



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

HELD AT MANZINI

REF NO: SIM 011/15

In the matter between:-

NONHLANHLA KHUMALO

APPLICANT

And

H.S. TRANSPORT (PTY) LTD

RESPONDENT

Coram:

Arbitrator : Nonhlanhla Shongwe
For Applicant : David Msibi
For Respondent : Musa Hlophe

**ARBITRATION AWARD
(Issued 3rd August 2016)**

DATE(S) OF ARBITRATION : 24/06/15, 15/07/15, 29/07/15,
12/08/15, 02/09/15, 23/09/15
and 28/10/15

VENUE : CMAC Offices, Simunye Plaza
Simunye.

DETAILS OF HEARING AND REPRESENTATION

1. The Applicant is Nonhlanhla Khumalo an adult Swazi Female of P.O. Box 118 Mhlume, in the Lubombo District. She was represented by David Msibi a Labour Consultant from the offices of David Msibi and Associates.
2. The Respondent is H.S. Transport (Pty) Ltd, a company duly incorporated in accordance with the company laws of Swaziland of P.O. Box 185 Simunye in the District of Lubombo. The Respondent was represented by Musa Hlophe a Labour Consultant from the offices of Min Management Consultants & Associates.

ISSUE TO BE DECIDED

3. To determine the procedural and substantive fairness of the Applicant's dismissal and the issue of underpayments.

BACKGROUND TO THE ISSUE

4. The Applicant was employed by the Respondent on the 15th January 2007. Her services were terminated on the 28th January 2015 after she had been found guilty by the chairperson of the disciplinary enquiry of three counts of misconduct. Her dismissal was upheld on appeal. At the time of dismissal she was working as an Administration officer earning the sum of E4, 963.64 per month.
5. Following the dismissal, the Applicant lodged a dispute with the Commission challenging the fairness of her dismissal. Unfortunately, the dispute was not resolved at conciliation and a certificate of unresolved dispute was issued. The matter was by consent of the parties referred to arbitration wherein I was appointed to arbitrate.

6. A pre-arbitration hearing was conducted wherein the Respondent intimated that they intend to raise a preliminary point contesting the inclusion of the issues of underpayments and unpaid Sundays in the Certificate of Unresolved dispute which they alleged were not conciliated upon. The preliminary point was however later abandoned by the Respondent. Consequent to conciliation within arbitration, the parties signed a memorandum of agreement after reaching a settlement on the issues of payment during suspension and underpayments. The Applicant also withdrew the issue of unpaid Sundays.
7. The Applicant is alleging that she was procedurally and substantively unfairly dismissed by the Respondent, therefore is seeking payment of underpayments, terminal benefits and maximum compensation for the unfair dismissal. The Respondent on the other hand contends that the dismissal was fair in all aspects.

SURVEY OF EVIDENCE AND ARGUMENTS

8. Both parties led evidence in support of their respective positions. The Applicant was the only witness who testified in support of her case. The Respondent called five witnesses namely, Elias Maseko a mechanic, Mandla Matsebula the Transport Officer, Gugu Vilakati the Stores Controller, Philemon Xaba a Driver and Cebisa Dlamini the Security Officer. I have considered all the evidence presented and submissions made by the parties but for the sake of brevity I have only recorded what I considered germane to this award.

APPLICANT'S CASE

9. The Applicant testified under oath that she was employed by the Respondent on the 15th January 2007 and was subsequently dismissed on the 28th January 2015. At the time of dismissal she was working as an Administrative Assistant earning the sum of E4, 963.83 per month.

10. The Applicant gave a background of her employment history which is relevant to her claim of underpayments. She stated that she was initially engaged as an Assistant Group Accountant earning the sum of E4, 000.00 per month. On or about June 2007 the Managing Director Mr. Vilakati (hereinafter referred to as the MD for ease of reference) spoke to her, complaining about her performance. His concerns mainly were that, the Applicant lacked the required expertise as her work had a lot of errors. The Company enrolled her for an accounting course at a certain college in Manzini in an effort to improve her inefficiencies.

11. When she returned, she was told by the MD that she will be demoted to a junior position and her salary will be commensurate with the position she will be occupying. She did not challenge the decision to demote her at that time. She was further handed a letter dated 9th May 2008 marked "25" from the Human Resources Director confirming the meeting and discussion between the MD and herself. The letter confirms that the Applicant was being 'transferred' from her position of Assistant Accountant to that of Secretary / Admin Clerk and that her salary will be reduced from the E4, 000.00 to E2, 000.00.

12. The letter records that the transfer to a junior position was at the instance of the Applicant after the MD

complained of her poor work performance. The letter further records the key areas of concerns which were addressed at the meeting between the MD and the Applicant.

13. The Applicant in her testimony admitted to some of the shortcomings noted on the letter but refuted that she was the one who requested for a 'transfer', instead it was imposed on her by the Respondent. She did not even sign the letter when it was served upon her.
14. In August 2012 she was promoted to the position of Administration Officer a position she held until her dismissal. As an Administrative Assistant, she was informed of her job description which was mainly: handling petty cash, responsible for banking, report any incidents of damage to company property, receiving revenue for river sand, supervise the security personnel and the gardener and or any other duties which may be assigned to her by the Managing Director.
15. Regarding the dismissal, she testified that on or about the 12th January 2015 she was served with a notice to attend a disciplinary enquiry which was scheduled for the 14th January 2015. The notification made reference to annexures which were not attached to it. She then wrote to the Respondent requesting for the missing annexures. The MD through Thandekile Sifundza told her that she would receive the documents at the hearing.
16. The 1st charge relates to cash shortages yet there were no details on how much the cash shortages were for her to respond accordingly during the hearing. This made it impossible for her to prepare for the hearing. The charge reads thus;

"1. Charge number (1) is failure to give convincing / tangible and clear account to cash short falls / discrepancies / anomalies stemming from sale of river sand and plaster sand.

1.1. You are the one accountable for capturing into the system of all information on Delivery Notes, Trip / ton sheets to specification to facilitate the of invoices, handles Petty Cash and receipts cash received for River / Plaster sand and banking all cash received and therefore you carry the burden of explaining what happened, how it came about that there are cash short falls / cash discrepancies.

1.2. Management will lead evidence that will give a narration of events / transactions wherein the cash anomalies became evident.

*1.3. Management will further demonstrate in the hearing that in the preliminary investigations you failed to table / present / meaningfully and tangible explanations. **See exhibit No.1/2014.***

1.4. Further take note that the matter is so serious that if found guilty, severe disciplinary measures could be preferred against you.

1.5. Management will seek to demonstrate in the disciplinary enquiry / hearing that your actions constituted maladministration / deliberate intent to deprive your employer of her rightful income / gains which on its own attracts fraudulent connotations and dishonest actions.

1.6. Management will also demonstrate that you failed to adhere to one of your key operational rule that says: "banking must be done twice a week", in that you received money on the 4th and only banked it on the 19th December 2014.

17. The Applicant testified that, during the disciplinary hearing, the initiator who was the MD for the Respondent, presented evidence in the form of a breakdown of cash discrepancies which were alleged to have been caused by the Applicant. It was at that point that the Applicant realized that the charges were more complex than she had anticipated. She then moved an application before the chairperson for a representative within her ranks or alternatively someone from outside the company on the basis that charges were more serious and might lead to a dismissal. She further told the chairperson of her failed attempt to obtain further information from the Respondent prior to the hearing.
18. The chairperson rejected her request for a more competent representative outright on the basis that she had been given sufficient notice to find a representative. On the issue of the missing annexures from the notification, the chairperson ruled that the Respondent was under no obligation to give her the documents prior to the hearing.
19. It was her testimony that the chairperson then asked her to plead. She stated that she did not necessarily plead guilty, she merely acknowledged that she was aware of some of the discrepancies the MD had highlighted.
20. According to the Applicant, the allegation on 1.6 was unfounded as she was not aware of any operational rule

as to when banking was supposed to be done. She did indicate however that the charge relates to an incident where she used a deposit slip to bank E3, 000.00 instead of the deposit book. The money had been sitting in the office safe for quite some time and they could not bank it because the MD had taken the deposit book. At first she asked the MD's Private Secretary to ask the MD for the deposit book. Seeing that it was not forthcoming she then decided to use the alternative.

21. The 2nd charge was framed as follows;

2. ***Charge number (2) is about THE INCIDENT INVOLVING THE SUPPLY OF RIVER SAND OF 28/29TH OCTOBER OF 2014 REPORTED TO HR OFFICER BY SECURITY GUARD CEBISA DLAMINI***

2.1 *Management will make presentations at the disciplinary enquiry / hearing to demonstrate that you, as a rightful custodian of the operations under question, either were negligent or made a conscious decision to deprive your employer of its rightful gains / income from the supply of river sand in the period under review.*

2.2 *Take note that you failed to present clear / tangible and convincing explanations when asked to do so during the preliminary investigations.*

2.3 *Management will present hard copy evidence and call upon witnesses to testify on its case against you.*

2.4 Management views this incident as serious enough as to warrant severe disciplinary measures against you if found guilty.

22. Her evidence in relation to this charge was that the incident referred to in this charge occurred on the 28th October 2014, after the Security Officer Cebisa Dlamini overheard a conversation between herself and Mandla Matsebula. Mandla Matsebula and the Applicant were standing within close proximity of the guard house. Mandla Matsebula had asked the Applicant the cost of river sand to Dvokolwako to which she told him it was E1, 000.00. It is said that the Security Officer then reported the conversation to the MD.
23. The following day the Security Officer started making enquiries about the Delivery notes (DN). She refused to hand them to him without authority from the MD.
24. She was further accused of fiddling with one of the driver's DN. The allegation was that, she was seen tempering with the number of loads on Mashsha's DN from two to three loads. Another allegation emanated from monies received from Mandla Matsebula for river sand he had bought on credit which was for E1, 000.00. The Applicant stated that she was able to present proof at the hearing in the form of the receipt of which MD had acknowledged and he withdrew the charge.
25. The third charge was framed as follows;

"3. Charge number (3) involves the incident of the 07/11/14, where trucks were allocated work to move river sand to various places much against company's instruction that sand storage in the yard and

deliveries to individuals other than our main customer RSSC should stop.

*3.1 This verbal instruction was issued in early September 2014, due to shortage of work from main customer RSSC. Delivering sand to individual customers impacts negatively on company performance as they are not charged at commercial rates. (See **Table and plaster sand from August to October 2014**)*

3.2 Management will present evidence that drivers under instructions from Stock Controller namely Gugu Vilakazi, delivered loads to individuals' places yet there is no clear indication that what was done on the day was done correctly in accordance with laid down rules i.e. the distances travelled by each truck that worked on the day in question.

3.3 Management will demonstrate in the disciplinary enquiry / hearing the detrimental effect of your actions in this kind of incident.

3.4 If found guilty, your actions will be classified as those that brings the employers' name under disrepute. Management will demonstrate the degree of prejudice that follows such proven guilt."

26. She stated that she was not involved in the commission of the third charge in that she was not the one who had dispatched the trucks on this day but Gugu Vilakati. One of the Truck Drivers Eric Simelane was caught stealing a load of river sand by one of the Company's Executive Tini

Vilakati. Eric Simelane then came to her and told her that Tini Vilakati told him to pay for the load. The Applicant refused to receipt the money because it was E300.00 short. She insisted on the full amount. After managing to raise the balance, he paid it to Gugu Vilakati.

27. At the end of the hearing, the chairperson advised that he would be delivering his verdict on the next sitting which was scheduled for the 20th January 2015. On the return date, the chairperson reiterated that he would be delivering the verdict and would then allow the parties to present their mitigation and aggravating for him to consider. When the opportunity came for the Respondent to make its submissions, the MD brought in new evidence for the Applicant to answer. It was not even clear if it was an addition to one of the charges or a new charge altogether. The chairperson allowed it and asked the Applicant to respond, the Applicant at first told the chairperson that she had nothing to say other than to mitigate.
28. In cross-examination, the Applicant was asked in relation to exhibit "3" of the Respondent's bundle being a letter of termination of employment dated 15th August 2007 from the Respondent to the Applicant. The letter reflects that the termination is premised on poor work performance of the Applicant which despite efforts by the Respondent to provide her with external training proved futile. The termination was to be effective on the 31st August 2007 offering her two months salary whilst looking for alternative employment. The letter in its closing paragraph reflects that the Applicant had requested for a transfer to a more junior position as an alternative, a request the Respondent undertook to consider. She admitted that she was aware of it.

29. The Applicant was asked in relation to exhibit "24" of the Applicant's bundle, being correspondence dated 9th May 2008 addressed to the Applicant concerning her performance. The letter makes reference to a 'transfer' to a junior position which was at her instance. The Applicant conceded that when she was served with the letter of demotion, she did ask to seek legal advice before acknowledging receipt. The Respondent allowed her to do that but she ended up not doing so. She did not challenge the demotion at the time for fear of victimization and that she really needed the job.
30. It was put to the Applicant that the record of the disciplinary hearing reflects that she had pleaded guilty. She denied and stated that she only admitted that she was aware of the discrepancies noted by the MD.
31. The witness was asked in relation to receipt 75 marked exhibit "19" if it was the receipt she made out to Mandla Matsebula and her answer was in the affirmative. It was put to her that according to their records Mandla Matsebula was given receipt no. 88 of which she denied. An attempt was made by the Respondent's counsel to cross-examine the witness on receipt no.88 but the Applicant's Representative objected on the basis that the document had not been properly discovered by the Respondent.

RESPONDENT'S CASE

TESTIMONY OF ELIAS MASEKO (RW1)

32. Elias Maseko testified under oath that he is currently employed by the Respondent as Mechanic and has been in the Respondent's employ since June 2012.

33. His testimony was that the Applicant asked him to accompany her to the Human Resources Office to fetch her charge sheet. When they got to the Office the Applicant introduced him as someone who was there for moral support not as a representative. In as much as he signed some documentation relating to the Applicant's case, he is not sure of their contents as they were never read to him nor did he read them as he is unable to read.
34. When cross-examined he clarified that during the Applicant's disciplinary hearing he was there for moral support not as a representative. The Applicant even moved an application before the Chairperson for a representative who was within her ranks but the application was rejected by the chairperson on the basis that she had been given ample time to prepare for the case.
35. When it was put to him in cross-examination that the record of the disciplinary hearing bears that he was there as the Applicant's representative, he vehemently denied. He reiterated that he was merely there to provide moral support to his colleague which was a norm. To prove that, he never said anything throughout the hearing other than to mitigate for her.
36. The witness re-iterated his testimony when re-examined of his role at the Applicant's hearing that he was not a representative.

TESTIMONY OF MANDLA MATSEBULA (RW2)

37. The witness took an oath and testified that he started working for the Respondent towards the end of 2008 as

Transport Officer and Supervisor for Drivers, termed as '*Indvuna*' in vernacular.

38. He testified that on or about the 28th October 2014, he approached the Applicant as she was leaving to speak to the MD on his behalf. He wanted river sand on credit as he was in the process of building a house. The Applicant undertook to speak to the MD on his behalf the following morning.
39. The following day, the Applicant told him that the MD had agreed. He then took a truck load of river sand to deliver at his homestead. The truck was driven by Mashsha. When he got paid he went to the office to pay, but was turned back by Busi who told him that they had been instructed by the MD not to accept any payment from him.
40. The first load was delivered on the 5th September 2014 and he made the payment on the 18th September 2014. The Applicant gave him receipt no. 88 as proof of payment.
41. During cross-examination he clarified that he got two loads on credit, the first one was on the 29th October 2014 and the second one was delivered at his homestead on the 5th September 2014. The former load was paid for on the 18th September 2014 when he got paid, but he could not pay for the latter as Busi refused to accept it.
42. He further testified that Thandekile helped him to write a statement on what had happened. She prepared the statement on what he told her to write as he can neither read nor write. The witness was asked on the number of statements he had made and he said one. Exhibit "18" of

the Applicant's bundle being a statement made and signed by the witness on the 15th December 2014 was read to the witness and he was asked to confirm the signature and the contents thereof. The witness confirmed it as his. Again the witness was confronted with Exhibit "HS 45" of the Respondent's bundle also being a statement made and signed by the witness. At first the witness disputed the signature on the document but when the statement was read to him, he then changed tune and confirmed knowledge of it.

43. He admitted that he did not testify during the disciplinary hearing.

TESTIMONY OF GUGU GLENROSE VILAKATI (RW3)

44. Her sworn testimony was that she is the Stores Controller for the Respondent since March 2014 and is the biological daughter of the Respondent's Managing Director.
45. According to the witness, the procedure is that the Applicant receipts monies from the clients and her duty is to allocate the work to the Drivers as per the orders received. On the 7th November 2014, she was allocated two trucks QSD 343 BM and VSD 783 AH for delivery by the Indvuna. She then asked that the QSD 343 BM be substituted with VSD 784 AH as the QSD had technical problems.
46. That morning she received a call from Tini telling her that she had seen the QSD 343 BM on her way to work. She then called the Driver of the truck Eric Simelane to find out his whereabouts. He lied and told her that it had slipped his mind that he was not supposed to load, so he was on his way back.

47. When Eric Simelane got to the office he confessed to her that he had stolen a load of river sand. By then, Tini had called the Applicant informing her to expect Eric Simelane who was coming in to pay for the stolen load of river sand. Unfortunately he had E1, 000.00 only and the Applicant refused to receipt the money insisting on the E1, 300.00 which was the standard charge for a load to Mafucula. The Applicant then left and asked the witness to receipt the full amount.
48. Indvuna Fanase felt that Eric should be taken to task for his actions. The Applicant suggested that Eric should be refunded the money so that he can take full responsibility for his actions.
49. The witness testified when cross-examined that Eric Simelane resigned soon thereafter. She also stated that she was never called to testify during the Applicant's hearing.

TESTIMONY PHILEMON XABA (RW4)

50. The witness has been an employee for the Respondent as a Driver for four years. His testimony was that on or about the 11th July 2014 in the afternoon, he received a call from the Applicant instructing him to deliver three loads of gravel sand at Manjengeni. The Applicant had told him that she had sought permission from the MD.
51. The witness with two colleagues, Siphon Kunene and Mashasha Magagula, delivered the loads as per the instruction from the Applicant. When they returned they all gave their Delivery Notes to the Applicant as per the norm.

52. During cross-examination he testified that he never questioned the legitimacy of the Applicant's instruction because they were used to getting instructions from her. According to him there was nothing sinister about the instruction, to him it was business as usual.
53. He testified that on the 28th October 2014 Mashsha made three loads.
54. He admitted that he never testified during the Applicant's disciplinary hearing.

TESTIMONY OF CEBISA DLAMINI (RW5)

55. The witness is a Security Officer for the Respondent, having been employed on the 4th October 2014.
56. His sworn testimony was that, on or about the 28th October 2014 around the afternoon, he overheard a conversation between the Applicant and Indvuna Mandla Matsebula about a thousand Emalangeneni that he had received from a Matsebula. The Applicant in response is said to have told Mandla that they would have to change the trucks schedule for the following day, instead of loading the gravel they would have to start with the river sand.
57. On the following day, he enquired from the Front Loader Driver Qiniso Myeni the number of loads each had made that day. Qiniso told him that he had done nine (9) loads. When the truck drivers came he enquired from them as well, the number of loads they had each made to compare with the information he got from the Front Loader Driver. Duma Dlamini told him that he had done four loads and Eric Simelane did three loads making a

total of seven loads which reflected a two loads difference. He asked Eric Dlamini for the Delivery Note (DN) to confirm the figures but he refused to give it to him.

58. The witness then confronted the Applicant for the DNs as she was the one responsible for the DNs. The Applicant told him that he had no right to view the DNs. The witness then reported the matter to Thandekile Sifundza the Human Resource Officer. They then viewed the DNs for the two trucks and noted that Mashsha's DN had two loads.
59. A few moments later, the Applicant instructed him to fetch the DN from Mashsha's truck. She took the DN and changed the number of loads recorded by the Driver from two to three. When he asked her why she was altering the Driver's DN, she seemed agitated. Around October 2014 the MD asked him to write a report.
60. During cross-examination it was put to the witness that his evidence contradicts the evidence he gave at the disciplinary hearing, in that in the minutes of the hearing there is no mention of E1, 000.00. The witness stated that he did mention it.
61. The witness was asked if he had enquired from Mashsha the number of loads he had made that day. He answered that Mashsha had told him that he had done three loads. Duma Dlamini and Eric Simelane had four and three loads respectively. According to the witness there were two loads missing.

62. At the close of the Respondent's case both parties agreed to file their closing submissions which I have also considered.

ANALYSIS OF EVIDENCE AND ARGUMENTS

63. I am required to determine the fairness of the Applicant's dismissal and whether the Respondent owes the Applicant monies in lieu of underpayments following her alleged demotion.

64. It is trite law that where the fairness of a dismissal is in issue, the onus is on the employer to prove on a balance of probabilities that the employee was dismissed for one of the fair reasons for termination stated in Section 36 of **The Employment Act 1980**. This proposition is in line with section 42 (2) of the **Employment Act**.

SUBSTANTIVE FAIRNESS

65. The substantive fairness of a dismissal is assessed according to a number of criteria. These are set out in item 6 of the Code of Good Practice: Termination of Employment, which reads:

"6.1 Any Person who is determining whether a dismissal for misconduct is unfair should consider-

6.1.1 whether the employee contravened a rule or standard regulating conduct relating to employment;

6.1.2 if a rule or standard was contravened, whether-

- (a) *The rule is valid or reasonable rule or standard;*
- (b) *The rule is clear and unambiguous;*
- (c) *The employee was aware, or could reasonably be expected to have been aware, of the rule or standard;*
- (d) *The rule or standard has been consistently applied by the employer; and*
- (e) *Whether dismissal is an appropriate sanction for the contravention of the rule or standard.*

66. It is common cause that the Applicant was found guilty and dismissed on all three counts of misconduct. She appealed and her dismissal was upheld on appeal.

67. Perhaps it would be prudent to highlight that an arbitration under the auspices of the Commission is a hearing *de novo* and that the decision of the arbitrator is not reached with reference to the evidential material that was before the employer at the time of the enquiry, but through evidence placed before the arbitrator during the arbitration hearing. Therefore, in arriving at my decision I will have to consider mainly the evidence presented during the arbitration hearing. See in this regard: **The Central bank of Swaziland v. Memory Matiwane (ICA case no: 110/1993)** and **Swaziland United Bakeries v Armstrong Dlamini (ICA case no 117/1994)**.

68. The Applicant led evidence in support of her contention that her dismissal was substantively unfair. I am persuaded to find in her favour as she did not just make bare denials, evidence was led in support of her claim. Same cannot be said for the Respondent. After a prima

facie case had been made by the Applicant it was incumbent upon the Respondent to adduce evidence to controvert the Applicant's contention.

69. Regarding the first charge, there was no evidence led to prove the cash shortfalls / discrepancies complained of in this regard. No accounting documents or witness were called by the Respondent to prove the allegations complained of.
70. There is an allegation in paragraph 1.6 of this charge that the Applicant failed to adhere to a company rule that banking must be done twice a week. The Applicant denied that there was an operational rule to that effect nor was she aware of this rule. The Respondent failed to prove the existence of such a rule if it was a workplace policy or an existing code. I can only infer that such a code or policy was not produced because it does not exist.
71. Concerning the second charge, RW5's testimony was that on the 28th October 2014 he overheard a conversation between the Applicant and RW2 which involved money. RW2's evidence corroborates the Applicant's version. Their evidence was that the conversation RW5 overheard was after RW2 had asked the Applicant the cost of a load of river sand to which the Applicant had stated was E1, 000.00.
72. RW5 further testified that he saw the Applicant tempering with Mashsha's Delivery Note. The Applicant is alleged to have changed the number of loads from two to three. His evidence was that on the 29th October 2014 he had asked Mashsha the number of loads he had made and he had told RW5 that he had done three loads that day. RW2

confirmed that Mashsha had done three loads which prove the allegation of tempering to be false.

73. Regarding the third charge the Applicant stated from the onset that the incident referred to in this charge does not implicate her. This contention was corroborated by RW3 whose testimony was that one of the Drivers Eric Simelane was caught by Tini Vilakati with a stolen load of river sand. Eric Simelane is said to have confessed to RW3 and he was asked to pay for the load. The Applicant was then asked to receipt the payment from Eric Simelane.
74. A learned author, Mr. Ivan Israel in his published article ***Proof wins the day, The Star, Workplace (4th October 2004)*** had this say:

"Thousands of cases are lost at arbitration simply because the loser failed to bring proof to the arbitration hearing... What parties do not understand is that it is not up to the arbitrator to ask for proof or call witnesses. Also arbitrators are not allowed to accept the truth of a party's testimony merely because the party says it's true. All arbitrators are required to do is to follow the rules of procedure and principles of justice during the hearing. These requirements include the paramount principle that the arbitrator must base its findings primarily on the facts presented in the arbitration hearing. It is not up to the arbitrator to bring the evidence or to show that the evidence brought constituted proven fact. The arbitrator merely creates the environment in which the parties can present their evidence... In this sense the arbitrator acts as a 'master of ceremonies'... In many cases, a party may lose, not because there is no evidence, but because he

(or she) failed to bring the evidence to the arbitration hearing.

75. In light of the foregoing, it is my finding that the Respondent has failed to discharge the onus of proof in terms of Section 42 of the **Employment Act 1980** in that, it has failed to prove on a balance of probabilities that the Applicant's dismissal was fair and reasonable.

PROCEDURAL FAIRNESS

76. There were several challenges to the procedural fairness of the dismissal which can be summarized as follows:

(a) The charges were ambiguous, vague and lacked sufficient information for the Applicant to prepare her defence on time.

(b) She was denied the right to be represented by an employee from within her ranks or alternatively someone from outside the company.

(c) The belated amendment and or new evidence being led by the Respondent's MD during mitigation / aggravating stage.

77. In relation to the formulation of charges, item 11. 3 of the **Code of Good Practice: Termination of Employment** provides that, an employee should be notified of the charges against him / her using a form and language that the employee can reasonably understand. The Industrial court has in the case of **Zephania Ngwenya v RSSC (IC Cases No. 262/01)** observed that employers are not expected to observe the same standards of particularity in disciplinary charges as applied in criminal prosecutions. In

my view, information on the charge sheet must be sufficient to make the employee's right to prepare for a hearing real and not an illusory right. The facts and information contained in a notice to attend a disciplinary hearing must not only be unambiguous but must contain sufficient information to ensure that the right to prepare for a hearing is realized.

78. The right to prepare for a disciplinary hearing may be undermined if insufficient or confusing information is provided as it is apparently the case in the present matter. In other words, the requirement to provide concise and adequate information arises from the need for adequate preparation. It is essential that the notice containing the charges should be precise and spell out in a precise manner the nature of the process that the accused person is to confront during the hearing. Thus, preparation for investigation and being faced with the 'possibility of *severe disciplinary measures*' as the notice in paragraph 1.4 and 2.4 in this case suggests is different to facing the disciplinary inquiry whose consequences included a dismissal.
79. The charges were deficient as they fail to give sufficient details of when the incident took place and the role of the accused. It is common cause that, charge one in particular merely reflects a charge of "cash shortfalls / discrepancies" and it does not contain any additional information. Even the annexures referred to in charges one and two which could have assisted her in preparing her defence were not made available to her. It appears from the record of the disciplinary hearing that there was more than one allegation of 'cash shortfalls and discrepancies' against the Applicant and this I believe, could have led to some confusion as to the exact nature

of the charge. In as much as the Applicant admitted that she understood the meaning of the charge of 'cash shortfall / discrepancies, I do accept that she would not on the paucity of information given to her have been in the position to properly prepare for the hearing.

80. Concerning the belated amendment of the charges and or new evidence introduced at mitigation / aggravating stage, it is trite that in civil proceedings, amendments to pleadings and documents can be sought at any stage of the proceedings. An amendment may also be granted at any stage before judgment on such other terms as to costs or other matters as the court deems fit. The granting or refusal of an application for an amendment of a pleading is a matter for the discretion of the court, to be exercised judicially in the light of all the facts and circumstances before it. An amendment will be allowed where this can be done without prejudice to the other party. In this regard see **GMF Kontrakteurs (Edms) Bpk v Pretoria City Council 1978 (2) SA 219 (T) at 222B-D and Wavecrest Sea Enterprises (Pty) Ltd v Elliot 1995 (4) SA 596 (SE) at 598I-J**. The principle applies equally in labour matters. Nothing prevents an employer to amend the charge sheet before a finding is made.

81. Unfortunately, in the present matter it is not easily discernable as to whether there was an amendment of an existing charge, evidence in support of one of the charges or it was an additional charge. The chairperson allowed the Respondent to bring in new evidence or charges, without even enquiring from the parties, in particular the Applicant if she was ready to respond. This was not even explained to the Applicant if it was a new charge or an

amendment to the existing charge sheet. This in my view was procedurally unfair.

82. Concerning the issue of representation, it is common cause that the Applicant was informed timeously of her right to be represented by a fellow employee. The minutes of the hearing records that the chairperson of the disciplinary hearing also read the Applicant her rights before the hearing. The record further records that the Applicant was represented by Elias Maseko (RW1). Both RW1 and the Applicant deny that RW1 was there as the Applicant's representative, their evidence was that he was there for moral support. RW1 even pointed out that he never said anything throughout the hearing.
83. The issue started after evidence on the first charge had been led and she was asked to plead. In response, the Applicant moved an application before the chairperson for a representative within her ranks or of her choice. Reason being that she had realized that the charges were serious and might lead to a dismissal. The chairperson without due consideration of the compelling factors presented in support of the application dismissed the application on the basis of sufficient notice.
84. Item 11.4 of **The Code of Good practice: Termination of Employment** recommends that every employee should be given the right to be accompanied at his disciplinary hearing by a fellow employee representative. It is trite law and a requirement of fair labour practice in Swaziland that an employee is entitled to be assisted by a representative when defending himself/herself against charges of misconduct at a disciplinary hearing, and that the employer must expressly and timeously inform the

employee of such right so as to give the employee the opportunity to arrange representation.

85. **Grogan** in his book **Is there a Lawyer in the House? Legal Representation in Disciplinary Proceedings (2005) 21 Employment Law Part 3 page 8, writes as follows;**

"The presiding officer cannot know how the hearing will unfold, or what issues it might throw up. It may accordingly be perilous to hold at the outset that a matter is so "simple" that legal representation is not required."

86. Should it appear during the course of the hearing that complex issues have arisen which the Applicant's representative is ill-equipped to handle or anticipated, the chairperson is not precluded from dealing with that issue in a fair manner. The chairperson committed a gross irregularity in that he failed to properly apply his mind to the issue of complexity of the charges against the Applicant, which would have warranted a consideration to be made on the application. This in my view, was a gross irregularity which vitiated the proceedings.

UNDERPAYMENTS

87. The Applicant's case is that, on or about November 2007, the Respondent unilaterally demoted her from the position of Assistant Group Accountant to that of Secretary / Admin Clerk. Her salary was also reduced to E2, 000.00 from E4, 000. Thus from that day on, she was underpaid by E2, 000.00 per month, which she now claims to be due to her.

88. On the contrary, the Respondent has refuted this claim. The position of the Respondent was that the demotion was in fact at the instance of the Applicant. The Respondent's contention is consistent with the correspondence to the Applicant from as far back as 2007. The letters are dated 30th October 2007 and 9th May 2008 marked exhibit "24" and "25" (Applicant's bundle) respectively. The relevant portions of those letters reads thus;

"9th May 2008

...

Dear Nonhlanhla

RE: YOUR REQUEST FOR A TRANSFER

On the advice of your immediate supervisor, Mr. H S Vilakati, be advised that your request to be transferred to the Front Office, as Secretary / Admin Clerk has been successful.

You are also advised that as you are now on a junior position your salary will be reduced from E4, 000.00 / month to E2, 000.00 / month with effect from the 1st November 2007...

89. The second letter dated the 9th May 2008 reads as follows;

"Dear Nonhlanhla

RE: MEETING BETWEEN YOURSELF AND YOUR IMMEDIATE SUPERVISOR.

This letter serves to confirm the discussions held between yourself and your immediate supervisor, Mr. H S Vilakati on 7 May 2008.

... You then requested from management to be transferred to the current position of Secretary /Admin Clerk... Management accepted your request and you were transferred to assume the current position and necessary adjustment was effected to your salary.

90. Based on these letters, I fail to find that the variation was a unilateral move by the Respondent, rather they reveal that the variation was at the behest of the Applicant. Even if the Applicant's contention were true, she should have invoked **Section 26** of the **Employment Act 1980**. This section deals with changes in the terms and conditions of employment of an employee. It provides that where the employee is of the opinion that the changes in his / her terms of employment would result in less favourable terms and conditions of employment than those that the employee previously enjoyed, the employee may request the intervention of the Labour Commissioner.
91. This Section provides a procedure whereby an employee may invoke the protection of the Labour Commissioner against unilateral changes in his / her terms and conditions of employment which operate to his / her disadvantage. The employee initiates the procedure by requesting his / her employer to submit relevant documents evidencing the changes to the Commissioner.
92. **Section 26 (1)** requires the employer to notify the employee of changes in his / her terms of employment. The Respondent notified the Applicant through a letter dated the 30th October 2007, that her request for a

transfer to a junior position has been approved by the Respondent. **Section 26 (2)** provides that an aggrieved employee “*may, within 14 days [my emphasis] of such notification, request his employer, in writing, (sending a copy of the request to the Labour Commissioner), to submit to the Labour Commissioner a copy of the form given to him, under **Section 22**, together with the notification...*” The time limit of 14 days is clearly peremptory, since **Section 26 (1)** provides that failing such request, the changed terms set out in the notification shall be deemed to be effective, consequently, her belated claim for underpayment cannot succeed on this claim.

RELIEF

93. In the circumstances I am satisfied that the Applicant’s dismissal was both procedurally as well as substantively unfair.

94. The Applicant does not seek re-instatement to her former employment with the Respondent, but claims compensation for her unfair dismissal. I have taken into account her length of service, age and personal circumstances; the nature and circumstances of the offence for which she was dismissed; and the manner she was dismissed. I am of the considered view that 7 months compensation constitutes fair and reasonable compensation.

95. The following order is made.

AWARD

96. The Applicant’s dismissal was procedurally and substantively unfair.

97. The Applicant’s claim for underpayments is dismissed.

98. The Respondent is hereby directed to pay the Applicant as follows;

98.1	Notice pay	E 4, 963.64
98.2	Additional notice pay	E 5, 832.40
98.3	Severance pay	E 14, 581.00
98.4	7 months compensation for the Unfair dismissal	<u>E 34, 745.48</u>
	Total	<u><u>E 60, 122.52</u></u>

99. The Respondent is further directed to pay the Applicant the said sum of **E60, 122.52** not later than the 30th September 2016.

THUS DONE AND SIGNED AT SIMUNYE ON THIS 3rd DAY OF AUGUST, 2016.

.....
NONHLANHLA SHONGWE
CMAC COMMISSIONER