



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

HELD AT MBABANE

SWMB 13/15

In the matter between:-

NHLANHLA FAKUDZE

APPLICANT

And

**PICADILLY FAST FOOD &
GROCERY**

RESPONDENT

CORAM:

Arbitrator : Ms. N. Shongwe

For Applicant : Mr. S. Dlamini

For Respondent : Mr. H. Nhleko

ARBITRATION AWARD

{29\04\16}

1. PARTIES AND REPRESENTATION

The Applicant herein is Mr. Nhlanhla Fakudze, a Swazi male adult. The Applicant's postal address is P.O. Box 4861 Mbabane. The Applicant was represented by Mr. Selby Dlamini in these proceedings.

The Respondent is Picadilly Fast Foods & Grocery and its postal address is P.O. Box 1879 Mbabane. The Respondent was represented by Mr. Hezekiel Nhleko an attorney from Dunseith Attorneys based in Mbabane.

2. **ISSUE IN DISPUTE**

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

3. **BACKGROUND FACTS**

3.1 The Applicant reported a dispute of unfair dismissal against the Respondent to the Commission (CMAC) on the 21st January, 2015. The dispute was conciliated upon but it was not resolved, hence the issuance of Certificate of Unresolved Dispute No. 52/15 by the Commission.

3.2 The Applicant then launched an Application for Determination of Unfair Dismissal to the Industrial Court and the matter was referred back to the

Commission by the Court on the 02nd June, 2015. I was then appointed to arbitrate same.

3.3 According to the Certificate of Unresolved Dispute the nature of the dispute is one of alleged unfair dismissal wherein the Applicant claims the following:-

- a) Reinstatement with arrear wages or alternatively.
- b) Notice pay = E1, 676.54
- c) Additional Notice pay = E2, 321.28
- d) Severance pay = E5, 803.20
- e) Leave pay = E1, 160.64
- f) Underpayments = E10, 647.72
- g) Maximum Compensation for unfair dismissal = E20, 118.48.

4. **SUMMARY OF EVIDENCE AND ARGUMENTS**

The Applicants' representative chose to call the Applicant as his sole witness and the Respondent also opted to call one witness as well, by the name of Mr. Q. B. Farooqi. Both the parties submitted various documents as part of the evidence to be considered in the determination of the dispute.

5. **APPLICANT'S CASE**

THE TESTIMONY OF NHLANHLA FAKUDZE

- 5.1 The Applicant gave his testimony under oath and stated that he was employed on the 14th February 2004 by the Respondent as a Cashier up until he was verbally dismissed on the 16th December 2014. He was earning a monthly salary of E1, 085.00.
- 5.2 Mr. Fakudze stated that on the day of his dismissal, the Respondent shouted unprintable words at him and also told him to go out and not to come back, as he will teach the others to steal; all this happened in front of customers. He went on to state that upon the dismissal, he approached the Commission wherein he was told to write an appeal letter which gave the Respondent seven days to respond; a letter he submitted to the Respondent on the 16th December 2016, but got no response. The Applicant tendered the letter as evidence.
- 5.3 He further testified that instead of a response, he was called to attend a disciplinary hearing on the 19th December 2014. A disciplinary hearing he did not attend as he had already been fired and felt was a waste of time.
- 5.4 He further testified that the charges that were preferred against him (absenteeism and misappropriation of funds) were all unfounded and false, as he never

absented himself on those stipulated days; but had taken his off days. On the misappropriation of funds charge he stated that he never stole the money but those were shortages from spoilt items which they calculated with his boss Mr. Farooqi.

5.5 The Applicant further testified that Mr. Farooqi also contributed to the shortages as he would sometimes sell items in the mornings before opening time and in the evenings after closing and the money was never accounted for.

5.6 Mr. Fakudze further stated that he was underpaid as he was earning E1, 085.00 whereas the 2012 Wages Regulations Order entitled him to E1, 552.23 and in 2014 he was still earning the E1, 085.00 whereas the 2014 Wages Regulations Order entitled him to E1, 676.54. He was therefore desirous to be paid what is due to him. The Applicant tendered the Wages Regulations Orders as evidence.

5.7 The Applicant also claimed to be paid in lieu of leave as he testified that he never went on leave ever since he started working for the Respondent. He stated that when he applied for it, he was told there was no leave at that establishment. He was therefore, also desirous to be paid his leave.

- 5.8 Under cross-examination, the Applicant admitted that his employer tried to communicate with him via sms after his purported dismissal to come and collect his notice to attend a disciplinary hearing, to which he did not attend as he felt that the Respondent was trying to evade paying penalties for verbally dismissing him.
- 5.9 He was asked if during the time the Respondent called him for a hearing, CMAC had formally intervened and received his case, the Applicant stated that yes; the letter of appeal had been written under the advice of CMAC, thus CMAC had formally received his case.
- 5.10 It was put to the Applicant that was not true as there was no tangible proof, once CMAC formally receives a case, a reference number is issued to the Applicant and in Applicant's case there was no reference number issued but mere advice to the Applicant to write an appeal letter.
- 5.11 It was further put to Mr. Fakudze that he is the one who refused to go and appear before a disciplinary hearing and state his side of the story, after the Respondent had received his appeal letter; the Applicant maintained that it was difficult for him to go back as he had become a stranger following his dismissal.

5.12 On the charge of misappropriation of company money, it was also put to the Applicant that he falsified his records when doing stock taking for the days he had been charged for, so that the records appeared as if they balanced. The Applicant disputed that and stated that he never; he just wrote what he found there.

5.13 It was further put to him that the books that he balanced did not have an impact on his case, as he had recorded for each day that he had balanced; as if the employer had not sold anything after closing and before opening. Mr. Fakudze responded by saying that he saw that it did not help his case presently as he never recorded the true reflection.

5.14 On the charge of absenteeism, it was put to Mr. Fakudze that he had taken a total of 6 days without justification instead of 3 days and that he knew it was not acceptable to the employer. The Applicant firmly responded by stating that he had taken his 3 off days not 6 days as alleged.

6. **THE RESPONDENT'S CASE**
THE TESTIMONY OF QAMRUL BARI FAROOQI

- 6.1 The witness testified that he was the Respondent's Managing Director and he knew the Applicant as he had employed him as a Cashier, at the request of his brother who was also working for him in the shop.
- 6.2 He further testified that the Applicant had taken his off days from the 06th December 2014 and came back on the 12th December 2014. During his absence, he took the liberty of re-balancing the books for the 04th December 2014 to be particular; as he was experiencing shortages and he discovered a difference of E800.00. He went to state that what worried him was the fact that the Applicant had indicated that the books had balanced for that day, but it was not the case for him.
- 6.3 He further testified that when the Applicant returned from his off, he pointed it out to him and they crossed checked to ascertain whether he was correct or not and they discovered that he was right. He stated that he then instructed the Applicant to re-check his work from October 2014 to the 05th December 2014. It was the witness's testimony that when the Applicant had finished reviewing his work he then wrote a letter acknowledging that he had made mistakes and directed him to appoint an Accountant. A letter the witness tendered as evidence.

- 6.4 He stated that the letter was delivered to him on the 15th December 2014 and on the 16th December 2014, he then instructed the Applicant to go and work at the Take Away Department, where he was not going to be in a position to handle money.
- 6.5 The witness stated that instead of heeding that instruction, the Applicant went into the Grocery Department where he bought an envelope and went outside. Upon seeing that he was disobeying him, he then told him to come on the following day for further instructions. He stated that he never dismissed the Applicant on the 16th December 2014 as alleged.
- 6.6 He went on to state that the Applicant failed to come on the 17th as instructed, but eventually came on the 18th December 2014 with a letter of demand. He further stated that when he brought his letter the witness put it aside and gave him his, being a letter inviting him to a disciplinary hearing. A letter he read carefully but refused to either take it or sign for. The letter was tendered as evidence.
- 6.7 The witness further submitted that, they had tried communicating with the Applicant before the 18th via his cellphone only to find that the Applicant's number

had changed and eventually when the sms went through the Applicant responded accusingly at the Respondent and further to that he stated that he was not going to attend the disciplinary hearing.

6.8 Indeed the Applicant did not attend the disciplinary hearing as stated in his response and upon reading his response, the Chairperson decided to proceed with the disciplinary hearing; the Applicant was found guilty and a dismissal was recommended. A dismissal letter was then sent to the Applicant via registered post using the postal address the Applicant had written on his letter of demand. A registered slip from the post office was also tendered in as evidence.

6.9 Under cross-examination, this witness was asked why on the 16th December 2014; he had called Applicant names and insulted him. Mr. Farooqi responded by saying that he loved his employees as such he never insulted the Applicant. He was further asked why he dismissed the Applicant without charging him. The witness responded by saying that he never dismissed the Applicant, but the Applicant left on his own volition after disobeying an instruction he had issued to him on the 16th.

6.10 He was further asked why he paid the Applicant E1, 085.00 as his monthly salary, instead of paying E1, 552.35 in 2012. He was further asked why he never upgraded the Applicant's salary in 2014, as he was supposed to have upgraded the salary to E1, 676.54; as this is tantamount to underpayments. The witness responded by stating that he did not have money as his business was deteriorating, furthermore he did not have stock and the Applicant never complained.

6.11 He was also asked why he never allowed the Applicant to go on leave or pay him in lieu of leave. Mr Farooqi submitted that before 2012, he used to allow his employees to go on leave, but after that he could not afford to pay them as money was getting short.

6.12 It was put to Mr. Farooqi that when the shop was closed in the evenings and in the mornings before opening he sold items. The witness vehemently denied that and stated that he only supervised his staff.

7. ANALYSIS OF EVIDENCE

7.1 In view of the requirements of **Section 17 (5) of The Industrial Relations Act 2000 (as amended)**, below are my concise reasons to substantiate my findings.

- 7.2 In terms of **section 42 (1) of the Employment Act 1980(as amended)**, an employee who challenges the termination of his services, must first prove that Section 35 of the Act applies to him. It is not in dispute that the Applicant was employed by the Respondent and that the Applicant was in continuous employment for a period not exceeding 10 years with the Respondent; consequently he has discharged this onus.
- 7.3 Further, section 42(2) of the Act provides that the employer shall prove that the reason for dismissing an employee was one permitted by Section 36 of the Act; and that taking into account all the circumstances of the case, it was reasonable to terminate the employee's services.
- 7.4 In casu, the Applicant is alleging unfair dismissal, in that on the 16th December 2014, the Respondent shouted unpalatable words at him and also told him to go away as he could not work with a thief and moreover, he was also told he was going to teach the others to steal. It is on the above basis that he views his dismissal to have been procedurally unfair; furthermore, the Respondent failed to convene a disciplinary hearing before verbally dismissing him.

- 7.5 On the other hand, the Respondent disputed Applicant's allegations and stated that he never dismissed the Applicant on the 16th December 2014 but the Applicant disobeyed an instruction of going to work in the take away department (a position where he was not going to handle cash) and left on his own free will.
- 7.6 **Grogan in Dismissal, Discrimination and Unfair Labour Practices, 2nd edition, 2008 at page 209** states that **“onus in this context (of dismissal) means that if the employer denies that the employee was dismissed, the employee must produce evidence to prove that the dismissal occurred”**. In casu, the Applicant failed to give proof in the form of calling witnesses to collaborate his assertions, as he stated in his evidence that the Respondent called him unpalatable words on top of his voice and also dismissed him there and then in front of the other employees and customers; an act which if it had occurred was witnessed by at least someone who would have easily testified to that effect.
- 7.7 Also, in determining which version is more probable, I have taken into cognizance the position taken by **Wessels JA** in the case of **National Employers**

Mutual General Insurance Association v Gany 1931 AD 187 at 199, wherein he stated as follows; **“Where there are two stories mutually destructive, before the onus is discharged the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false”**. In the present case, the Applicant’s version should be taken with caution for the following reason;

7.8 As stated above that not only did the Applicant fail to call witnesses to corroborate his assertions, it was also Applicant’s evidence that after the purported dismissal he then approached the Commission for advice wherein he was told to write an appeal letter. A letter which when he submitted, the Respondent then decided to convene a disciplinary hearing to escape paying him his terminal benefits. By his own admission a disciplinary hearing he felt was a complete waste of time since he had already been dismissed and CMAC had already formally intervened in his case.

7.9 I wish to point out that, when CMAC formally intervenes in any case, a reference number is issued to that Applicant (which in this case the reference number had not been issued, only mere advice had

been given to the Applicant); before then the parties are free to engage each other, which follows that at that stage the Respondent was still within his rights to subject the Applicant to a disciplinary hearing.

7.10 From evidence presented, the hearing proceeded in Applicant's absence as the Applicant in his testimony testified that he deliberately did not attend the hearing, which hearing resulted in his dismissal on the 19th December 2014 not the 16th the Applicant is alleging.

7.11 It is vital at this point to weigh the evidence tendered by the two sides and balance same upon the preponderance of credible evidence. **Esteen AJP** stated in **National Employers General Insurance Co. Ltd v Jagers 1984(4) SA 437(E) at 440 E-F**, when he qualified the pronouncement of Wessels JA by opining that: ***“where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance at probabilities that his version is true and accurate and therefore acceptable, and that the version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that***

evidence is true or not, the court will weigh up and test the Plaintiff's allegations against the general probabilities"

7.12 I have taken into account the foregoing principle, and I am inclined to point out that Applicant's version that he was dismissed on the 16th without being invited to a disciplinary hearing is unprobable and must be rejected, as presented evidence indicated that the Applicant was dismissed on the 19th December 2014 after a properly constituted disciplinary hearing, which Applicant chose not attend on his own free will as he felt it was a complete waste of time as he had already been dismissed. Moreover, evidence which was not disputed by the Applicant. Consequently, I find that the Applicant has failed to show on a balance of probabilities that the dismissal occurred on the 16th December 2014 and as such the Applicant has not discharged the burden of proof.

7.13 Substantively, the Applicant was charged for misappropriating company funds and absenteeism. He is alleged to have misappropriated company funds to the tune of E6, 126.23 between the month of October to December 2014 and absenteeism in

that he took more than three days without permission from the employer and/or an authorized medical certificate.

7.14 The Applicant was called to appear before a disciplinary hearing; a hearing he felt was a waste of time since he had already been dismissed. Applicant's conduct - waiver to defend the charges against him dealt his case a blow in that the Respondent tried all in his powers to conform to the rules of natural justice; that is according the Applicant a chance to state his side of the story and defend the charges; but the Applicant decided to waive his right.

7.15 The next step is to determine whether taking into account all the circumstances of the case it was reasonable to terminate the Applicant's services. In **Zephaniah Shongwe vs Royal Swaziland Sugar Corporation (IC) Case No.262/2001** the Court stated that the factors to be considered amongst other things include the following;

- a) The Applicant's personal circumstances and service record;
- b) The nature of the Respondent's undertaking and the workplace itself;

- c) The disciplinary standards set by the Respondent and contained in the Disciplinary Procedure;
- d) The seriousness of the offence.

7.16 The Respondent operates a Retail business and its core function is selling goods for profit; therefore, it deals largely with handling money. It was put to the Applicant that the Respondent has zero tolerance towards stealing and that it was for that reason that even the other cashier who was implicated in misappropriating company funds was also dismissed, an issue the Applicant did not dispute.

7.17 It was also stated that this was a serious offence; with a dismissal sanction even for first offenders. Furthermore, the Applicant was fully aware of this, as the Respondent had told them when he saw that the business was not doing well sometime in August 2014.

7.18 Applicant's defence that the shortages were partly Respondent's fault as he would sometimes sell items after closing and before opening times and never accounted the money, lose credibility in that through Applicant's own admission that by presenting balanced books to the Respondent he was implying that the allegations against the Respondent are

fabricated and untrue. I therefore find that the Respondent was justified to terminate Applicant's services in line with section 36(b) of the Act.

7.19 I wish to point out that the sanction meted out to the Applicant was clearly punitive as opposed to being corrective. **The Code of Good Practice: Termination of Employment** issued under Section **109 of the Industrial Relations Act, 2000 (as amended)** emphasizes that discipline should be corrective, and dismissal should be reserved for cases of serious misconduct or repeated offences. The Code states at paragraph 5 and 6 that dismissal may be justified if the misconduct *is of such gravity that it makes a continued employment relationship intolerable*.

7.20 The learned author, **John Grogan** in his book "**Work Place Law**" **9th Edition at page 167** states the above position as follows;

"Intolerability is, of course, a wide and flexible notion. Generally, the courts accept an employment relationship becomes intolerable when the relationship of trust between employer and employee is irreparably destroyed".

7.21 In casu, the relationship between the two parties had become intolerable in that the Applicant had acknowledged balancing the books incorrectly (resulting in the Respondent losing profit) and instead of showing remorse about his mistakes he informed the Respondent to hire an Accountant; which can be interpreted in a negative way, that his alleged mistakes were deliberate. The Respondent throughout his evidence kept on stressing that he lost his business due to the misappropriation of funds by the Applicant. Thus rendering the Applicant and Respondent's trust relationship irreparably destroyed and continued working relationship impractical and impossible.

7.22 The Applicant, claimed leave pay to the value of E10,058.88 (based on the Legal notice No. 176 of 2012, the Regulation of Wages (Retail, Hairdressing, Wholesale and Distribution Trades Industry Order, 2012) this he submitted that is necessitated by the fact that he never went on leave ever since he started working for the Respondent; which the Respondent did not dispute but stated that he could not afford to pay the Applicant in lieu of as the business was not doing well.

7.23 The Applicant also claimed underpayments to the value of E9, 157.44 being underpayments ever since he started working for the Respondent and also based on the 2012 and 2014 Wages Regulations Orders. What is interesting even on this claim is that the Respondent did not dispute it; he simply stated that if he could afford it he would have paid the Applicant accordingly.

7.24 I wish to point out that when deliberating the Applicant's claims, one has to take into consideration the provisions of **Section 76(2) of the Industrial Relations Act 2000 (as amended)** which read thus

"A dispute may not be reported to the Commission if more than eighteen (18) months has elapsed since the issue giving rise to the dispute arose".

This provision can be loosely translated, to mean that all claims should be confined to 18 months. Consequently, the Applicant in this case is owed 27 days for leave (E1, 740.96) and for underpayments he is entitled to be paid for 18 months; as this issue appears certified as unresolved on the Certificate of Unresolved Dispute filed herein. This is contrary to the submission of the Respondent's representative in

his closing submissions this claim must fall away as the Applicant never engaged the Respondent on this claim.

8. **AWARD**

8.1 Having heard the evidence and submissions of both parties, it is my finding that the application by the Applicant for payment of Notice pay, Additional notice, Severance Allowance as well as Compensation for unfair dismissal is hereby dismissed in its entirety.

8.2 The Respondent is hereby ordered to pay the following to the Applicant;

- (a) Leave pay (27 days) E1, 740.96
- (b) Underpayments 2013(6 months) E2, 803.38
- (c) Underpayments 2014(11 months) E6, 506.94

Total	= E 11,
051.28	051.28

Payment of the total sum of **E11, 051.28 (Eleven Thousand and Fifty One Emalangeneni Twenty Eight Cents)** is to be paid at the **CMAC Offices Asakhe House, Mbabane**, not later than the 31st of May, 2016.

8.3 No order for costs is made.

**THUS DONE AND SIGNED AT MBABANE ON THIS
.....DAY OF APRIL 2016.**

**NOMCEBO SHONGWE
CMAC ARBITRATOR**