



**CONCILIATION MEDIATION AND ARBITRATION
COMMISSION**

HELD AT NHLANGANO

REF NO: NHO 087/15

In the matter between:

SANDILE NKAMBULE

APPLICANT

AND

CIVIL SERVICE COMMISSION

1ST RESPONDENT

**MINISTRY OF PUBLIC WORKS
AND TRANSPORT**

2nd RESPONDENT

**MINISTRY OF PUBLIC SERVICE
AND INFORMATION**

3rd RESPONDENT

Coram

ARBITRATOR : VELAPHI Z. DLAMINI

FOR APPLICANT : HEZEKIEL NHLEKO

FOR RESPONDENT : NGABISA NKAMBULE

ARBITRATION AWARD- 06/12/17

DETAILS OF HEARING AND PARTIES

- 1.1 The arbitration hearing was held on different dates between the 28th September 2016 and the 15th June 2017 at the offices of the Conciliation Mediation and Arbitration Commission (CMAC) at former Supreme Furnishers building and KaLaNkhosi building in Nhlangano and Manzini respectively.
- 1.2 The Applicant is Sandile Nkambule, an adult Swazi male of KaLuhleko area, Bhunya in the Manzini region. Mr. Hezekiel Nhleko, an attorney from Dunseith Attorneys in Mbabane represented the Applicant.
- 1.3 The Respondents are the Civil Service Commission, Ministry of Public Works and Transport, and Ministry of Public Service and Information, being organs of the Government of the Kingdom of Swaziland. Ms. Ngabisa Nkambule an attorney from the Attorney General's Chambers in Mbabane represented the Respondents.

2. ISSUE TO BE DECIDED

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

3. BACKGROUND FACTS

- 3.1 The Respondent employed the Applicant as labourer in February 2007 and promoted him to be Storeman/Petrol attendant in 2008 stationed at Khubuta Road Camp. The

Applicant worked continuously until the Respondents dismissed him on the 15th September 2014 for alleged theft of diesel and dishonesty.

3.2 The Applicant reported a dispute for unfair dismissal to the Commission on the 20th November 2015. The dispute was conciliated by CMAC; however it remained unresolved hence the Certificate of Unresolved Dispute No. 002/16 was issued by the Commission. On the 30th August 2016, the Industrial Court referred the dispute to the arbitration under the auspices of CMAC and I was subsequently appointed to arbitrate it.

3.3 At the time of his dismissal, the Applicant was earning a sum of E2, 195.00 per month. He seeks the following relief: Reinstatement or alternatively Notice Pay (E2 195.00), Additional Notice Pay (E3 192.60), Severance allowance (E7 981.60), Leave Pay (E1 496.59) and maximum compensation for Unfair Dismissal (E26, 340.00).

4. SURVEY OF EVIDENCE AND ARGUMENTS

4.1 Both parties led the evidence of one witness apiece. The Applicant was the only witness who gave evidence in support of his case. On the other hand, the Respondent led the evidence of David Simelane.

4.2 APPLICANT'S CASE

4.2.1 The Applicant was responsible for receiving fuel (diesel) delivered by the fuel company. It was his duty to record dipstick readings on the fuel tanks

before the diesel was filled in the tanks. The Applicant also recorded and signed on the delivery note confirming that a certain quantity of fuel had been delivered. The delivery note was also countersigned by the fuel truck driver.

- 4.2.2 It was also the Applicant's duty to fill fuel on Swaziland Government motor vehicles that came to refuel at Khubuta. The transactions were recorded on a book called the Receipts, Issues, and Stock Record. The motor vehicles and quantity of litres filled were recorded and each driver signed to confirm that the fuel had been filled in his motor vehicle.
- 4.2.3 The Applicant was also responsible for recording the fuel delivered by the fuel company in the Receipts, Issues and Stock Record and his supervisor the Roads Overseer had to sign certifying that the information in the record was correct.
- 4.2.4 When the fuel in the tanks had been depleted, the Applicant had to submit returns at the Central Transport Administration (CTA) at Dlanubeka building in Mbabane. These returns were used by CTA to order more fuel. CTA did not order fuel if the returns were not submitted.
- 4.2.5 The Applicant admitted that the fuel records of the months March to July 2010 reflected a discrepancy and or fuel shortfall. He justified the fuel shortfall on the fact that his supervisor David Simelane filled a lot of fuel on containers to refuel earth-moving

equipment which could not go to Khubuta to be refueled.

- 4.2.6 The Applicant said he did not record these transactions on the Receipts, Issues and Stock Record because it was prohibited by procedure to do so.
- 4.2.7 Then sometime in July 2010 his supervisor, took the fuel records for inspection and a few days later police from KaPhunga Police Station arrested him. He was arraigned before the Nhlanguano Magistrates court where he was charged for theft of 50,000 litres of diesel/ fuel, however during trial, the court found that only 260 liters of fuel were stolen.
- 4.2.8 After his criminal case, he was served with a notification to attend a disciplinary hearing at the 1st Respondent's offices. He was represented by Quinton Dlamini. However, he was not allowed to challenge the employer's witnesses and to state his side of the story. Moreover, the Roads overseer never returned one of the record books where he recorded motor vehicles that were fueled.
- 4.2.9 The Applicant admitted that even though the keys to the tanks were stored in the office he was the custodian of the fuel and records at Khubuta. Furthermore, he said at one time thugs stole fuel but he was not sure if this was reported to the police; the theft only occurred once.

4.2.10 The Applicant also said he could not record properly because he lacked the necessary skills however, he admitted that he did not advise his supervisor of his incapacity.

4.3 **RESPONDENT'S CASE**

4.3.1 David Simelane testified that he was the Roads Overseer responsible for supervising the operations at Khubuta Roads Camps. The Applicant worked under his supervision as a fuel attendant.

4.3.2 Sometime in May 2010, he was detailed to clear land for the construction of a bridge so he was busy and could not routinely inspect the fuel records used by the Applicant. However, he asked the Applicant if everything was fine, the latter said operations were running smoothly.

4.3.3 After the construction of the bridge, he resumed his other duties and asked for all the fuel records from the Applicant. Upon inspection, he discovered several discrepancies and fuel shortages. He submitted his findings to his Supervisor Mr. Bernard Simelane in Nhlangano and a decision was taken to report the matter to the police.

4.3.4 David Simelane's investigations revealed that between March and July 2010 there was 30,492 litres of fuel that was unaccounted for by the Applicant. The Applicant was arrested and he (David

Simelane) was a witness in the Applicant's criminal trial at the Nhlanguano Magistrates court. The Applicant was found guilty of the theft of 30,492 litres of fuel.

4.3.5 The Applicant did not return to the Khubuta Camp after the criminal case and he (David Simelane) was again called to give evidence at a disciplinary inquiry where the Applicant was given an opportunity to question him (David Simelane).

4.3.6 David Simelane stated that the Applicant was responsible for signing the delivery note and for filing the Receipts, Issues and Stock Record. The drivers only had to sign to confirm that the litres of fuel were filled. He disputed that he signed the Receipts, Issues and Stocks Record where it was written "***certified correct by Signature.***"

4.3.7 David Simelane also denied that he had not returned all of the record books used by Applicant after his investigation. Moreover, he denied that he filled caterpillar fuel on containers. The procedure dictated that even if the fuel was filled in a container, the driver of that motor vehicle was still obliged to sign the record books. A driver was not allowed to take fuel before signing.

4.3.8 The discrepancies he discovered in the fuel records included the following: Fuel delivered twice in a month yet the records reflected that it had not been depleted; quantity delivered and meter readings were not recorded on the Receipts, Issue and Stock

Record; quantity of fuel filled on government motor vehicles did not balance with fuel delivered each month.

5. SUBMISSIONS

5.1 APPLICANT'S SUBMISSION

5.1.1 The Applicant's counsel, Mr. Hezekiel Nhleko submitted that there were discrepancies in the records of the Magistrates Court, Civil Service Commission, and CMAC regarding the amount of fuel alleged to be missing.

5.1.2 Initially the Applicant was charged with theft of 31,482litres of government diesel by the crown, but the Court found that the prosecutor was able to prove that the Applicant had stolen 261 litres. Then the Civil Service Commission adopted the amount found by the Magistrates Court. At CMAC, Mr. David Simelane said that his findings were that the fuel shortfall was 30,482litres.

5.1.3 Mr. Nhleko also argued that even though Mr. David Simelane denied that fact, the CSC record of proceedings proved that there were missing documents that were withheld with impunity by the Applicant's supervisor. These documents reflected that only 261litres were missing.

5.1.4 The Applicant's attorney submitted that the Respondent's witness should be discredited because he denied his own evidence that he gave during the

Applicant's disciplinary hearing before the CSC. The evidence concerned the inspection of the fuel records. Mr. Simelane denied that he told the CSC that he checked the records twice a day.

- 5.1.5 Finally, Mr. Nhleko contended that the discrepancies in the Respondents' case, untrustworthiness of the Respondents' witness and the withholding of vital documents by the Respondents should work in the Applicant's favour.

5.2 RESPONDENTS' SUBMISSIONS

- 5.2.1 The Respondents' counsel Ms. Ngabisa Nkambule submitted that substantive fairness required valid and fair reasons for dismissal on grounds of misconduct. The reason is valid if the facts indicate precisely that the employee actually committed the misconduct. The misconduct must be sufficiently serious to warrant dismissal.
- 5.2.2 Ms. Nkambule argued that it was generally accepted that the Court or an arbitrator who determines whether dismissal for misconduct was substantively fair should consider the following: whether or not the employee contravened a rule or standard regulating conduct in or relevant to the workplace, if that rule or standard contravened was valid or reasonable, that the employee was aware or could reasonably be expected to be aware of the rule or standard, the rule or standard has been consistently applied by the employer and dismissal was an appropriate sanction for the contravention of the rule or standard.

- 5.2.3 The Respondents' counsel contended that the Respondents suffered fuel stock loss due to the Applicant's dishonesty and the Applicant was aware that fuel theft was unlawful. The Applicant could not explain his failure to complete the Receipts, Issues and Stock Record and could not give an explanation for unaccounted fuel. No incident was cited by the Applicant to explain the loss and he did not deny that fuel was lost.
- 5.2.4 Ms. Nkambule submitted that **Section 36 (b)** of the **Employment Act of 1980** provided that it shall be fair for an employer to dismiss an employee who was guilty of dishonesty.
- 5.2.5 It was also argued by the Respondents' attorney that the employer does not have to prove the misconduct beyond reasonable doubt.
- 5.2.6 Ms. Nkambule contended that the fuel losses had a great impact on the Respondents' business and this justified the conclusion that the trust relationship between the Applicant and Respondents had broken down. Theft was regarded as one of the most serious forms of misconduct justifying dismissal. It was therefore reasonable to dismiss the Applicant.

6. ANALYSIS OF EVIDENCE AND ARGUMENTS

- 6.1 **Section 42(2)** of the **Employment Act of 1980** provides that the employer has the onus of proving that the reason for terminating the services of an employee

was one permitted by **Section 36 of the Employment Act**, and that taking into account all the circumstances of the case, it was reasonable to terminate the employee's services.

6.2 The Respondent dismissed the Applicant for dishonesty and/or theft. **Section 36(b) of the Employment Act** provides that it shall be fair for an employer to terminate the services of an employee because that employee is guilty of a dishonest act.

6.3 **Grogan: Dismissal, Discrimination and Unfair Labour Practices** at pages 244-247 defines dishonesty as follows:

"Dishonesty is a generic term embracing all forms of conduct involving deception on the part of employees. In employment law a premium is placed on honesty because conduct involving moral turpitude by employees damages the trust relationship on which the contract is founded.

Dishonesty can consist of any act or omission which entails deceit. This may include withholding information from the employer or making false statement or misrepresentation with the intention of deceiving the employer" (Emphasis added).

6.4 In **Nkosinathi Ndzimandze and Another vs Ubombo Sugar Limited (IC case no. 475/05)**, the court said the following:

"A person is guilty of the crime of theft if he dishonestly appropriates property belonging to another with the

intention of permanently depriving the owner of his property.”

6.5 The Applicant’s attorney placed a lot of reliance on events that transpired at the Nhlanguano Magistrates Court and the Civil Service Commission disciplinary inquiry to discredit the Respondents’ case.

6.6 The correct approach in dealing with the evidence led at the arbitration is one that was expressed by the Industrial Court of Swaziland in **Mshayeli Sibiya v Cargo Carriers (Pty) Ltd IC case no: 282/2003**). At page 9 of that decision, the court stated thus:

“The Industrial Court does not merely decide whether the decision of the disciplinary enquiry and the appeal inquiry were fair and reasonable on the basis of the facts and evidence before these enquiries at the time. The court must arrive at its own decision on the facts and to that end we must have regard to the evidence led during the disciplinary process as well as fresh evidence led before the court.”

Central Bank of Swaziland v Memory Matiwane (ICA case no: 110/1993)

Swaziland United Bakeries v Armstrong Dlamini (ICA case no: 117/1994”

(Emphasis Added).

6.7 Moreover in **Mphikeleli Sifani Shongwe v The Principal Secretary of the Ministry of Education & Others (IC Case No: 2017/2006)** the court stated the

following regarding the outcome of previous criminal proceedings:

"The position is the same where an employee has been convicted by a criminal court of a criminal offence which also gives rise to disciplinary charges. The employee is entitled to contest the correctness of the decision of the criminal court, and to try and persuade his employer that his defence was not properly presented at the criminal trial or that there is other evidence which establishes his innocence or that for one reason or another, his criminal verdict was mistaken or wrong.

The finding of a court that a person is guilty of a criminal offence is an expression of opinion by the court..."
(Emphasis added).

- 6.8 Now, the Applicant did not dispute that he was the only one responsible for receiving and dispatching diesel fuel. Moreover, he did not deny that he was the only one responsible for recording the quantities of fuel received and dispatched on the delivery note and the Receipts, Issues and Stock Records.
- 6.9 Furthermore, the Applicant did not challenge the authenticity of the fuel records produced by the Respondents during arbitration. He also did not deny that he was the one who made the entries on these records. He only disputed the signature on the box marked '**Certified Correct by Signature**'.

- 6.10 Whether the above-mentioned box was signed by Mr. David Simelane or not is immaterial. All the crucial information including the meter and dip stick readings on the tanks, fuel delivered and total fuel issued were recorded by him. The Applicant also admitted omitting to record where he had a duty to do so.
- 6.11 Furthermore, the Applicant admitted that there were discrepancies and or fuel shortfalls that were reflected in the documents. I will deal with his reason for justifying the shortfalls below. It is important at this stage to describe the few discrepancies that gave rise to the disciplinary action.
- 6.12 According to delivery note marked "**A1**" on the 8th March 2010, Total Swaziland delivered 4351litres of Eco Diesel Plus. The Applicant signed acknowledging receipt of the fuel. He further recorded on the delivery note that when the two fuel tanks were filled with the diesel, they were empty.
- 6.13 Then on the 29th March 2010, the Applicant received 4399litres of eco diesel plus and signed for it. Again he recorded in the delivery note that the tanks were empty when they were filled.
- 6.14 However, the Receipts, Issues and Stock Record document reflected that only one delivery was made in March 2010 and that 4380litres were issued in March. The Applicant recorded the total issued of 4380litres. However this information does not balance with the actual fuel signed for by the drivers who filled

government vehicles between the 2nd March 2010 and 30th March 2010.

6.15 In fact, the fuel issued in March 2010 was 763litres which tallies with the fuel signed for by the government drivers who filled the fuel. Consequently, the Applicant's figure of 4380litres as fuel issued in March was false.

6.16 On the 21st April 2010, Total Swaziland delivered 4401litres of diesel which was received and signed for by the Applicant. He recorded in the delivery note that the two tanks Nos: 1 and 2 were empty when the delivery was made. The Applicant recorded this despite the fact that he had received 8750litres and issued 763 in March 2010. A difference of 7987litres was unaccounted for in both the March and April 2010 in the Issues Record.

6.17 Now, in the April 2010 the Applicant issued 954litres between the 7th and 16th April 2010 and 3447litres of diesel were unaccounted for by the Applicant in the fuel records. In May 2010, Total Swaziland delivered diesel twice at Khubuta; 4400litres on the 6th May 2010 and 4395 litres on the 20th May 2010. However only 944litres were issued and there was a shortfall of 7801litres.

6.18 Similar discrepancies appear in the June and July 2010 fuel records. Additional irregularities include the Applicant's failure to record pump readings, deliveries and closing stock on the Receipts, Issues and Stock Record.

6.19 It is also striking that the Applicant recorded the same delivery note number for the March, April and May 2010.

- 6.20 The CSC disciplinary minutes reflect that the Applicant did not raise the defense that the Roads overseer filled fuel in containers. He only stated that he was not trained for the job.
- 6.21 It is improbable that the Applicant lacked the skill to perform his job. He was appointed into the job in 2008 and his problems started in 2010. The Applicant did not allege nor prove that between 2008 and February 2010 he requested training but was ignored.
- 6.22 In any event, the March 2010 records prove that he was capable of doing his job; he recorded all the information in the correct spaces. What is apparent is that the discrepancies coincided with the Roads Overseer's absence on other duties.
- 6.23 The Applicant did raise the issue of the missing record book during his disciplinary hearing and also mentioned it during arbitration. It is not clear how this missing record book would have assisted his case.
- 6.24 He did not explain why he would record everything in the missing record book and fail to do so in the Receipts, Issues and Stock Records where similar information was required. In fact this assertion proves that he had the capacity to deliver, but elected not to fill information in the official record.
- 6.25 Mr. David Simelane denied that there was a missing record book. The onus rested on the Applicant to prove that records were missing.

- 6.26 The Applicant also said the Roads overseer used containers to fuel earth-moving vehicles and did not sign for those transactions; Mr. Simelane denied this. The latter stated that no fuel was released without a driver's signature.
- 6.27 In fact, during arbitration Mr. Simelane identified his own signatures on the fuel records. If Mr. Simelane was not signing for fuel filled in containers, the Applicant should have reported this to the overseer's superiors. After all, he demonstrated during arbitration that he was in talking terms with Mr. Simelane's seniors.
- 6.28 The Applicant did not allege nor prove that Mr. Simelane threatened him or offered him some benefit in exchange for the favour. What betrays the Applicant's version is that he never mentioned it during his disciplinary hearing. Consequently, I find that it was an afterthought.
- 6.29 Taking into account all the above reasons, I find that on a balance of probabilities the Respondent has proved that the Applicant committed dishonesty and theft of diesel/ fuel at Khubuta Roads Camp.
- 6.30 In **Sanele Mkhonta v Swaziland Meat Industries (IC case no: 64/2005)**, the Applicant was dismissed for theft of two pig carcasses. There was no direct evidence of theft, but there was a discrepancy in the records of carcasses loaded at SMI and those delivered to the customer.

6.31 At pages 7 and 8 of the **Sanele Mkhonta** case (supra), the court said the following:

"The Respondent alleges that the Applicant was guilty of the theft of two pig carcasses and it bears the onus of proving this allegation. We are not concerned here with the criminal onus of proving guilt beyond reasonable doubt, but the civil onus of proof on a balance of probabilities. It was held by the South African Labour Court in Marapula & Other v Consteen (Pty) Ltd (1999) 20 ILJ 1837(LC) at paragraph 33:

'The onus is discharged if the employer can show by credible evidence that its version is the more probable and acceptable version. The credibility of the witness and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piece meal. They are part of a single investigation into the acceptability or otherwise of the employer's version"

6.32 The Court (supra) continued to state thus:

"Where the employer's case, as in the present matter, relies largely upon circumstantial evidence of theft, an inference of guilt may be drawn where, on a preponderance of probabilities, it is the more natural or plausible, conclusion from amongst several conceivable ones- see Potgietersrus vs Platinum (Ltd) v CCMA & Others (1999) 20 ILJ 2679 (LC)."

6.33 I also find that in all the circumstances of the case it was reasonable for the Respondent to dismiss the Applicant.

- 6.34 The Khubuta fuel records demonstrate that the theft and or dishonesty was calculated and not a random occurrence; it occurred over a period of five months.
- 6.35 The fuel records prove that the Applicant failed to account for ±30,000litres of fuel. The negative impact of such a huge loss on the Respondents' business has destroyed the trust relationship between the Applicant and the Respondents.
- 6.36 The Applicant's years of service and previously clean record cannot override the seriousness of the misconduct committed by him. See: **Central News Agency (Pty) Ltd v Commercial Catering & Allied Workers Union of SA and Another (1991) 12 ILJ 340 (LAC)**.
- 6.37 In the premises, I find that the Applicant's dismissal was for a fair reason and reasonable, thus substantively fair.

7. PROCEDURE

- 7.1 The Applicant attacked the procedure at the CSC disciplinary hearing on the grounds that he was not afforded the opportunity to state his case and challenge the Respondents' witnesses. The record of proceedings tells a different story. He was given the opportunity to state his side and his representative to question the Respondents' witnesses.
- 7.2 What is telling is that the Applicant's counsel never raised the issue in his closing submissions, it must be taken

that the issue was abandoned. I accordingly find that the Applicant's dismissal was procedurally fair.

7.3 In the premises I would dismiss the Applicant's claims.

7.4 I accordingly make the following order:

8. AWARD

8.1 I find that the Applicant's dismissal was substantively and procedurally fair.

8.2 The Applicant's claims are accordingly dismissed.

DATED AT NHLANGANO THIS ____ DAY OF DECEMBER 2017.

**VELAPHI Z. DLAMINI
CMAC ARBITRATOR**