IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 295/05

In the matter between

JETRO SEYAMA **Applicant**

and

MAX ENTERPRISES (PTY) LTD **Respondent**

CORAM:

S. NSIBANDE: **Acting Judge**

P. THWALA: **Member**

A.M. NKAMBULE: **Member**

D. MSIBI: **For Applicant**

Z. SHABANGU: **For Respondent**

JUDGEMENT-16™ SEPTEMBER, 2008

1] The Applicant Jetro Seyama was employed by the Respondent, Max Enterprises (Pty) Ltd t/a Swaziland Security Academy on 30th October, 2001 as a Security Guard.

2] He worked continuously for the Respondent until 6th July, 2004 when his

employment was terminated by the Respondent. At the date of the termination of his employment, the Applicant was earning a salary of E1039.50 per month.

3] The Applicant reported a dispute in terms of the Industrial Relations Act claiming that his services were unfairly and unlawfully terminated and that the termination of his services was unreasonable. The Conciliation, Mediation and Arbitration Commission was unable to resolve the dispute and issued a certificate of unresolved dispute.

4] The Applicant duly applied to this court for the determination of the unresolved dispute, claiming payment of terminal benefits and also maximum compensation for unfair dismissal.

5] The Applicant, in his statement of claim states that his dismissal was unfair, unlawful and unreasonable because:-

5.1. The disciplinary sanction was grossly inconsistent in that the Respondent made findings through hearsay evidence;

5.2. The Respondent suffered no prejudice arising from Applicant's alleged misconduct.

5.3. No consideration was given to the Applicant's unblemished record.

6] The Respondent denies liability for the Applicants claim and avers that the Applicant's dismissal was fair and for a ground contemplated by Section 36 of the Employment Act of 1980, following a fair disciplinary process.

7] It is common cause that the Applicant was an employee to whom section 35 of the Employment Act applied. Section 35 (2) of the Employment Act states;

"No employer shall terminate the services of an employee unfairly."

The importance of this is that the burden of proof shifts to the Respondent to show, on a balance of probability that;

7.1. The Applicant was dismissed for a reason permitted by Section 36 of the Employment Act; and

7.2. That is was fair and reasonable to dismiss the Applicant in the circumstances of the case (see **Section 40 (2) of the Employment Act 1980).**

8] The Applicant testified as to the circumstances of his dismissal. He testified that he was charged with misuse of a client's vehicle and sleeping on duty and that he was subsequently called to a disciplinary enquiry. The disciplinary enquiry was chaired by a certain Mr. Hermanson who wrote what was being said therein and who from time to time posed questions to the Applicant.

9] The Applicant testified that no witnesses were called to the hearing to give evidence against him, the company representative having indicated his satisfaction with the statements given during the investigation of the incident giving rise to the disciplinary enquiry.

10] He further testified that despite his request that the Respondent's witnesses be availed so he could pose questions to them, he was told he would have to call such witnesses himself if he wished to have them support his version of the incident.

11] As to the charge he faced, he denied that he had driven the motor vehicle in question and stated that he had only closed its windows in view of a sudden change in weather - it seemed that rain was fast approaching.

12] He testified that he was spotted by a certain Mathonsi of Holcim Cement (his work station) when he was closing the windows of the vehicle. The Applicant told the court that he was in the company of his colleague Mandla Dlamini when he decided to close the vehicle's windows. He stated that he stood outside the vehicle while he was closing the windows.

13] The Applicant further testified that he could not have driven the vehicle since not only does he not know how to drive but there were no keys in the vehicle to enable him to drive it.

14] Respondent called three witnesses. Mr. Bhekisisa Gamedze employed as a security guard by Swazi Security Guards and was at the Holcim Cement premises on the fateful day on 4th April 2007 when Applicant was said to have been in control of a client's vehicle without authority. He was stationed at the

same premises as the Applicant but was looking after a different client, Long Distance - which occupied part of the same premises as Holcim Cement.

15] Mr. Gamedze testified that during the night and while the Applicant had gone patrolling with a colleague called Delani, he heard the sound of a motor vehicle starting up and got up to see what was happening; that he saw the Applicant and his colleague in the car, with the Applicant in the driver's seat; that his attempt to intercept the car was unsuccessful as it reversed back to the parking lot and that on his arrival there he found the two Buffalo Soldiers security guards alighting from the vehicle and that Applicant alighted from the driver's side. He testified that after a few days he was called by a Mr. Nxumalo to give a statement about what had happened. This statement was handed in as part of his evidence. He stated that he was not called to give evidence at the Applicant's disciplinary enquiry.

16] The 2nd witness for the Respondent was Sydney N. Nxumalo, an employee of Holcim Cement since 1999. Although he had been away on 4 April 2004 when the Applicant was allegedly found in control of the motor vehicle, the incident had been reported to him by one Mathonsi and after investigating he wrote a letter to the Applicant's employer complaining about the Applicant's conduct on the night in question. He testified that the keys to the vehicle were always kept in the vehicle as a company norm. He confirmed that he did not attend the Applicant's disciplinary hearing nor had he seen the Applicant drive the vehicle. He handed in his letter of complaint.

17] The last witness for the Respondent was Hosea Thwala who has been employed by the Respondent as Guard Force Commander for the last 15 years. He testified as to the complaint by Holcirn Cement against the Applicant, the investigation that ensued thereafter and to the circumstances of the disciplinary enquiry. He stated that the disciplinary enquiry was first scheduled for April 2004 but because of the Applicant's non-appearance on various occasions, was postponed and eventually held on 21st and 28th June 2008. Applicant was found guilty as charged and his services were terminated.

18] Mr. Thwala confirmed that no witnesses were called to the enquiry and that as initiator he was satisfied with the statements made during the investigation of the incident.

19] The Court is satisfied that the Applicant was advised of his rights at the hearing and that he chose not to be represented therein, having been told he could only be represented by a fellow employee.

20] From the evidence, including the minutes of the hearing, the court finds that the hearing was procedurally flawed. The Respondent failed and in fact refused to call any witnesses to substantiate its allegation that the Applicant had been in control of a client's car.

20.1. From the minutes, it is clear that the Applicant had refuted the allegations against him and had insisted on questioning the authors of the statements made against him and on which the initiator was relying. In particular when he sought the attendance of Mr. Nxumalo, the Respondent's 2nd witness in court, so that he could question him on his statement. The Chairman ruled that the Applicant would have to call the said Mr. Nxumalo to give witness on his behalf. It would appear that the Chairman took the position that the statements on which the initiator was relying could not be questioned. And that it was for the Applicant to show that such statements were incorrect.

20.2. This position was quite clearly wrong as it was the Initiator and not the Applicant who had the onus to prove that the incident complained of had happened and in the manner in which the authors of the statements relied upon had set out. In this respect, the Applicant was clearly entitled to question the said authors on their evidence. He was entitled to an opportunity to challenge the adverse evidence given against him and to test the truthfulness of the allegations against him by cross examination. The refusal of the Chairman to call the authors of the statements resulted in Applicant being denied the right to cross-examine witnesses and therefore resulted in a flawed disciplinary enquiry. For this reason, the enquiry was procedurally flawed.

21] As set out in **Meshack Tsabedze vs Master Garments (Pty) Ltd Case No. 443/05,** the Respondent still had an opportunity to lead evidence, in court to prove, on a balance of probability that the Applicant was fairly dismissed **(see also Central Bank of Swaziland vs Memory Matiwane Industrial Court of Appeal Case No. 110/1993).**

22] In this regard the Respondent called Bhekisisa Gamedze RW1 whose evidence sought to establish that Applicant had indeed been in control of a client's vehicle without authority. The court was not impressed with the evidence of Bhekisisa Gamedze. This evidence in court differed from a statement he made two days after the incident namely;

22.1. In court he said Applicant and his colleague Delani, left him in the guard house as if to patrol. He heard the sound of a car starting up and got up to investigate. In his statement he says he got out of the guard house 10 minutes after the Applicant and his colleague Delani, had left to patrol and went to the back of the sheds where "they were driving around in a vehicle being SD 685 ZM." It was only on returning to the gate house that he saw a vehicle was missing from the parking bays and thereafter he heard the sound of an engine start. The Applicant in a statement filed in Respondent's bundle of documents states that he closed the windows of vehicle SD 431 AG which Mr. Mathonsi may have thought he was "playing" with.

22.2. RW1 said in his statement that the Applicant approached him after the incident to request that he not report the incident. In court, however, he stated that only Delani asked him not to report the incident.

22.3. In court and in answering a question from the Respondent's attorney on who was driving the vehicle, he answered, "the person who alighted from the driver's door was Jetro Seyama" In his statement he categorically states that "They were driving around and the driver was Jetro Seyama".

22.4 In his statement, RW1 states that on the night in question Applicant was with Delani Lukhele whereas RW3, Mr. Thwala states that Applicant was with Delani Khanyile.

23] The material aspects of RW1's evidence were denied by the Applicant. Although it appears the Applicant was also inconsistent in his evidence regarding the issue of whether he got in the car or not, he was consistent in his denial of driving the car. He was adamant that he was on duty with Mandla Dlamini and did not know the Delani that he was being asked about and who was said to have been on duty with him on the night of the alleged incident. His evidence that he did not know how to drive was unchallenged.

24] The Respondent led no further evidence of the alleged incident. Mr. Nxumalo RW2 was unable to assist save to state that at all times the car keys were kept in that particular car that Applicant allegedly drove. He could only say that he was told of the Applicant driving the vehicle. He never even asked the Applicant about the allegations against him.

24.1. RW3 Mr. Thwala could also not assist with evidence of the incident and could only state what happened after a complaint had been raised by Holcim Cement. He also gave evidence on what happened at the disciplinary hearing. He could not assist with the incident in question. He hadn't seen the Applicant take control of the client's vehicle.

25] On a consideration of all the evidence led in court and submitted by the parties, the Court finds that the Respondent has not discharged its onus and has failed to show, on a balance of probability, that there was a fair reason to terminate the services of the Applicant in terms of section 36 (a) (b) or (d) of the Employment Act.

26] Taking into account the above, observations the court comes to the conclusion that the Applicant's services were unfairly terminated both substantively and procedurally.

27] The Applicant is thirty-four (34) years old. Although single he has four children. Following his dismissal he was unemployed for two (2) years until he was employed elsewhere in 2007. Taking into account the Applicant's personal circumstances, we consider it fair to award him 10 months wages as compensation. Applicant is also entitled to notice pay, additional notice and severance allowance as claimed.

28] Judgement is entered against the Respondent for payment to the Applicant as follows:

Notice Pay	**1039-50**
Additional Notice Pay	**320-00**
Severance Allowance	**800-00**
Compensation	**10395-00**
TOTAL	**12554-50**

The members agree.

S. NSIBANDE

ACTING JUDGE