IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 17/2001**

In the matter between:

KENNETH BHISHA **Applicant**

and

CARGO CARRIERS LIMITED **Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**S. KUBHEKA**
FOR RESPONDENT	**:**	**Z. JELE**

J U D G E M E N T - 05/10/06

1. The Applicant was employed by the Respondent as a heavy duty driver on 31st July 1995. After four years continuous service, he was summarily dismissed on the 16th July 1999. At the date of his dismissal he was earning a monthly remuneration of E1389.22.

2. The Applicant considered that he had been unfairly dismissed, and he

reported a dispute to the Commissioner of Labour in terms of the provisions of the Industrial Relations Act of 1996, which was in force at the time. The dispute was certified as an unresolved dispute, and the Applicant thereafter instituted proceedings in the Industrial Court claiming payment of terminal benefits and maximum compensation for unfair dismissal.

3. In terms of Section 42 of the Employment Act 1980 (as amended), the services of an employee shall not be considered as having been fairly terminated unless the employer proves –

- that the reason for the termination was one permitted by section 36; and

- that, taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee.

4. In his Application for Determination of an Unresolved Dispute, the Applicant avers that his services were terminated on false allegations of theft and dishonesty, in particular that he stole sugar from the Respondent's Big Bend depot.

5. According to the Respondent's Reply, the Applicant's services were terminated "after he had been found guilty of dishonest conduct by a properly constituted disciplinary enquiry wherein the Applicant failed to give a satisfactory explanation of his conduct."

6. The burden of proving that the Applicant committed dishonest conduct which justified the termination of his services rests squarely upon the Respondent.

7. The Applicant testified regarding the events which occurred on and after a certain Sunday during the first half of 1999. The Applicant was transporting sugar from the Sugar Mill at Big Bend to the railway siding at Phuzamoya. In the afternoon, after his truck had been loaded, he was informed that no more loads could be delivered at Phuzamoya on that day. He accordingly parked his truck at the Cargo Carriers depot at Big Bend. Another loaded truck driven by his workmate Mike Ntombela was also parked at the depot. The Applicant and Ntombela reported to their supervisor Alson Bhembe that the trucks were being parked overnight and that they each had a full load of sugar. According to his unchallenged evidence, the Applicant then sat in the depot office until he knocked off at 5-00pm.

8. The sugar in the truck was loose unrefined brown sugar. The truck consisted of a closed truck with two trailers in the nature of tanks. The tanks contained hatches at the top for loading the sugar into the tanks, and openings at the bottom for unloading the sugar at the point of delivery. The hatches at the top were closed but unsecured, apparently because the locks were defective.

9. On that Sunday night, the depot was left in the custody of two security guards employed by a private security company, Guard Alert. These guards were Jericho Dlamini and Fana Mdlovu. Jericho Dlamini was relieving one Dumisani Lukhele, who was usually on the night shift.

10. When the Applicant reported for duty at about 6-00 am the following morning, he found a number of drivers crowding around his truck. He was shown sugar that had been spilt on the ground around the truck. He climbed onto the truck and opened the hatches. He found that a

quantity of sugar had been removed from one of the tanks. There was a depression in the level of the sugar, showing that sugar had been extracted through the hatches. Applicant immediately reported to his supervisor Bhembe that sugar had been stolen from his truck. He showed Bhembe the spillage and the depression in the level of sugar in the tank.

11. The Applicant estimated that about one ton of sugar had been removed. He was challenged on this estimate under cross-examination, but no evidence was led by the Respondent as to the precise amount of sugar that was stolen.

12. The supervisor Bhembe instructed the Applicant and the other driver Ntombela to proceed to Phuzamoya and deliver their loads. The Applicant was uneasy about removing the 'corpus delicti' before any proper investigation into the missing sugar had taken place, but he followed the instructions of his supervisor. It is clear that at this stage no suspicion attached to either the Applicant or the other driver Ntombela, otherwise Bhembe would not have sent them off to deliver their loads. The Applicant duly offloaded the sugar at Phuzamoya, and continued to collect and deliver further loads.

13. The Respondent's Depot Manager one Solomon Mchobokazi came to the depot. The Guard Alert regional manager one Simon Mzimba also came to the depot. The security guards who had been on duty the previous night were interrogated. They confessed to their involvement in the theft of the sugar. They also implicated Dumisani Lukhele; one Mlambo, an employee of MaxiPrest Tyres; and one Amos Ndlovu, an employee of the Respondent. All these persons were arrested by the Royal Swaziland Police. The following day they were taken to the

Swazi National Court, where they were convicted of the theft of the sugar after pleading guilty. Those convicted were:

- Jericho Dlamini (security guard on duty)

Fana Mdlovu (security guard on duty)
Dumisani Lukhele (security guard off duty)
Mlambo (MaxiPrest Tyres employee)
Amos Ndlovu (relief driver employed by Respondent)

14. The Applicant was subsequently stopped on the road by a Cargo Carriers supervisor and instructed to report to Big Bend Police Station. Whether this occurred on the same day that the theft was discovered is not entirely clear from his evidence. On a consideration of all the evidence led, it seems most probable that this occurred about three days later.

15. At the police station, the Applicant was interrogated about the missing sugar. He was together with one Phillip Mathse, a mechanic employed by the Respondent. Mathse told the police that he had loaned his van to the Applicant “on a previous occasion.” The Applicant made a statement to the police concerning the circumstances surrounding the theft of the sugar. He overheard the Respondent’s Depot Manager insisting that the police arrest and charge him. The police declined to lock him up and he was taken home. The police searched his home and confiscated a plastic basin of sugar. He was warned to attend at the Swazi National Court on the following day.

16. At the Swazi National Court, the Applicant was charged with theft. Mathse was called as a prosecution witness. He was asked by the Court whether the Applicant had given him a sack of sugar. He denied this. He was asked whether he had anything further to say concerning the charges against the Applicant and he said he had nothing to say.

Jericho Dlamini and Alson Bhembe were also called as witnesses. The latter told the Court that the persons who stole the sugar had been apprehended, and the Applicant was not implicated. The Applicant was acquitted by the Court and discharged to return to work.

17. On returning to work, the Applicant was verbally suspended and ordered to return for a disciplinary hearing. He attended a hearing on about the 6th June 1999, chaired by the Depot Manager Mchobokazi. At this hearing, the Applicant objected to the proceedings because he had been acquitted by a court of law. The hearing was postponed to enable the Applicant to reconsider his position. At the postponed hearing, according to the uncontradicted evidence of the Applicant, Mchobokazi referred to a written statement obtained from one of the convicted security guards, which allegedly implicated the Applicant. The Applicant asked for the guard to be called as a witness so that he could be cross-examined. Mchobokazi stated that the guard could not be called because he had been incarcerated. The Applicant pointed out (correctly, as it transpired from the evidence of Jericho Dlamini) that the guard had paid a fine and was available to be called as a witness. Mchobokazi refused to call the guard, and the Applicant refused to proceed with the hearing. The enquiry was adjourned to a later date to give the Applicant a chance to reconsider his refusal to proceed with the hearing.

18. At the third hearing, the Applicant again demanded that the guard be produced for cross-examination on the contents of his statement. This was again refused by the Chairman of the hearing. Solomon Mchobokazi proceeded to find the Applicant guilty on the basis of the guard's statement. No witnesses were called by the Respondent in support of the charges. The Applicant was thereupon summarily

dismissed.

19. In the case of **MAHLANGU v CIM DELTAK, GALLANT v CIM DELTAK (1986) 7 ILJ 346 (IC),** the Industrial Court in South Africa analysed the components of a fair disciplinary process, and held that a fair procedure should confer on the employee the right to challenge *'any statements detrimental to his credibility and integrity'.*

20. The eminent jurist and constitutional judge Edwin Cameron expanded on this right of an employee to challenge adverse evidence introduced at a disciplinary enquiry, in his article **THE RIGHT TO A HEARING BEFORE DISMISSAL - PROBLEMS AND PUZZLES (1988) 9 ILJ 147:**

> "It is not a matter of doubt in employment practice that the right to a fair hearing before dismissal includes the right effectively to challenge the adverse evidence. The duty to act fairly which the industrial court broadly imposes on employers would evidently be breached if an employee were deprived of the opportunity to challenge prejudicial evidence by exploring weaknesses in it and by putting the defensive version. It is generally accepted that the most satisfactory and probably the only effective way of doing so is by cross-examination. Though the courts have not insisted on the right to cross-examination as an invariable feature of natural justice *[see Twala v A B C Shoe Store (1987) 8 ILJ 714 (IC) at 716D-I], it may be argued that it is even more important in the employment situation, where enquiries will often be conducted relatively informally and where those presiding may not have formal expertise in sifting reliable from unreliable evidence, to allow the employee or a representative to test adverse evidence by cross-examination."*

21. In **SOSIBO v SA STEVEDORES LTD (1987) 8 ILJ 789 (IC)** at **792F** and **793C-D** it was held that the absence of an opportunity to cross-question crucial witnesses rendered an enquiry *'inadequate from a procedural point of view'* and lessened the value of the evidence against the employee, who was reinstated.

22. In the judgement of this Court, the general rule is that an employee has the right during a disciplinary enquiry to challenge any evidence given which is adverse to his employment interests, and in the absence of exceptional circumstances such right includes the right to cross-examine any witness giving adverse evidence against him. 'Cross-examination' here does not mean the sustained probing of the veracity of a witness normally associated with trials conducted by professional counsel. What is required for a fair hearing is that the employee should be given the opportunity to put questions to the witness to challenge the reliability of his or her version. Such questioning enables the accused employee to correct any misconstruction of the evidence and to expose any weaknesses in the witness' version. It also enables the witness to comment on the employee's version and to accept or rebut it by reacting to it.

23. Moreover, the opportunity to put questions means that the employee should be present when the evidence against him or her is given, and should there and then be allowed to put questions to the witness.

24. The exceptional circumstances when this general rule does not apply may arise, for instance, when a witness is not available for cross-examination and the evidence in question is either formalistic, irrebuttable, or purely corroboratory.

25. In the present matter before us, the Chairman of the disciplinary hearing introduced evidence in the form of written statements. These statements apparently contained serious allegations implicating the Applicant in the charge of theft which was the subject of the enquiry. The statements were made by persons convicted of the theft in issue. As every student of the law knows, the evidence of an accomplice must be regarded with great circumspection. Not only does he often have an ulterior motive for implicating an innocent person in his crime, but he also has a facility for doing so convincingly because of his own involvement in the offence. Moreover, the honesty of a convicted thief is an oxymoron.

26. The Applicant requested the opportunity to challenge the contents of the statements by cross-examination. He had the right to do so. The general rule applied: the evidence was damaging, contentious, and fundamental to the case against the Applicant; and the author of at least one of the statements – Jericho Dlamini - was available. He was not incarcerated, as claimed by the Chairman. There is no reason to believe he would not have agreed to testify. In fact he willingly came to court without subpoena to testify on behalf of the Respondent, some six years after the event. Nevertheless the Chairman persistently denied the Applicant his right to challenge the evidence against him.

27. Respondent's counsel suggested to the Applicant that the latter refused to participate in the hearing on the grounds that he had been acquitted, not that he wanted the witnesses against him to be produced for cross-examination. The Applicant conceded that he raised this objection at the first sitting only, but insisted that at the two subsequent sittings he agreed to participate provided that the witnesses against him were produced. The evidence of the witness

Simon Dlamini took the matter no further, since his memory of the disciplinary hearings was sketchy and shown to be unreliable. Since the Respondent elected not to call Mchobokazi or Alson Bhembe (who was also present at the hearings), the Applicant's uncontradicted version must be accepted.

28. The Applicant had every right to object to the hearing proceeding without the Respondent's witnesses being called to confirm their statements and submit to cross-examination. Any layperson with the most elementary sense of fairness appreciates that a man has the right to confront his accuser. The conduct of the Chairman Mchobokazi was not only subversive of a fair hearing: in the Court's view it was so grossly unreasonable as to imply *mala fides* on his part.

29. As shall be observed later in the course of this judgement, this was not the only display of *mala fides* on the part of Mchobokazi. Moreover, there are other reasons to question the impartiality of Mchobokazi as Chairman of the disciplinary hearing. He conducted the investigations leading to the arrest and conviction of the security guards. He interviewed the witnesses and obtained statements from them. He pressed the police to arrest the Applicant. He suspended the Applicant, and subsequently charged him.

30. Having been dismissed by Mchobokazi, the Applicant appealed and he was duly called to an appeal hearing chaired by the company's Human Resources Manager Rocky Smith. At the conclusion of the appeal, the decision to dismiss the Applicant was confirmed.

31. The appeal chairman testified before court. According to him, he had before him at the appeal hearing the statement of the security guard

and also a statement made to the Company by Phillip Mathse. Both of these statements incriminated the Applicant. The chairman told the court that he decided in fairness to the Applicant to call Phillip Mathse as a witness at the appeal hearing in order to confirm his prior statement and give the Applicant a chance to cross-examine him. According to Smith, when Mathse entered the office where the appeal was being held, the Applicant objected to him testifying and abruptly left the hearing. Smith said he then continued to question Mathse in the absence of the Applicant (but in the presence of the two shop stewards who had attended the meeting as employee representatives). Smith told the court that he came to the conclusion, on the basis of the statements of the security guards and Mathse's oral confirmation of the statement he made to the Company, that the Applicant was guilty of the theft of the sugar. He accordingly upheld the decision to dismiss the Applicant for dishonesty.

32. Smith produced in court a document (marked Exhibit RA) which he described as a transcription of notes that he took at the appeal. Smith was at pains to state that this document was not the minutes of the hearing but was prepared after the hearing. The minutes were not made available to the court. Smith's notes are in the form of questions and answers, and have all the appearance of a verbatim record of the appeal proceedings. There is nothing in these notes to indicate that the Applicant refused to participate in the proceedings or abruptly left the hearing, save for one curious concluding paragraph. This paragraph is significant and is quoted in full:

"As KB was not participating in the hearing and to ensure that his interests are taken into consideration, PM was called to the office were (sic) he confirmed his statement that he gave his ldv to KB on the day

in question and that he received sugar from KB as a reward for letting him use the ldv.
This was done in the presence of the shop stewards."
(KB refers to the Applicant and PM to Phillip Mathse).

This paragraph is rendered in bold type, unlike the rest of the document. It appears to have been added to the recorded questions and answers at a later stage.

33. Smith's version of events at the appeal hearing was contradicted by Phillip Mathse himself, notwithstanding that he was called as a witness on behalf of the Respondent. Mathse categorically denied that he made any written statement to the company concerning the theft of the sugar. He was himself dismissed by the company, and on the day of the Applicant's appeal he had been called to attend his own appeal hearing. His appeal was heard first, whilst the Applicant was sitting outside. The Applicant was not called into the hearing to hear what he had to say. He did not give evidence at the Applicant's appeal hearing, and he did not confirm any prior statement.

34. The Applicant also testified about the appeal hearing. He said Mathse was there for his own appeal. Mathse was not called to testify against him, and he did not at any stage refuse to proceed or abandon the hearing. In this regard, the evidence of the Applicant and Mathse tally completely.

35. Smith's version cannot be believed. Not only is it denied by the Respondent's own witness, but it is belied by Smith's own notes. The concluding paragraph of the notes has every appearance of an afterthought. In the view of the Court, Smith knew that he could not

justify the dismissal of the Applicant, for the simple reason that no witnesses had been called at the disciplinary hearing and the Applicant had been denied an opportunity to challenge the statements relied on by Mchobokazi. In order to bolster the Respondent's case and his own decision on appeal, Smith concocted a false story about calling Mathse to testify, and fabricated a postscript to the minutes of the hearing.

36. The Court has no hesitation in describing the initial hearings conducted by Mchobokazi, and the appeal hearing conducted by Smith, as a sham. Employers are expected to pay more than lip service to fair disciplinary process. In this case, Mchobokazi and Smith appear to have jettisoned fair process in order to secure the Applicant's dismissal.

37. In the case of Mchobokazi, this impression is cemented by the evidence of one Dumisani Sihlongonyane, who was called as a witness by the Applicant. Sihlongonyane was a Guard Alert security guard stationed at Cargo Carriers, Big Bend at the time of the theft of sugar. He was not on duty on the evening of the theft, and no suspicion attaches to him. He testified that he was importuned by Mchobokazi, together with the Guard Alert supervisor Simon Mzimba, to falsely implicate the Applicant in the theft. When he refused to do so, he was threatened with dismissal. He held his ground, and he was suspended by Mzimba for a period of two months in retaliation. Neither Mchobokazi nor Mzimba were called to deny this testimony.

38. It is remarkable that Mchobokazi was not called as a witness by the Respondent. He carried out the investigations into the theft, and pressed the police to arrest the Applicant. He obtained statements from witnesses which allegedly implicate the Applicant. He tried to procure

false testimony against the Applicant. He chaired the disciplinary hearing, and dismissed the Applicant. The overall impression created by the evidence is that Mchobokazi engineered the dismissal of the Applicant. The court is left to speculate whether he was motivated by a sincere belief in the Applicant's guilt, or some more sinister agenda.

39. It is against this background of unfair disciplinary process; a human resources manager who tries to hoodwink the court; and the unexplained machinations of the depot manager Mchobokazi, that the Court now turns to an examination of the evidence adduced by the Respondent to prove the theft of sugar by the Applicant.

40. As a starting point, it is useful to note the case that was put to the Applicant during cross-examination by Mr. Jele for the Respondent:

40.1 Counsel stated that according to his instructions, a certain security guard Dumisani Lukhele was on duty on the day that Applicant parked his truck at the depot (ie the day of the theft);

40.2 This Lukhele told the company that he saw the Applicant washing Phillip Mathse's bakkie early in the morning following the theft, and there were remnants of sugar on the floor of the bakkie;

40.3 It was that piece of evidence from Lukhele that linked Mathse's bakkie with the theft of the sugar;

40.4 Mathse would testify that the Applicant borrowed his bakkie on the evening of the theft, purportedly to visit his girlfriend at

Qokwane, and on his return the Applicant gave Mathse sugar as a token of appreciation for the use of the vehicle.

40.5 A bag of stolen sugar was recovered from Mathse's house by the police, and Mathse told the police that this was brought to him by the Applicant.

41. The Applicant vehemently denied all these suggestions. He said that he had borrowed Mathse's van on other occasions long before the theft. He said that he had given Mathse about two kgs of sugar – purchased from a shop – for making juice, but this was also long before the theft. He never borrowed Mathse's van on the night of the theft, and he has no girlfriend at Qokwane.

42. Lukhele never came to testify regarding the alleged washing of Mathse's bakkie. Apparently he is deceased. The Respondent called Mathse and one of the security guards who confessed to the theft, namely Jericho Dlamini, in support of the accusations against the Applicant.

43. Mathse testified that he has worked for the Respondent for twenty nine years. He is still so employed, as a welder at Big Bend. He said that the Applicant borrowed his Mazda bakkie after lunch towards 3.00pm one afternoon, saying that he wanted to visit his girlfriend at Qokwane. He returned between 7.30 – 8.00 pm. As thanks for the use of the vehicle, the Applicant gave the witness some sugar – between six to eight kgs.

44. Two or three days later, when he was clocking in, Mathse was approached by Lukhele, who asked where his bakkie had been on the

previous day. He told him he had lent it to the Applicant to go to Qokwane. Later that day, or on the following day, Mathse was instructed by Mchobokazi to report to the police station. He did so and he was interviewed by the police about the theft of the sugar. He made a formal statement. The Applicant then arrived at the police station and was questioned. Later the police took Mathse and the Applicant home. They seized the quantity of sugar that he had been given by the Applicant. They then proceeded to the Applicant's house where they confiscated a ten litre plastic bucket. He did not see what it contained.

45. Mathse said he was told by Mchobokazi to go and testify against the Applicant at the Swazi National Court. This was presumably on the day following his return from the police station. In court he was asked whether the Applicant gave him a sack of sugar, and he denied that. When asked if he had anything to say concerning the theft of sugar from the company, he replied that there was nothing he could say. The Applicant was then acquitted and discharged.

46. Shortly thereafter, Mathse was dismissed by Mchobokazi. This was allegedly because his bakkie was involved in the theft of the sugar, although he (Mathse) was never criminally charged. He could not recall being given any disciplinary hearing. It is difficult in these circumstances to avoid drawing the inference that Mathse was dismissed because he did not incriminate the Applicant at the Swazi National Court to the satisfaction of Mchobokazi.

47. Mathse successfully appealed against his dismissal, and he was reinstated to his employment by Rocky Smith. The only statement he made to the Company was the evidence he gave at his own appeal hearing.

48. Mathse's evidence, with one exception, stood up rather well under cross-examination. He denied that the Applicant had given him the sugar for making juice. He stuck to his story that the Applicant had indeed borrowed his vehicle, purportedly to visit his girlfriend at Qokwane. The difficulty arose when he was asked about the date when he loaned the bakkie to Applicant. He said he did not know the date. The following exchange then occurred:

> Counsel: "Where was Applicant from, when he came to borrow the motor vehicle?"
>
> *Mathse: "He was from the depot."*
>
> *Counsel: "This was two to three days after the theft of the sugar?"*
>
> *Mathse: "Correct."*

49. The Court initially assumed that Mathse had made an error, since if the Applicant only borrowed the vehicle some days after the theft, there can be no suggestion that he used it during the theft for transporting stolen sugar. Indeed, when one of the members of the court asked Mathse to confirm that Applicant borrowed his van three days after the theft, he corrected himself and said that the vehicle was borrowed before the sugar was stolen. However, there is another anomaly in Mathse's evidence on the dates. As stated earlier, he said Lukhele came to him **two or three days after the theft of the sugar** and asked who had borrowed his van **the day before** (to which he replied that it was the Applicant). Whichever way one looks at it, the day before 'two or three days after the theft' can only at the earliest be the day *after* the theft.

50. There is another anomaly which also relates to the question as to the date upon which the Applicant borrowed Mathse's van. Mathse said the Applicant borrowed the van at 3-00pm. According to the Applicant's unchallenged evidence, he did not leave the depot until 5-00pm. on the afternoon of the theft.

51. Respondent's counsel asked the court to discount these anomalies in Mathse's evidence as mere errors. However they have a certain significance because they all relate to whether the van was borrowed on the day of the theft.

52. The general demeanour of Mathse in the witness box was good. He was not evasive, and he stood his ground under a vigorous bout of cross-examination. Apart from the anomalies referred to above, he was a credible witness. The same can be said for the Applicant, who also made a good impression on the Court. It is problematic when two witnesses give mutually destructive versions and both witnesses appear to be credible and candid. The court is then obliged to look for other factors to assist it in determining which of the versions it should accept. Such factors may include possible motives for giving false testimony; improbabilities in one of the versions; and corroboration of one of the versions by other established facts or credible testimony.

53. The Respondent also called Jericho Dlamini as a witness. His evidence would be damning to the Applicant's case, if it were to be believed, but the court does not believe it. This witness made a very bad impression on the court. A self-confessed thief enters the witness box under a handicap as far as honesty and reliability are concerned, and *a fortiori* must the evidence of an accomplice be treated with circumspection. But over and above this reservation, the court found

Dlamini to be shifty and sly in his demeanour. Moreover, his evidence as a whole was inherently improbable.

54. Dlamini said that he was on guard duty on the night of the theft, relieving Dumisani Lukhele. Lukhele came to visit him at the depot at about 7.00pm. One Mlambo from MaxiPrest Tyres was also there. Both were chatting to Dlamini. A red van driven by the Applicant arrived. The other driver Ntombela was in the van also. The Applicant announced to Dlamini that they had come to steal sugar from their trucks, and he should allow them to enter. After initially refusing, Dlamini was 'overpowered' and allowed the van to enter. Dlamini's companions (Lukhele and Mlambo) then suggested that they follow after the Applicant and Ntombela and also steal sugar. This suggestion found favour with Dlamini, especially when he was told that he would be given a share of the sugar.

55. According to Dlamini, the red van returned from the trucks loaded with sacks, which he assumed were full of sugar. Soon thereafter, Lukhele and Mlambo also exited in a van driven by Amos Ndlovu, a relief driver. This van also was loaded with sacks of sugar.

56. When asked by Applicant's counsel why he did not report the Applicant and Ntombela to the police or his supervisor when they entered to steal the sugar, Dlamini's response was that it was the promise by Lukhele of a share in the sugar that made him decide to permit the theft.

57. Dlamini told the court that when the theft was discovered the following morning, he immediately reported to Bhembe, the depot supervisor, that the sugar had been stolen by the Applicant and Ntombela. When

Mchobokazi arrived, he made the same report to him. He only disclosed the involvement of Lukhele and Mlambo for the first time to the Guard Alert supervisor Mzimba, whereupon they were all arrested and handed over to the police.

58. The court finds the witness' version of events patently farfetched. It is impossible to believe that two otherwise trusted heavy duty drivers, such as the Applicant and Ntombela, would brazenly arrive at the depot and demand entry for the stated object of stealing sugar. There is no evidence that they had any relationship with Dlamini which would have prevented him from immediately reporting them to the police. Moreover, according to Dlamini, they announced their criminal purpose in the presence of Lukhele and Mlambo. Unless drunk or deranged, no person engages in criminal theft in this reckless manner. Further, there was another guard on duty, namely Fana Mdlovu. Although Dlamini avoided any mention of his role in the theft, it seems on Dlamini's version that the Applicant and Ntombela also expected Mdlovu to passively watch whilst they stole the sugar he was guarding. Dlamini's claim that he was 'overpowered" is likewise quite absurd. He had another guard and two friends to assist him against the two alleged "robbers".

59. It is far more likely that Dlamini had made a prior arrangement with Lukhele and Mlambo to steal the sugar, hence their 'visiting' him at the depot that evening. Likewise, the other guard was persuaded to join the criminal conspiracy, as was the driver, Amos Ndlovu. The involvement of the Applicant and Ntombela has the appearance of a false embroidery, neatly inserted into the true fabric of events

60. The Applicant's witness Sihlongonyane testified that he conducted

investigations on the morning after the theft to ascertain the culprits. He stated that he interviewed the security guards Jericho Dlamini and Fana Mdlovu. They implicated Lukhele and Mlambo, and confessed that they had allowed them entry to steal the sugar. Dlamini, Mdlovu, Lukheke and Mlambo were thereafter arrested by the police. Sihlongonyane was adamant that the Applicant was not implicated in the theft by the guards, nor did the guards mention Mathse's red van. They told him that a white van belonging to Amos Ndlovu was used to remove the sugar.

61. Sihlongonyane impressed the court as a truthful witness. The relevance of his evidence is that it contradicts Dlamini's claim that he reported the involvement of the Applicant and Ntombela on the morning after the theft. It confirms the court's impression that the allegations against the Applicant arose at a much later stage, and also confirms the court's view of Dlamini as an untruthful witness.

62. It is important to bear in mind that the Applicant was only arrested some three days after the theft was discovered. It is reasonable to assume that the allegations against him were not raised until then.

63. According to the Respondent's counsel, the case against the Applicant arose as a result of Lukhele letting it be known that he had seen the Applicant washing sugar from Mathse's bakkie in the early morning. This story was concocted by Lukhele. Mathse himself stated that the last time his bakkie was with the Applicant was when he returned it at 8.00pm. Lukhele had a very good reason for concocting such a story. He was trying to divert criminal responsibility from himself to the Applicant. In the court's view, it is very likely that Dlamini's fabricated involvement of the Applicant in the events of the night in question was

cooked up with his partner-in-crime, Lukhele.

64. The Respondent's depot manager Mchobokazi may have been caught in a web of lies artfully spun by Lukhele and his crooked associates. He apparently dismissed the driver Ntombela solely on the say-so of these thieves. His concerted efforts to dismiss the Applicant and justify such dismissal has seriously compromised the integrity of the disciplinary process.

65. The court cannot rule out the possibility that Mathse was persuaded to implicate the Applicant by the promise of reinstatement to his employment. This would explain why Mathse failed to incriminate the Applicant in the Swazi National Court (resulting in his dismissal), but did so *volte-face* either during or after his appeal hearing. There is no evidence before the court that Mathse implicated the Applicant, or stated that he had lent his van to the Applicant *on the afternoon of the theft*, prior to his own appeal hearing.

65. The Respondent did not produce any of the statements made by the security guards to the company or to the police. These statements were part of the disciplinary record before Mchobokazi and Smith. No evidence was led that these statements are unavailable.

The Respondent was also entitled to produce prior statements to rebut the Applicant's attack on the evidence of Mathse and Dlamini as being a recent fabrication - See **PINCUS v SOLOMON 1942 WLD 237 (at 241-243)** – and to confirm the disputed evidence of Smith that the statement of Mathse was before him at the appeal.

The Court infers that the statements were not produced because they do not assist the Respondent's case.

66. It is recorded in the Certificate of Unresolved Dispute that "*the Respondent submits that the Applicant's Union's member was dismissed fairly because he failed to produce convincing evidence that he was never involved in the theft of sugar.*" It is worth pointing out that it was for the *Respondent* to produce convincing evidence that the Applicant *was* involved in the theft of sugar, both at the disciplinary hearing and before this court.

67. As was stated earlier, the principal difficulty faced by the court has been in weighing the contradictory versions given by the Applicant and Mathse, since both witnesses gave their evidence in a candid and credible manner. At the end of the day, however, the scales must fall in favour of the Applicant, for the following reasons:

67.1 Mathse did not incriminate the Applicant in the Swazi National Court. Either he was falsely protecting the Applicant, or his evidence in this court is fabricated. Either way, a shadow is cast over his credibility.

67.2 There is a weak area in Mathse's evidence regarding the date when he loaned his van to the Applicant. It may be true that the vehicle was loaned, and that the Applicant gave him sugar, but these otherwise innocent transactions assume a sinister aspect when linked to the day on which the sugar was stolen. The anomalies in Mathse's evidence regarding the day on which the van was loaned cast a further shadow on his testimony.

67.3 The machinations of Mchobokazi create an atmosphere in which the fabrication of false testimony is a distinct possibility.

The reinstatement of Mathse after his incrimination of the Applicant provides a credible motive for false testimony.

67.4 The onus of proving the Applicant's complicity in the theft rests on the Respondent, on a balance of probabilities. The Court has rejected the evidence of Jericho Dlamini in its totality. In the absence of any feature compelling the court to reject the version of the Applicant in favour of that of Mathse, the Respondent has failed to discharge its onus.

68. Another peculiar feature of the case is the Respondent's decision not to call any management witness to confirm that sugar was in fact stolen from its depot, and how much. The Applicant observed a depression or hole in the level of the sugar in his tanker, and some sugar grains spilt around the truck. Presumably the truck was subsequently taken over a weighbridge at Phuzamoya, and the precise shortage of sugar accurately determined. We learned from the evidence that sacks of sugar were recovered from the homes of Lukhele and Ndlovu, and Sihlongonyane told the court that the police returned a vanload of sacks of sugar to the depot. If the weight of the sugar recovered from Lukhele and Ndlovu accorded with the weight of the missing sugar, then this would establish the Applicant's innocence. Unfortunately the Respondent gives the impression of having devoted its efforts in trying to prove the guilt of the Applicant instead of trying to establish the truth.

69. For all the above reasons, the Respondent has failed to prove that the Applicant is guilty of dishonest conduct. In the judgement of the Court, the termination of the Applicant's services was substantively and procedurally unfair.

70. The Applicant is entitled to be paid his terminal benefits in the sum of E2671.55, as claimed. Mr. Jele for the Respondent informed the court at the outset of the trial that the computation of these benefits was not in issue.

71. The Applicant has claimed compensation for unfair dismissal in the sum of E16,670.64. This figure represents twelve months salary. At the time the present application was instituted, the Industrial Relations Act 2000 had been promulgated. In terms of this Act, the jurisdiction of the Industrial Court to award compensation for unfair dismissal is limited to twelve months salary.

72. The Applicant is a married man aged 46 years. He has one dependent child. He was unemployed for a period of twelve months after the termination of his services. He is presently unemployed due to illness which prevents him driving heavy vehicles.

73. The court believes that the Applicant must have suffered considerable personal hardship as a result of the unfair termination of his services. Apart from losing his job and remuneration, he was falsely branded as a thief notwithstanding that he had been acquitted in a court of law. This injustice must have occasioned the Applicant pain and humiliation, particularly because the Respondent persistently denied him the opportunity to confront his accusers and challenge their allegations. The Applicant had a clean record and four years continuous service to his credit. He no doubt had expectations of a long and rewarding association with the Respondent company, All his hopes and prospects were dashed, through no fault of his own, by his unfair dismissal. The court finds that this is a suitable case in which maximum compensation

should be awarded.

74. Judgement is entered for the Applicant against the Respondent for payment of the total sum of E19342.19. The Respondent is ordered to pay the Applicant's costs.

The members agree.

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P.R.DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT