an employee is aware of his rights at a disciplinary hearing, see **Joseph Sangweni vs. Swaziland Breweries Industrial Court case No. 52/2003**. The Applicant in the present case whilst under cross examination conceded that the chairperson of the disciplinary enquiry read out to him his rights during the hearing.

6.12 It is therefore my finding that in the absence of an application for external representation by the Applicant, the allegation by the applicant that he was denied legal representation by the chairperson is without merit and therefore dismissed.

6.13 The Applicant has argued further that his dismissal was procedurally unfair in that he was denied his right to appeal. Applicant led evidence to the effect that he duly noted his appeal against his dismissal within the stipulated time. Applicant testified that he submitted his appeal letter with Mr Quassim Mansoor who subsequently requested him to submit the appeal letter at his office. Applicant testified that he was never called to attend the appeal and consequently denied an appeal. On the other hand the Respondent argues that the Applicant failed to properly submit his appeal and that he is responsible for his failed appeal. RW1 who testified on behalf of the Respondent stated that he received the appeal letter from the Applicant and made a copy of the appeal. RW1 stated further that he directed the Applicant to submit his appeal at the Manzini store and that the Applicant never objected.

6.14 A question that I am now called upon to answer is whether the filing of the appeal by the Applicant at the Mbabane store was proper and whether the failure by the Respondent to call the

Applicant for an appeal hearing amounts to a procedural irregularity.

- 6.15 Emphasizing the importance of an appeal hearing, the Industrial Court had this to say in the decided case of **Nkosinathi Ndzimandze and Another vs. Ubombo Sugar Ltd, Case No: 476/2005** (per Dunseith P.R the then Judge President):

“It is well established in our labour law that an important ingredient of a fair disciplinary hearing is the right to appeal to a higher level of management. As was stated by the eminent Jurist and Judge Edwin Cameron in his article “The Right to a hearing Before Dismissal- Part 1” (1986) 7 ILJ 183: a right to an appeal is an important safeguard, giving the affected employee a chance of persuading a second tier of authority that the adverse decision was wrong or that it should otherwise be reconsidered. In the end, the final decision will have been the subject of more careful scrutiny, prolonged debate and sober reflection”.

See also: **Ndumiso Nhlengethwa v Standard Bank Swaziland (IC case No. 288/2003, Joseph Sangweni v Standard Bank Swaziland(IC 52/2003)**

- 6.16** The present case is one of breach of contract and therefore the written fixed term contract signed by both parties is the guiding document in the matter. Article 20 of the fixed term contract provides as follows;

20. Addresses:

20.1 The parties select the following addresses at which all notices may be given to them and legal processes served upon them.

The employer:

Physical address BUY N SAVE SUPERMARKET PTY LTD
WAREHOUSE ERF 203
MANCISHANE STREET
MANZINI

Postal

P.O BOX 3404
MANZINI
M200

The employee:

Mangwaneni Mbabane
Next to Mangwaneni Primary
P.O BOX 661
MBABANE
CELL: 76881069

6.17 It is therefore my finding that the Applicant failed to properly submit his appeal. The contract of employment expressly states the address at which all notices are to be served. The Applicant further did not dispute the allegation that he was advised to submit the notice of appeal at the Respondent's headquarters in Manzini.

6.18 Substantively, the Applicant was charged and dismissed for eating a piece of pizza. It is not in dispute that the Applicant ate the pizza. The Applicant in his evidence testified that he tasted the pizza and that it was common practice for employees to taste cooked products. The Respondent led the bakery supervisor RW2 in evidence. RW2 testified that he was the only person authorised to taste products in the bakery. RW2 stated that it was not every product that was tasted but rather it was only new products that were tasted.

RW2 explained the process followed when a product was being tasted in the bakery. Under cross examination the Applicant conceded that employees were not allowed to eat inside the store.

6.19 Having considered the evidence and submissions by both parties I find the applicant's version as improbable. It is highly improbable that any employee in the bakery would be allowed to taste any product whenever he or she felt like tasting that particular product. The Applicant took the slice of pizza after the first batch had already been put on the display.

6.20 The Applicant when questioned undercross examination conceded that employees were not allowed to eat inside the store. Applicant was therefore aware of the rule in the workplace that precluded employees from eating within the store but never the less proceeded to eat the pizza. The Applicant's actions were clearly dishonest.

6.21 Section 36 (b) Employment Act 1980 permits an employer to dismiss an employee who is found guilty of a dishonest act.

1.1 Considering the nature of the Respondent's business I find that the sanction imposed was not disproportionate to the offence committed. It is and should be a sensible responsible response to risk management in the particular enterprise; a dismissal has everything to do with the operational requirements of the employer's enterprise, see: **De Beer Consolidated Mines Ltd vs. CCMA & Others 2000 ILJ 1051.**

7. AWARD/ ORDER

7.1 The award that I make is as follows:

7.2 The dismissal is held to be procedurally and substantively fair.

7.3 No order for costs is made.

**DATED AT MBABANE ON THE __ DAY OF FEBRUARY
2015**

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**SIPHO M NYONI
CMAC ARBITRATOR**