



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

**HELD AT MBABANE**

**SWMZ 239/16**

In the matter between:-

**PERIS MAZIBUKO**

APPLICANT

And

**ADVANCED CLEANING SERVICES**

RESPONDENT

CORAM:

<b>Arbitrator</b>	:	Ms K. Manzini
<b>For Applicant</b>	:	Ms. M. Hillary
<b>For Respondent</b>	:	Mr. E. Dlamini

---

**ARBITRATION AWARD**

**(15-09-17)**

---

## **1. PARTIES AND REPRESENTATION**

- 1.1 The Applicant herein is Ms. Peris Mazibuko, a Swazi female adult who is resident at Eteni, Matsapha, within the Manzini region. The Applicant was represented by Ms Marcia Hillary, an Attorney from M.J. Hillary Attorneys.
- 1.2 The Respondent herein is Advanced Cleaning Services (Pty) Ltd, a company duly incorporated and registered in terms of the Law of Swaziland. The Respondent's principal place of business is situated at the Premium Bakery premises, Matsapha Industrial Site, Manzini Region. Mr Ephraem Dlamini, a Labour Consultant appeared on behalf of the Respondent.

## **2 ISSUES IN DISPUTE**

- 2.1 The Certificate of Unresolved Dispute filed herein (No. 233/16) states that this is a matter pertaining to alleged unfair dismissal, as well as unlawful deductions. The Applicant herein makes the following claims.
- |  |            |
|--|------------|
| a) 2 months salary unlawful suspension         | -E3638.00  |
| b) Leave Pay                                   | -E840.00   |
| c) Notice pay                                  | -E1819.00  |
| d) Illegal Shortage s                          | -E2312.00  |
| e) 12 months compensation for unfair dismissal | -E21848.00 |
- 2.2 The Applicant alleged that she was unfairly dismissed in that she was found guilty of having fought at the workplace, whereas she had been acting in self defence against an attack perpetrated against her by a workmate.
- 2.3 The Respondent on the other hand maintained that the Applicant had been fairly dismissed in all respects because she had been found guilty

of gross misconduct in that she engaged in a fight during working hours.

### **3 SUMMARY OF EVIDENCE**

The parties relied on the oral testimonies of witnesses, as well as documentary evidence.

#### **3.1 THE APPLICANT'S CASE**

##### **THE TESTIMONY OF MS PERIS MAZIBUKO**

3.1.1 The Applicant testified under oath that she had been employed by the Respondent as a Cleaner in February, 2015. According to the Applicant the Respondent had paid her a monthly remuneration of E1820.00. She explained in terms of her conditions of employment, she had been called upon to work for twenty-six days in a month, from Monday to Saturday. She stated that in the first month that she worked (February, 2015) she had been paid for the seven (7) days that she had worked. She stated even on the subsequent months that she had worked for the Respondent, she often noticed that certain short-payments were being made. She stated that she engaged Mr Mchosana at the workplace and he told her that the company's head office in Johannesburg would sort out her issues. She submitted her payslips as part of her evidence.

3.1.2 She stated that she had been dismissed from the Respondent's employ after she had been subjected to a disciplinary hearing. She stated that she had been found guilty of fighting with a fellow employee during working hours. She stated that her duties entailed the cleaning of the toilets and offices at the Premier Bakery premises in Matsapha. She pointed out that she had been cleaning the toilets on the 16<sup>th</sup> of December, 2015 in the Production Room at these premises when she discovered that the toilet had a leak. The Applicant testified that she had reported this to the Maintenance manager at the Premier

Bakery (Mr Khumalo), who told her to clean the toilets first, and then put a tape around it with a sign to notify possible users that it was out of order.

3.1.3 She testified that she had proceeded to go and clean the maintenance section, but discovered that she needed to go back to the Production Room to collect a mop-squeezer that she had placed on top of the toilet seat. The Applicant stated that when she got there, she discovered that someone had removed the red-tape and was inside using the toilet despite the notice that clearly stated that the toilet was out of order. According to the Applicant, she discovered that her colleague Bonsile Dlamini (also a Cleaner) was the person who did this because she had waited outside the toilet to see who had done inside and using the toilet despite the notification to desist from doing so.

3.1.4 The Applicant stated that she enquired from Bonsile as to she had proceeded to use the toilet, and why she had removed the red tape, but the said Bonsile simply ignored her and walked away. The Applicant stated that she reported this to the Site Manager, Morgan Mtariswa. She testified that Mr.Morgan told her to go back and tell Bonsile to return the squeezer on the toilet seat, and to put the red-tape back. The Applicant stated that she had located Bonsile at the Confectionery Department, and relayed the message from Mr Morgan. She stated that the said Bonsile had arrogantly asked her what Mr Morgan would do to her, if she refused to comply with his instructions. The Applicant testified that she had returned to Mr Morgan, and reported that Bonsile was refusing to put the things back as they had been, and then proceeded to go and resume her task of cleaning the Maintenance Department.

- 3.1.5 The Applicant stated that whilst she was getting water from the sink, and pouring it into a bucket, Bonsile entered the Maintenance Department through a back door that was behind her. She stated that the said Bonsile attacked her from behind, and she felt a blow on her back, only to turn around to find her swinging a slack chain, in readiness to hit her with it. She stated that she instinctively held her assailants hands to avoid being hit with the chain, but because the chain was swinging, it had then hit Bonsile in the face and caused her an injury to her eye. The Applicant stated that Bonsile screamed in pain, and a Mr Banda came in to see what the commotion was about.
- 3.1.6 She explained that Mr Banda is one of the workers at the Maintenance Section at Premier bakeries. The Applicant stated that Mr Banda came in and found her (the Applicant) holding Bonsile's hands, and he separated them and removed the chain from Bonsile's possession. She stated that Mr Khumalo, another Premier bakery worker came in and asked Bonsile what had caused her injury, but she had refused to speak to him, and left to go to the Safety Department. She stated that she (the Applicant) then took it upon herself to explain everything to Mr Khumalo, and then took the chain with her to the Safety Department. She stated that this took place on the 16<sup>th</sup> of December, 2016. She stated that Mr Douglas, their Site Manager, and Supervisor then verbally told her to go home, and Bonsile was taken to hospital. She stated that she proceeded to report the incident to the Esigodweni Police, and they told her that they would await a report on what transpired at the workplace, and told her to bring them a report on this.
- 3.1.7 She stated that she remained at home for a day, and went back to the workplace the following day to ask for a formal written communication directing her to remain at home. She stated she was simply told to go home and wait for a call from Mr Morgan.

She testified that she later received a telephone call summoning her to attend a disciplinary hearing on the 22<sup>nd</sup> of January, 2015. She stated that she was advised of the date, time and venue of the hearing telephonically. She testified that Mr Morgan had called her to inform her that the hearing was set to proceed on the 29<sup>th</sup> of February, 2016. She stated that she did not receive a written notification of the disciplinary hearing, and therefore, the charges against her were not made known to her until the date of the hearing.

3.1.8 The Applicant stated that she was not apprised of her rights, and the hearing was not conducted in Siswati as Mr Douglas is not a proficient Siswati speaker. She decried this because she is not comfortable, nor proficient in speaking English. She stated that she did ask someone to represent her at the hearing, but this was not approved of by the Chairperson of the hearing because the person was employed by Premier Bakeries, and not the Respondent company. She pointed out that she felt disadvantaged because no one enquired from her if she was comfortable with the hearing being conducted in English. She stated that she had selected an employee from Premier Bakeries to represent her because she wanted someone who was impartial because most of the employees at the respondent company were Bonsile friends.

3.1.9 She stated that the Chairperson did not ensure that she understand the charge that she was facing at the hearing, and further did not explain the consequences of a finding of guilt. She stated that no one explained what might befall her if she pleaded guilty or otherwise. She stated that after the hearing Mr Ephraim Dlamini (who was the Chairperson of the hearing), did not inform her of the verdict, but listened to her when she gave an account of the event of day of the physical altercation between herself and Bonsile. The Applicant stated that Mr

Dlamini then told her to await a call from Mr Douglas. She stated that she did not receive a verdict of the disciplinary hearing, but was called in to speak to a lady known as Mrs Lushaba. She stated that Mrs Lushaba had asked her to recount the events of the day of the physical clash between herself and Bonsile. She stated that the reason she believed that she had been dismissed was that she was told to go home, and the Security Guards at the workplace were told not to let her into the premises, but she had not received a verdict to the effect that she had been dismissed.

3.1.10 She stated that she had only been told telephonically by Mr. Morgan to come to the workplace on the 11<sup>th</sup> of March, 2016. She pointed out that she was not told why she was being called, nor who Mrs Lushaba was. She stated that she had merely obliged and spoken to Mrs Lushaba and relayed the events of the assault on her. She stated that she was never told of Mrs Lushaba's role in all of this. She testified that this was the last she heard of the matter because she was told to go home and to wait for a phone call. She stated that no one from the workplace ever called her thereafter, and that is when she then decided to go and report a dispute at CMAC.

3.1.11 The Applicant, during Cross-examination was reminded that February is a month with only 28 days, and therefore she could not have worked for seven (7) days in the first month of her employment. The Applicant acknowledged that this was the case, but pointed out that she had worked from the 23<sup>rd</sup> of February, 2015 to the end of that month. She was referred to the pay slips in page 22 of the Respondent's documents. She stated that her total earnings ought to have been E1820.00, but the pays lip reflected that she earned E1596.00, after R84.00 had been deducted for Provident Fund. She stated that this is an anomaly because she had expected a gross earning of

E1820.00. It was put to her that according to all the pay slips (page 22, 23 and 24 of the Respondents bundle) she had never earned, nor been entitled to E1820.00 gross earnings. The Applicant stated that all of the pay slips were defective.

3.1.12 The Applicant was asked to confirm when exactly she had been dismissed? She stated that she believed that this had been in or about March, 2016. She was referred to a letter of dismissal (page 31 of the Respondents bundle of documents) which is dated 8<sup>th</sup> February, 2016. She stated that she had never seen this letter before that day, and stated that she had never received such a letter from the Employer. The Applicant was asked when she filed her appeal against her dismissal? She stated that this had been done on the 16<sup>th</sup> of February, 2016. It was put to her that she had filed her appeal after receiving the letter of termination of employment. She admitted that she could not recall all the facts well but could confirm that she had indeed applied for an appeal hearing after being dismissed.

3.1.13 The Applicant was referred to page 33 and 34 of the Respondent's bundle, when a notification to attend a disciplinary hearing, and the Applicant's rights are listed dated 12<sup>th</sup> January, 2015. The Applicant denied that she had ever seen the document, but acknowledged that the hearing had indeed been held on the 22<sup>nd</sup> of January, 2016. The Respondent's representative put it to the Applicant that she had received the letter hence she had been apprised of her rights, and of the date of the hearing. The Applicant denied all of this and pointed out that letter was not signed the second page (page 34), and the letter was dated 12<sup>th</sup> January, 2015, and yet her hearing had taken place in 2016. The Respondent's Representative put it to the Applicant that he had been instructed that she had refused most of the documents that the Respondent served her with. He pointed out that she had also failed and/or refused to



sign the letter of dismissal (page 31). The Applicant stated that she did receive a letter of dismissal, but it had not looked like the document before her she denied that she had not been apprised of her rights before the disciplinary hearing commenced. The Applicant was asked if she had informed the Chairperson, of the disciplinary hearing that she had been told what her rights were. She denied that she told the Chairperson, but pointed out that she did speak to Mr Douglas, who told her to get a fellow employee to represent her.

3.1.14 During Cross-examination, the Applicant further maintained that she did not fight with Bonsile. She stated that Bonsile had approached her from behind, using the back door, and she was therefore unable to escape. She stated that Bonsile had been struck by her own chain which she had swung in order to hit her (Applicant), and her hands had been restrained by the fact that she held both of them. Mr Dlamini put it to the Applicant that she could have escaped via the front door, instead of engaging in a fight with Bonsile. The Applicant denied this, and pointed out that she had not been given sufficient time to run away because the chain was already in mid-air as Bonsile was swinging it, and she instinctively grabbed both of her hands to avoid being struck by it.

3.1.15 It also came to light that the Applicant was not actually claiming that unlawful deductions had been effected on her salary by the employer. She explained that she did not think that she had been paid according to the hours that she had worked. She admitted that no deductions had actually been made, but she did not understand how the employer calculated her earnings. She was referred to the pay slips on page 15 of the Applicant's documents and stated that she had worked for the entire month, but had only been paid E490.00 in March

2015. She stated that she had approached Mr Bunga, at the workplace, and he had told her that the Head Office personnel would address the problem because the payroll was done in Johannesburg.

3.1.16 She was referred to the pay slips from pages 17-24 of the Applicants own documents. She confirmed that she had worked for 6 days per week, hence she had earned money for 26 days, per month (see pay slip dated 30/04/15 on page 16 of the documents), and after deductions of E91.00 (SNPF), and E160.67 for a canteen payment, she had earned a net pay of E1568.13, whilst the gross pay was initially E1820.00. She also acknowledged that if she worked for less than 26 days in a month the employer would reflect the hours worked in the pay slip (see pages 18-22), she pointed out however that she did not agree with the pay slip on pay 24, because the employer did not show the number of hours or days that she was being paid for. She was asked if indeed it was true that the employer would initially issue a pre-advice slip to the employees, hence the Applicant had the opportunity to make any corrections to the figures and information contained therein before the actual pay slip and salary were issued? She admitted that this is indeed the case, and maintained that she had directed all of her queries to Mr Bunga at the workplace, and had been assured that her corrections would be reflected by the South African Head Office.

3.1.17 The Applicant was referred to her claim that she had not been paid the full amount for the period of her suspension. She stated that she was suspended on the 18<sup>th</sup> of December, 2015. She acknowledged that she had been paid a E1680.00 gross salary for December, 2015 (page 23 of the bundle), as well as a gross salary of E1819.90 for January, 2016 (page 24 of the bundle). She stated that she had a shortfall of about ten cents

in the January, 2016 salary, as compared to that which she had earned in May 2015 and yet she had worked for 26 days in both those months. She stated that the pay slip on page 24 (January 2016) confused her because it did not reflect the number of days or hours that she had worked. She admitted that she had been absent on some days in the month of December, 2015. She maintained that she had still expected to be paid full despite being absent. She was asked if she was still on suspension in January, 2016 and she stated that she had been dismissed by this time.

3.1.18 The Respondent's representative reminded the Applicant that she had been subjected to a disciplinary hearing on the 22<sup>nd</sup> of January, 2016, so she could not have been dismissed in January 2016. The Applicant maintained that she had already been dismissed, but had simply attended the hearing because Mr Morgan insisted that she should do so. It was put to her that this did not make sense, but the Applicant insisted that this was the case. She was asked to refer to the letter or communication that dismissed her from work in January 2016. She referred to the Notice of Suspension dated 18<sup>th</sup> December, 2015 (page 1 of the bundle of documents). She admitted that when it was put to her, that this was not a letter of dismissal.

3.1.19 The Applicant was referred to her claim for leave. She admitted that when the Respondent's Representative referred her to a schedule of payments that she had received a sum of E2660.00 which had been deposited into her account in May 2016. The Respondent's representative put it to the Applicant that this amount was comprised of E1610.00 which pertained to her salary, whilst E1050.00 was her leave pay. The Applicant stated that her concern was that she had not been informed by the Respondent what the money was for.

3.1.20 During re-examination the Applicant explained that she was infact asked at the disciplinary hearing if she wanted to be represented, but she was refused permission to have a representative who worked for the Premier Bakery. She stated that she had been loathe to ask a fellow employee because most of the people there were friends to Bonsile.

3.1.21 During re-examination the Applicant stated that she had never been made aware of the Respondent's disciplinary procedure and/or Grievance and Disciplinary Code of the company during her term of employment there. She stated that the contents of this document, if it existed, were not explained to her. She lamented that she had never actually understood the charges that she faced at the disciplinary hearing, and that she had faced at the disciplinary hearing, and that she had not been comfortable with the language in which the hearing had been conducted because she is not very proficient in speaking and understanding English. She stated that the employer had not provided an interpreter for the proceedings, and no one had asked her if she needed one.

3.1.22 The Applicant also reiterated that since Bonsile had launched her attack on her from the rear, she had been taken by surprise, and had not been able to run away from her. She stated that she had not actually fought with Bonsile, but had merely defended herself. She also pointed out that as far as she was concerned, the pay slips all bare the hours that she had worked and not a calculation in terms of days as suggested by the Respondent's representative. She pointed out that the employer had never explained this to her, and the pay slip itself only referred to Units or hours. She maintained that she had never seen the schedule of payments that she had been

referred to by the Respondent's representative, and had not been apprised of the fact that the E2660.0 payment which was affected by the Respondent also included her leave pay. She stated that the employer ought to have issued a document to her that reflect the breakdown of the payment made to her.

### 3.2 **THE RESPONDENT'S CASE**

#### **THE TESTIMONY OF MR DOUGLAS PUNUNGWE**

3.2.1 The Witness testified under oath that he is currently employed by the Respondent as the Area Manager. He stated that the Applicant is a former employee of the Respondent, and she was employed as a Cleaner based at the Premier Bakeries. He explained that the Respondent provided cleaning services to Premier Bakeries. He referred to page 33 and 34 of the Respondent's bundle of documents, and explained that this was the notice to appear at the disciplinary hearing that was held against the Applicant at the workplace.

3.2.2 He explained that the Applicant faced two charges, these being:-

- i) Alleged Dishonest Act (using violence, threats or ill treatment towards another employee of the undertaking in which you are employed
- ii) Bringing the name of the company into disrepute

He explained that these two charges emanated from the physical altercation that took place between the Applicant and Bonsile on the 18<sup>th</sup> of December, 2015 at or about 10:45 am at the workplace.

3.2.3 The Witness explained that the Applicant had received the notice to attend the hearing, hence she had availed herself for

the proceedings, on the 22<sup>nd</sup> of January, 2016. He stated that the second page of the notice contained all of her rights, including the right to representation which she took advantage of by bringing a representative to the hearing. He explained that the Applicant had unfortunately brought a non-employee to act as her representative, and this could not be allowed because the notice explicitly stated that she should bring a fellow employee. He pointed out further that she had sought to be represented by an employee of the Premier Bakery, which was problematic for the employer because the Bakery is their client. The witness testified that it is not true that the Applicant could not have found a fellow employee to represent her because she had a choice of over twenty colleagues to select from. He stated that when she asked about this at disciplinary hearing, this was clearly explained to her.

3.2.4 The Witness stated that the Applicant had been asked to plead to the two charges which were levelled against her at the disciplinary hearing, and she had pleaded guilty to both charges. He explained that he had been the Initiator at these proceedings, and the company had led two witnesses from Premier bakery, one Mr Mbongeni Khumalo (Maintenance Supervisor), and Mr Simon Banda. He testified that referred to the Minutes Of the Disciplinary Proceedings (page 1 of the Respondents bundle of documents) and applied that this document be made part of his evidence. According to the Witness it was the evidence of these two gentlemen, who had been on site when the physical altercation took place that had established the Applicant's guilt at the disciplinary hearing.

3.2.5 The witness then focused on the second charge which relates to bringing the Respondent's name into disrepute. He explained that the Premier Bakery is the Respondents client, and they are bound together by contract. He stated that the Applicant's way-

ward behavior had jeopardized the company's good name in the eyes of the client, because the Respondent could have lost their contract with Premier bakeries. He explained that the client expected quality services, and exemplary behavior from the Respondent's workers. He stated that as things had turned out, the client's employees had been engaged in separating the Respondent's employees (Bonsile and the Applicant) during the fight. He stated that it was also the employees of their client (Mr Banda and Mr Khumalo) who had dealt with the injuries that were sustained by Bonsile as she had sustained bleeding wounds on her face, and they had taken her to hospital. He stated that the employees from Premier Bakeries had brought the hospital bill of about E1000.00 to the Respondent for payment. He reiterated that this seriously dented the Respondent's image in the perception of their client.

3.2.6 The witness testified that after the Respondent communicated its decision to dismiss her, the Applicant lodged an appeal, and a hearing was convened for this purpose. The Witness referred to page 12-16 of the Respondent's documents and applied that the "Record of the Appeal proceedings" be made part of his evidence. The Witness stated that the Chairperson of the appeal hearing recommended that the dismissal with notice should be upheld. He confirmed that the Applicant was indeed paid her notice pay as well as leave pay after this decision was reached by the Chairperson of the appeal proceedings. He further dismissed the allegation made by the Applicant in her evidence that she had not been paid during her suspension period. He stated that she had been suspended with pay. He further dismissed her complaint that she did not know what the monies paid to her were for because he did not understand why she failed to enquire about these in that case.

- 3.2.7 He referred to the pay slips filed by the Applicant in her documents from pages 15-24, and pointed out that only deductions relating to SNPF, and the canteen (where the Applicant herself took meals) were reflected there. He dwelt on page 22 and stated that in this page, the pay slip had some handwritten notations made to the effect that there is a E70.00 shortage. He stated that he does not understand how this was arrived at by the Applicant. He stated that this could have been caused by a day where she had been absent, but stated that all in all, it had been the Applicant's responsibility to forward all queries to the Site Manager before the final pay slip was produced. He stated that if there were errors the blame lay with the Applicant herself for failing to fix the pay register timeously.
- 3.2.8 During Cross-examination the witness was asked to clarify the issue regarding the method that was used to calculate the Applicant's earnings. The Witness stated that the Applicant had been paid in accordance with the number of days she worked because she was not a permanent employee. He explained that the Applicant had been called upon to periodically sign a one month contract of employment with the Respondent. He stated that the said contract had not been included in the Respondent's bundle of documents because the Applicant had not included this issue as one of her claims in the report of dispute. It was the testimony of the witness that the code reflected on the pay slips pages 15-23 reflected that the Applicant was a casual employee of the Respondent (Code: SC6577). He pointed out that at some stage he did bring it to the attention of their Head Office that some of their workers had been working on a casual basis for an inordinately long period, and by his reckoning the Applicant was ultimately made a permanent employee since the pay slip on page 24 (Applicant's document) reflected a Code that indicated that she is a permanent worker (SW6577). He explained that SC stood



for “Swaziland casual worker”, whilst the SW code is used for “Swaziland Permanent Worker”. He explained however, that this had not been brought to his attention by the Head Office, but he surmised that this was the case because after his discussion with people at Head Office about the casual workers being made permanent, the Applicant’s pay slip then reflected a permanent employee code.

3.2.9 The Witness explained that the Applicant had none-the-less been paid on a monthly basis, depending on the number of hours she worked. He explained that if she worked for all 26 days in a month she was paid accordingly. If she was absent on some days she was paid at the monthly rate of E10.00 per hour. He stated that the Respondents employees were expected to work from 6 am to 2 pm (7hours per day with one hour for lunch). The Applicant’s representative put it to the witness that the pay slip of page 15 did not reflect any hours worked at all, so the method of calculation as put across by the witness did not appear to be accurate in this case. The witness reiterated that the Applicant had been at liberty to approach her Supervisor to fix any error which appeared on the pay-register. He stated that it was her failure to do this that resulted in an erroneous pay slip being eventually issued to her. He stated however that the only defect there was the absence of the hours she was paid for, but she did receive her wages at the end of the day.

3.2.10 He stated further that the Applicant was well aware that she could have escalated the matter further to his own office if she was not satisfied with the actions of the Supervisor. He stated that he could recall a single incident where the applicant did bring an enquiry to his attention, and he had referred her back to the Supervisor, Mr Bunga. He stated that he did make a

follow up with Mr Bunga, and he assured him that the Applicant's concerns had been dealt with.

3.2.11 The witness was referred to page 1 of the Applicant's documents, being the letter of suspension that the Respondent issued to the Applicant. He confirmed that the Applicant was suspended as from the 18<sup>th</sup> of December 2015, and that the suspension was with pay. He confirmed that she was indeed paid a gross salary of E1680.00 on the 31<sup>st</sup> of December, 2015 (see pay slip on page 23 of the Applicant's documents). He stated that what the employer did was to minus the days that she would ordinarily have been off from the total of 26 days. He explained that the salary paid in January 2016, was ostensibly for the full 26 days worked because the Applicant was still on suspension. He did point out that he could not explain why the figures varied, because he does not work at the payroll office. He stated that the figures could be influenced by the fact that in December the Applicant was still being paid as a casual employee, and in January she was paid as a permanent worker. He reiterated that he was not entirely sure of the reasons though.

3.2.12 The Applicant's representative put it to the Witness that the Applicant's dismissal had been substantively unfair because she had only defended herself from an attack against her that had been launched from the rear. The witness stated that the company policy frowned upon fighting on duty, and it was expected of an employee who had been attacked to flee from the attack, and not to fight back. He stated that although he had not witnessed the "fight", but he was aware that Bonsile had sustained more injuries than the Applicant who had supposedly been attacked. He stated that he doubted that the would-be assailant would come out of the fight with more wounds than the alleged victim. He stated that even if she had

been defending herself, the force she used was excessive in the circumstances.

3.2.13 It was also put to the Witness that it had been unfair of the employer to refuse the Applicant the right to have an external representative at the hearing. The Witness pointed out that the company policy dictated that their employees had to be represented by a fellow employee. He explained also that the Applicant had sought to be represented by a senior employee of Premier bakeries which is the Respondent's client. He pointed out that this did not bode well for the employer because it was bad enough that the fight had taken place at the client's premises, but the client was also a different company from the Respondent. He also stated that he did not believe that the Applicant could have failed to locate a representative out of the twenty or so co-workers that she had at the time.

3.2.14 The Witness admitted , when it was put to him, that the Applicant had not been provided with an interpreter at the disciplinary hearing. He pointed out that the Applicant and the Chairperson were both Siswati speaking individuals, and so most of the proceedings were conducted in Siswati. He stated that he was the one who was the most disadvantaged because he had to rely on the occasional interpretations afforded to him by the Chairperson. He stated that the charges were put to her in Siswati, and she pleaded guilty so he presumed that she understood the charges well before she pleaded guilty.

3.2.15 The Witness acknowledged, that she knew of the letter on page 13 of the Applicant's bundle of documents and further confirmed that the Applicant accepted the letter and signed it. He stated that the Applicant did however refuse to sign in receipt of the letter of the 12<sup>th</sup> of January, 2015 (page 33 of the Respondent's bundle) where she was invited for a disciplinary

hearing. The Applicant's representative put it to the Witness that the Applicant had not received this document at all. The Witness stated that as far as he was aware, the Applicant had indeed received the document, hence she availed herself by attending the hearing on the date stated in the letter.

3.2.16 During re-examination the Witness confirmed that the Applicant had been paid at the rate of E10.00 per hour, and had no fixed salary. He also reiterated that calculations on page 16 of the Applicants bundle were accurate because she had worked for 26 days, (page 16 of the Applicants bundle). He pointed out that where she worked for fewer than 26 days, she was paid only for the hours worked, for instance E1400.00 would be paid for 20 days worked.

#### **THE TESTIMONY OF MR. MORGAN MTARISWA**

3.2.17 The Witness testified under oath that he is employed as the Respondent's Site Manager, and is based at Premier Bakeries in Matsapha. He stated that he knows the Applicant to be a former employee who was dismissed for violating the company's code of conduct by fighting whilst on duty. He stated that from the information that he had gathered, he surmised that the Applicant and her co-worker had engaged in a fight which resulted in the said co-worker being injured to the extent that she had to be rushed to the hospital. He stated that the co-worker's name is Bonsile Dlamini, but pointed out that the said Bonsile had also been dismissed for the same offence as the Applicant.

3.2.18 The Witness admitted that he had not personally witnessed the fight. He stated that it had been brought to his attention by the Applicant that Bonsile had removed some danger-tape which she had placed around and "out of order toilet", and had proceeded to use it. He stated that he told the Applicant to tell

the said Bonsile to return the tape as she had found it. He stated that apparently Bonsile then confronted the Applicant for reporting her to him (Morgan), and an exchange of words had ensued, which then turned physical. He stated that he had asked Bonsile why she removed the tape, but denied she having done so. He stated that Bonsile told him that she had used the toilet after having found that the tape already been removed.

3.2.19 He stated that he had been in the office when the fight took place. He pointed out that when he asked the Applicant why she had injured Bonsile, she had told him that she had acted in self defence. He stated that Bonsile had in fact confirmed to him that she had been the one who launched an attack against the Applicant. He stated that he had been convinced by this because, indeed it had been Bonsile who had left her own work station, and had proceeded to seek out the Applicant at her own work station. He confirmed that the company's policy in relation to fighting at work was that the parties had to be suspended immediately, and subjected to disciplinary hearing. He stated that the usual sanction in such circumstances was that where an employee was found guilty they would be summarily dismissed.

3.2.20 During Cross-examination the Witness confirmed that he had been aware of the cause of the fight because the Applicant had reported Bonsile's actions to him. He stated that she had approached him before the fight ensued, and told him that Bonsile had removed the danger warning tape (from the toilet) which she had put up to warn people not to use the toilet. He stated that he did not however go to the scene, but told her to go back and tell Bonsile to restore the tape as she had found it. He stated that he had taken it for granted that team work and communication were a spirit that existed in their line of work.

3.2.21 The Applicant's work asked if he believed he had handled the matter appropriately in view of the fact that the Applicant had lodged a complaint with him. He stated that he had, with hind sight, realized that he should have sent someone senior, or attended the scene of the fight himself, but he had been too busy with other work at the time. He denied it, when it was put to him, that he had contributed to the fight because he believed it would have occurred even if he had been to the scene prior to the fight.

3.2.22 He stated that although he had not witnessed the fight, but he realized that it has been Bonsile who had confronted the Applicant because she had left her own work station, and proceeded to go to the Applicant's work station. He stated that he did ask the said Bonsile why she attacked the Applicant, but she had told him that she had not attacked the Applicant. The Witness stated that Bonsile told him that she had been looking for a ladder when she went to the Applicant's work station. The Witness was also asked if it is standard procedure for the employer to dismiss workers who were victims of attacks by other employees? The Witness stated that normally this was not the case.

3.2.23 The Witness under re-examination confirmed that Bonsile had told him that she had gone to the Maintenance Department to get a ladder. He also explained that slack chains are kept outside the Maintenance Department. He stated however that he was not aware who (between the Applicant and the said Bonsile) had been found in possession of the slack chain. He stated that it was usual for him to tell workers under his supervision to work out their differences between themselves, hence it was not out of the norm for him to tell the Applicant to go and tell Bonsile to put the tape back around the toilet.

#### 4 **ANALYSIS OF EVIDENCE**

4.1 It is common cause that the Applicant was an employee, protected by the provisions of **Section 35 of the Employment Act, 1980 (as amended)**. She could therefore not be dismissed for a reason other than any of the fair reasons for termination of employment listed in **Section 36 of the Act**. In terms of **Section 42 (2) of the said Act**, the Respondent bears the onus of proving that:-

- a) The reasons for termination of the Applicant's services was on permitted by Section 36 of the employment Act, and
- b) That taking into account all of the circumstances of the case, it was reasonable to terminate the services of the Applicant

4.2 According to the **Code of Good practice: Termination of Employment (Clause 3.6.2)** the dismissal of an employee must also be in accordance with fair procedure. **(see: Nkosinathi Ndzimandze and Another v Ubombo sugar Ltd, I.C. case no. 476/05 and Abel Kunene v Swaziland Security Guards 9Pty) Ltd I.C. case No. 280/2001)**

In casu. The Applicant alleges that her termination was unfair both substantively and procedurally.

#### **SUBSTANTIVE FAIRNESS**

4.3 The Applicant was summoned to a disciplinary hearing, which was scheduled on take place on the 22<sup>nd</sup> of January 2016. The charges levelled against her stood as follows:-

- i) Alleged Dishonest Act, (using violence, threats or ill treatment towards another employee of the undertaking in which was employed) she was duly charged with having engaged in a physical confrontation with her colleague Bonsile Dlamini during

working hours which is against the company's Disciplinary Code, as well as Section 36 (6) of the Employment Act, 1980.

- ii) Bringing the Name of the Company into Disrepute in that she engaged in despicable behavior by fighting with her colleague on the premises of the principal contractor, thus bringing the employer's name into disrepute.

4.4 The Applicant in her own evidence testified that she had been attacked by the said Bonsile from the back, because she entered the Maintenance Department through a back door, and took her by surprise. She stated that Bonsile was swinging a slack chain, and had the intention of hitting her with it. She stated that she had instinctively grabbed her hand, and the chain which had still been in the swinging motion then hit Bonsile in the face. She did not deny that the physical altercation took place, but she raised the defence of self defence. She admitted also that the chain caused injury to Bonsile's face, such that she had to be taken to the hospital. She also relayed the events that took place before the actual physical confrontation. She explained how she had reported to Mr Morgan that Bonsile had removed a red danger-tape from a toilet which she had cleaned and sealed off because it was out of order. The Applicant testified that Mr Morgan told her to go and tell Bonsile to return the tape as she had found it, and that is what angered Bonsile. The Applicant stated that Bonsile castigated her for having reported her to Mr Morgan, and attacked her with the chain.

4.5 It is true that the Applicant at the disciplinary hearing pleaded guilty to the charges that she faced. However, at the arbitration proceedings the Applicant, who was now represented by an Attorney, denied these charges, and further raised the defence of self defence. The fact that Applicant pleaded guilty at the internal disciplinary hearing is immaterial as it is the legal position that it is not for the Arbitrator to determine the fairness of the employer's decision, based on evidential material that was before the employer at the disciplinary hearing **(see:**



**Country fair foods (Pty) Ltd v CCMA and Others (1999) 20 ILJ 1701 (LAC) at 1707 (para 11).** This legal position is entrenched in our Law as it was stated that the Industrial Court does not sit as a Court of Appeal or review of internal disciplinary hearings )by extension this also applies arbitration proceedings at CMAC. It conduct its own enquiry on the allegations and makes its own findings of fact, **(see: Central bank of Swaziland v Memory Matiwane case No. 110/93 (ICA).**

- 4.6 The Respondent's witness Mr Morgan, as well as Mr Douglas were all not present during the physical confrontation, and did not attend the scene of the altercation just after the alleged fight. All that the first witness could opine was that Bonsile was more injured than the Applicant, and they had received a medical bill of approximately E1000.00. He surmised that it would be odd for the would be assailant to be more injured than the victim. This is based on mere conjecture because he did not witness the physical confrontation. The Applicant went to great lengths to explain how she had avoided being injured by the said chain, and further shed light on how the swinging chain then hit Bonsile and injured her face.
- 4.7 The Respondent's Representative was given time to call witness who testified at the disciplinary hearing (a Mr Khumalo and a Mr Banda), to give their testimonies at the arbitration proceedings, but was unable to secure their attendance. These witness might have shed better light on what convinced the Chairperson of the internal enquiry to make a finding of guilt. As matters stand, the Respondent did not adduce any cogent evidence to negate the Applicant's version, and to disprove her assertions that she had acted in self-defence. It is not enough to say that the Applicant ought to have fled from the attack, and not defended herself, because she stated that she acted in the heat of the moment, and her first instinct was to defend herself. Each person, when faced with danger, reacts according to his or her own instinct.

There is no rule of thumb on how a human being will react when faced with imminent harm.

4.8 According to the learned author, **J Grogan, (2012) “Dismissal”, page 183**, when an employee exchanges blows with a colleague, this may be termed assault, except where the employee in question is acting in self- defence. It is stated that where the employee is acting in self- defence, he or she lacks the requisite intention, and is therefore not guilty of an offence. The learned author does however caution the reader that the plea of self- defence will only succeed if the assault is proportionate to attack. Mr Douglas did opine that the force used by the Applicant had been excessive in casu. However, it must be noted yet again that Mr Douglas was not present during the altercation. The only Witness who was present was the Applicant, and according to her she did not use force, because she merely evaded the swinging chain, and it hit Bonsile, the very person who was wielding the (weapon) chain in the first place. This explanation, in my view is quite plausible, and in the absence of any cogent evidence in the contrary, I do not see why her version should not stand.

4.9 It is trite that the Respondent’s representation did not Cross-examine the Applicant on her testimony about how she had grabbed Bonsile’s hands, and as such the swinging chain had then hit her on the face, thereby causing her injury. He only asked her why she did not run away from her would-be attacker. It is a well-respected position of the law that if a court is to be asked to disbelieve a witness, he should be cross-examined upon the matters which it will be alleged make his evidence unworthy of credit **(see Zeffert D.T. and Paizes A.P., “The South African Law of evidence”, 2<sup>nd</sup> edition, page 912. In the case of Small v Smith 1954 (3) SA 434 (SWA), at 438 the learned Classen** said the following

“ Once a Witness’s evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal

practitioner, the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness's testimony is accepted as correct.... Unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person may attach any credence to it whatsoever".

In casu, the Respondent was ably represented, and it was incumbent on the representative to duly cross-examine the Applicant on this point, and to further adduce evidence to effectively negate her version. This however, was not done.

- 4.10. Although the first charge was in itself quite poorly drafted because it makes reference to an alleged "Dishonest Act", it is however clear that it referred to the physical altercation between the Applicant and Bonsile. It is not clear how the draftsman sought to call this a "dishonest act", when there was no hint of some sort of being accused of "deceit" which the Applicant was allegedly accused of having perpetrated. It is my finding in the circumstance that the Applicant is not guilty of the first charge of having engaged in a physical altercation and or confrontation with Bonsile as she had been acting in self- defence. Having made this kind of finding, it stands to reason that the Applicant can also not be found to be liable or guilty under the second charge either. The Applicant was the victim of an attack, and therefore since she was not the aggressor, she cannot be held accountable or guilty of having brought the employer's name into disrepute. She did not wilfully, or willingly engage in a physical altercation. An attack was launched against her, and she had no alternative, but to deflect the danger that had been instituted against her by her assailant, Bonsile. In the given circumstances, it is my finding that the Applicant's dismissal was substantively unfair.

## **PROCEDURAL FAIRNESS**

- 4.11 The Applicant made several allegations of procedural impropriety regarding the disciplinary hearing. Many of these were later proved to be unsubstantiated. She alleged that she was not notified of the charges against her, and the date of the hearing. She alleged also that she was not apprised of her rights. She however attended the hearing on the appointed date, and exercised her rights. It is clear that she was well aware of the date of the disciplinary hearing, and of the charges against her. She also knew that she should obtain a representative. She also exercised her rights to appeal against her dismissal, and duly attended the appeal hearing when it was held.
- 4.12 The only points worth delving into are the issues that pertain to the language used at the hearing, and the employer's refusal to allow her representation by a non-employee of the Respondent. It came to light at the arbitration, and during Mr Douglas's Cross-examination that the disciplinary proceedings had largely been conducted in Siswati, and the Chairperson had gone an extra mile to ensure that most of the issues were translated to the Applicant in her mother tongue. Mr Douglas's version which was not effectively controverted, was that he was the person who was more disadvantaged, as Initiator, because he does not understand Siswati. He went on to point out however, that the Chairperson did translate for him what he did not understand. The fact that the Applicant had been employed, and had worked with Mr Douglas and Mr Morgan since 2015, is indicative that she is not totally devoid of an understanding of English. Her immediate Supervisor, Mr Morgan does not speak Siswati, but she took instructions from him on a daily basis, and was able to report Bonsile for removing tape from the toilet to him. She also understood when he told her to tell Bonsile to put the tape back on the 18<sup>th</sup> of December, 2015.

4.13 Pertaining the Applicant's claim that her hearing was procedurally flawed because she was not permitted outside representation, it is necessary to look at the position of the Law in this regard. *The case of **Hamata and Another v Chairperson , Peninsula Technikon Internal Disciplinary Committee 2002 (5) S.A. 445 (SCA); (2002) 23 I.L.J 1531 9SCA*** is authority for the legal position that there is no general right to outside representation in internal disciplinary enquiries. It is a common law position that special circumstances have to exist for an employee to be allowed such a dispensation. In casu, the Applicant's only assertion was that she did not feel comfortable with asking her co-workers to represent her because most of them were Bonsile's friends. This point was vehemently disputed by the Respondent's witness; Mr Douglas. He stated that the Applicant had been twenty co-workers to choose from. It cannot be said that all twenty of these were indeed Bonsile's friend. It was also not shown by the Applicant, in her evidence, why she believed that they were indeed Bonsile's friends in any event. The legal position as stated in the Hanata case, and which was followed and upheld in the local case of ***Khetsiwe Mhlongo v Edcon (Pty) Ltd and Another I.C. case no. 135/12*** must therefore be observed and followed in casu; for this reason, it is my finding that the Applicant's case was not procedurally flawed in any way.

## **5 CONCLUSION**

5.1 The Applicant herein had made several claims pertaining to the following:-

a) Leave Pay -E840.00

b) Notice Pay	-E1819.00
c) Illegal Shortage	-E2312.00
d) 12 months compensation for unfair dismissal	-E21848.00

The said claims shall be dealt with as follows.

**LEAVE PAY**

5.2 It came to light when the Applicant was cross-examined that after her dismissal she was paid a total of E2660.00 in May, 2016. She acknowledged that she did receive this money. It was pointed out to her that the said amount of money was comprised of E1050.00 leave pay which is an amount in excess of that E1610.00 which pertained to her salary. Although the Applicant decried the fact that she had not apprised of what the amount she had been paid was for, the fact remains that she did receive this amount. This being the case, it is clear that her claim for leave pay must fall away.

**ILLEGAL SHORTAGES**

5.3 It was further clarified by the evidence of Mr Douglas that up until January, 2016, the Applicant had been employed as a casual worker who signed monthly contracts of employed. The Applicant was therefore paid only for the hours that she had worked. The Applicant herself admitted that she worked 26 days in an ordinary month, and was paid accordingly. Mr Douglas clarified that the Applicant was paid E10.00 per hour. Indeed in January, 2016, when the Applicant was paid her salary (although on suspension), she had earned a full month's salary of E1,819.00 paid as a permanent worker. She acknowledged in her evidence that she had been absent for some days, hence her employer paid her for hours worked instead of 26 days. This was evidenced by the pay slips on pages 18-22 of the Applicant's bundle of documents. She also acknowledged that

the opportunity to fix whatever errors on her pre-advise, or pay register. It is therefore clear that although this was the case the Applicant's main problem was that she had not understood that she was paid only for hours when she did work. It is also clear that on the pay slips where no hours were reflected at all, these were merely printing errors that ought to have been corrected, but were not. It remains true however that the Applicant was paid for work performed regardless of these errors.

#### **PAYMENT DURING SUSPENSION**

- 5.4 The Applicant, it is common cause, was suspended on the 18<sup>th</sup> of December, 2015, and was subjected to a disciplinary hearing on the 22<sup>nd</sup> of January, 2016. She was dismissed on the 8<sup>th</sup> of February, 2016. The letter of termination stated that the Applicant is dismissed with notice. The Applicant acknowledged payment of her salary in December, 2015 (pay slip on page 23 of the Applicants' bundle), as well as in January, 2016 (pay slip on page 24 of the Applicant's bundle). It is therefore clear that this claim too must fall away because the Applicant was indeed paid during the period of suspension.

#### **NOTICE PAY**

- 5.5 The Applicant in May, 2016, after the appeal proceedings had been completed, and the dismissal duly confirmed, was paid a sum of E2660.00. The amount comprised of E1610.00 and E1050.00. The E1610.00 was for her salary, as she had been dismissed on notice. Indeed and in line with Mr Douglas's testimony, at that point (from January 2016) the Applicant had been a permanent employee and ought to have been paid for the full 26 days, and no longer at an hourly rate. This being the case the Applicant ought to have been paid E1819.90 notice pay. There was therefore a shortfall of E209.90. This is money that is due to the Applicant in terms of her notice pay.

**12 MONTHS COMPENSATION FOR UNFAIR DISMISSAL.**

5.6 In view of the fact that the Applicant's dismissal has been found to have been substantively unfair, an award for compensation will be made. Cognisance has been taken of the fact that the Applicant had only worked for the Respondent for about one year (for February 2015 to February 2016). The Applicant is therefore awarded compensation for unfair dismissal for three months. (E1819.90x3=E5459.70).

**6 AWARD**

Having heard the evidence of both parties it is hereby held that the Applicant's dismissal was substantively unfair. The Respondent is hereby ordered to pay the Applicant the following amounts.

i)	Notice Pay	-E209.90
ii)	3 months compensation for unfair dismissal	-E5459.70
	<b>Total</b>	<b><u>=E5,669.60</u></b>

6.2 The Respondent is ordered to pay the said amount no later than the 30<sup>th</sup> of November, 2016, at the Manzini CMAC offices situated at ka Lankhosi Building, Manzini.

**THUS DONE AND SIGNED AT MANZINI ON THIS .....DAY OF SEPTEMBER, 2017.**

\_\_\_\_\_  
**KHONTAPHI MANZINI**  
**CMAC ARBITRATOR**