



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

HELD AT MANZINI

SWMZ 120/05

In the matter between:-

STEPHEN MNISI

APPLICANT

And

**ASIKHUTULISANE SAVINGS & CREDIT
COOPERATIVES LIMITED**

RESPONDENT

CORAM:

Arbitrator : Mr. Ncamiso Manana
For Applicant : Mr. Siphon Mnisi
For Respondent : Mr. Nduduzo Mabuza

Nature of Dispute : Unfair Dismissal
Date of Hearing : 24/11/16

ARBITRATION AWARD-12/01/17

1. DETAILS OF HEARING AND REPRESENTATION

- 1.1 The Applicant is Mr. Stephen Mnisi, an adult Swazi male resident of Zombodze area in the District of Manzini duly represented during these proceedings by Mr. Siphon Mnisi, an attorney practicing as S.S. Mnisi Attorneys.
- 1.2 The Respondent is Asikhutulisane Savings & Credit Cooperative Limited, a company incorporated in terms of the company laws of the country having its principal place of business in Malkerns in the District of Manzini duly represented during these proceedings by Mr. Nduduzo Mabuza, an attorney practicing as Mabuza Johnson Attorneys.
- 1.3 The arbitration hearing was held at CMAC-Manzini Office situated at KalaNkhosi Building. The matter was heard on the 17th August 2016, 21st September 2016, 28th September 2016, 13th October 2016, 20th October 2016 and the 24th November 2016 not mentioning the pre-arbitration date and postponements in between with the award being prepared after the filing of closing submissions.

2. ISSUE TO BE DECIDED

- 2.1 The issue for determination pertains to the fairness of the Applicant's dismissal by the Respondent and the reasonableness of the dismissal taking into account the circumstances of the case.

3. BACKGROUND TO THE ISSUE

- 3.1 The Applicant was suspended, charged, tried and subsequently dismissed for four transgressions that were allegedly committed by

him whilst still in the Respondent's employment. The Applicant contends that there was no evidence led to prove his guilt and he was denied further particulars in order for him to prepare himself for his hearing.

- 3.2 The matter was referred back to the Commission for compulsory arbitration after it had been partly heard by the Industrial Court and the presiding judge elected to recuse himself from further hearing it after some improprieties were leveled against the Respondent's officers.

4. SUMMARY OF THE EVIDENCE

The Applicant's Version

- 4.1 The Applicant testified that he was employed by the Respondent as a Debt Collector on the 1st August 1998 earning the sum of E3 598-23 per month. At the time of his dismissal in 2004 he was holding the post of Assistant Accountant.
- 4.2 He testified to the effect that he used to act as a Credit Controller when the post became vacant due to resignation of the incumbent. When he was dismissed he was acting as a credit controller and the charges emanate from such acting.
- 4.3 He detailed the hierarchical structure of the Respondent starting from the members, board of directors down to the accounts clerk. He further gave a detailed testimony on the operations of the Respondent, and how the loan application was processed from the time of filling in the form up to the stage of payment.
- 4.4 He testified that the member, when applying for a loan, would fill in a loan application form and hand it over to the accounts clerk

who would check for any wrong information in the form. The form was then taken to the credit controller who assessed the form and handed it over to the manager for recommendations. From the manager the form was taken to the credit committee which would interview the member/loan applicant.

- 4.5 The form was then returned to the manager who looked at the Respondent's finances to check whether it was possible to issue the loan or not. If it was possible the manager prepared a cheque which was taken to the board for signing by the chairperson and the treasurer. Thereafter the cheques were returned to the manager for distribution by the accounts clerks.
- 4.6 The Applicant testified that there were four branches of the Respondent with the head office being Bhunya but it was later moved to Malkerns. Each branch had its own credit committee comprising of members of the Respondent who met during the lunch hour every Tuesday and Thursday. Accounts clerks were in all the branches until the relocation of the head office to Malkerns where the post of accounts clerk was abolished at Bhunya.
- 4.7 The loan forms, according to the Applicant, were taken for approval by the credit committees on Tuesdays and Thursdays of every week. Forms which were taken for approval on Tuesday were returned on Thursday and those taken on Thursday were returned on Tuesday.
- 4.8 The Applicant gave a testimony on how a credit committee loan was assessed from the loan form filling in up to the approval and payment. He detailed how the assessment of the loan application was done through comparing the information in the loan form with

that in the computer. In the computer there were details of each member but some was said not to be up to date.

- 4.9 The Applicant was the one who would do the assessment and then take the assessed loan application to the manager who would then verify the information in the form before making a recommendation. The assessment form was attached to the loan application form/credit form.
- 4.10 The Applicant testified that when approving the loan application the credit committee used Paragraph 1 of the Loan Policy (Exhibit "B") in conjunction with Paragraph 5. He further testified that the credit committee had to follow Clauses 22 and 23 of the Respondent's Constitution when approving loans. He said that this proved that he never coerced any one to approve the loan applications he was eventually dismissed for.
- 4.11 Testifying on his dismissal the Applicant stated that in July 2004 he was suspended pending investigations pertaining to loans advanced to Alvit Dlamini and Andreas Dube. The suspension was through a letter signed by the then treasurer of the Respondent, Glenrose Dlamini.
- 4.12 He testified that on the 2nd August 2004, he received a letter calling him to a disciplinary hearing on the 4th August 2004, which had all the charges he was facing. He testified that the charges he was facing were baseless as he had followed the Respondent's procedures when assessing the loan application forms. He denied ever giving wrong information to the Respondent.
- 4.13 The Applicant further denied ever causing the Respondent to lose anything. He denied withholding information to the Respondent to

cause theft to occur. He reiterated that he followed the laid down procedures when assessing the loan forms and further making the comments that he did.

- 4.14 He testified that upon receiving the letter inviting him for a disciplinary hearing, he caused a letter to be served upon the Respondent on the 4th August 2004, requesting further particulars pertaining to the charges he faced. He indicated that he needed the further particulars in order to prepare his defense. The hearing did not proceed on the day appointed until the following day.
- 4.15 The Applicant testified to the effect that whilst assessing the loan application by Alvit Dlamini he followed January 2003 memorandum which stated that all members were to be loaned based on their shares and permanent savings they held with the Respondent. The loan application form had been delivered by a driver who collected it from the branch.
- 4.16 The Applicant said that he changed the amount that Alvit Dlamini was applying for as it was beyond the provisions of the January 2003 memorandum. He further checked whether the other details were correct or not and found that the tax identity number was wrong. He stated that he had no way of verifying the signatures in the loan forms as there were no specimen in the computer. The members' files were not accessible to him.
- 4.17 He did the same in the loan application form of Andreas Dube. He found that Dube had no outstanding loan as captured in the computer. He stated that he further called the cashier, Nelsiwe Qwabe, enquiring on the incompleteness of some comments on the loan history of the said Dube. Qwabe promised to update the

information after having searched for the information which she did after about an hour had passed.

- 4.18 He stated that the computer provided loan history of members for up to two years after they had fully serviced their loans. After the two year period the member's loan history showed that the member was not owing anything as there was no updating of the computer data.
- 4.19 The Applicant then testified on the Commission of Enquiry which was conducted at the Respondent where it was found that the computer system was no longer able to capture all the data pertaining to the activities of the Respondent.
- 4.20 On the date to which the hearing was postponed the Applicant testified that he addressed the chairperson of the hearing on his request for further particulars. The response he got was that he would be shown the documents when evidence was being led but that did not happen as he was only given the documents at the end of the hearing.
- 4.21 The Applicant testified that he applied for a postponement in order for him to get representation but he was informed that he could represent himself as the hearing was not a court of law. The hearing proceeded with Mrs. Glenrose Dlamini being both the initiator and witness who adduced evidence. The chairperson was the one leading the said Glenrose Dlamini in evidence.
- 4.22 The Applicant stated that he was not advised of his right to cross examine the said Glenrose Dlamini resulting in her being asked no question. The only advice he got from the chairperson was that he had the right to call his own witnesses. He was also advised to

mitigate before the guilty verdict was pronounced by the chairperson.

- 4.23 After he had received the guilty verdict he then appealed against same. The appeal hearing was held and the appeal chairperson upheld the dismissal of the Applicant.
- 4.24 The Applicant then testified on the relationship between himself and the then manager Glenrose Dlamini which he believed caused the charges to be preferred against him. He stated that in 2003, Glenrose Dlamini tried to apply for a loan using the name of Khulani Manyatsi, member 1763. She is the one who had filled in the form and signed on it.
- 4.25 When the Applicant was asked to assess the form he refused and took it to the accountant as the signature had been appended by Glenrose Dlamini. The accountant then took the form to her and she produced a letter authorizing her to make the application though that was against the policies of the Respondent.
- 4.26 The Applicant testified that Nelsiwe Qwabe, the cashier, was married to one Brian Qwabe who was an employee of the Respondent. Brian Qwabe was arrested, tried and sentenced in respect to the loan forms of Alvit Dlamini and Andreas Dube which was proof that he, Applicant, had done no wrong.
- 4.27 Lastly, he testified that after his dismissal he was not employed any place else as the matter dragged in court until he attained the retirement age. He had three dependants who were in tertiary institutions. His wife was employed and his dismissal affected his household. His personal integrity as the head of the family was impaired. He prayed that he should be compensated for his unfair

dismissal. He abandoned the claim for reinstatement as it had been overtaken by events.

- 4.28 Under cross examination the Applicant maintained his position that he never committed the offenses he was charged with. He further maintained his position that he followed the Respondent's procedures when assessing the two loan applications he was charged, tried and dismissed in connection with.

The Respondent's Version

- 4.29 The Respondent led two witnesses to prove its case in the person of Thembi Dlamini, RW1 and Thembani Beauty Mhoney, RW2. RW1 testified that in 2003 she was employed by the Respondent as a manager. She stated that her duties were to oversee the smooth running of the Respondent and also assess loan applications which had been scrutinized by the credit controller. She would then make recommendations to the Board.
- 4.30 She testified that whilst checking whether loan repayments were up to date she discovered that the loans applied for and granted to Alvit Dlamini and Andreas Dube were not being serviced. She then detailed a driver to search for the two members and a report was brought back to her.
- 4.31 She stated that what drew her attention to the two loans were the particulars of the members in that Alvit Dlamini was said to be a farmer in Vuvulane yet she knew him as a medical doctor. She conducted an investigation that revealed that the account was his but the information in the loan form was not what was contained in his file.

- 4.32 She stated that she further looked at the particulars of the witness as a loan application was witnessed by a fellow member and found that the tax identity number of the witness was that of Andreas Dube. She realized that the two loan applications had been processed by the same person as particulars of the second loan applicant had been used.
- 4.33 She stated that the loan forms showed that the Applicant was the person who assessed the loan application forms. In respect of Alvit Dlamini's loan application the Applicant commented that he, Dlamini, had fully paid his loan yet he had not taken any loan from the Respondent but was saving only. Even Dube was said to have fully serviced his loan yet he had not taken any.
- 4.34 She stated that when making a verification of the loan form she did not start afresh as the application had been checked by credit controller. Her duty was to look at the comments of the credit controller and make recommendations to the Board on the basis of the comments. She stated that the comments of the credit controller made her and the credit committee believe that the loan applicants' credit history was good yet that was not true.
- 4.35 She stated that the signatures of the loan applicants were not authentic as they were not similar to those in the personal files. The Applicant had commented that he had verified the signatures. She stated that the personal files were kept in the general office at the head office where the Applicant was working and he had access to them. Had he needed further particulars the Applicant was to call the members as their contact details were in their files.
- 4.36 RW1 further stated that the Applicant got the loan history from the computer. The computer system was said to have had an archives

section and it had a back up section where more information could be accessed when the need arose.

- 4.37 After discovering these anomalies the witness stated that she wrote a report to the Respondent's treasurer on her findings. Thereafter the Applicant was called to a meeting where the discoveries of the investigations were conveyed to him. Those present in that meeting were the witness, Glenrose Dlamini, Mrs. Thabsile Dlamini, Mr. Simelane and Tengetile Dlamini.
- 4.38 The Applicant was requested to state his side of the story but he shifted the blame onto the cashier stating that he based his comments on the information provided by her yet his duty was to scrutinize the loan forms and put what was truthful about the members.
- 4.39 The Applicant was then dismissed from work pursuant to a hearing and there were some more discoveries that were made pertaining to fraudulent loan applications that involved him. A commission of enquiry was then conducted which discovered that the computer system was not properly functioning.
- 4.40 This witness underwent a lengthy cross examination where she made some concession particularly that the two alleged loan applicants were never called to adduce evidence to prove that they never applied for loans during the time relevant to the case. She also failed to show the Commission where in the Policy Document it was stated that she was not to assess the loan forms but rely on the comments of the Applicant.
- 4.41 When asked to produce proof in the form of the Applicant's job description as she had alleged that the Applicant's duties were

therein stated. It was suggested to her that the loan assessment form did not call upon the Applicant in his capacity as credit controller to assess the form but it was the duty of all the people who played a role in the loan application to it and she failed to give a tangible response.

- 4.42 RW2 Thembani Beauty Mhoney testified to the effect that she had been an employee of the Respondent as a cashier then data capturing clerk in the period relevant to the case before the Commission. She stated that her duties included, *inter alia*, capturing receipts from members into the computer system, payments made by the Respondent and capturing loan application forms into the system.
- 4.43 She stated that the duties of the Applicant were, *inter alia*, assessing loan application forms and processing payments for deceased members. As there was no credit controller the role of the credit controller was performed by the Applicant who held the post of assistant accountant. She further stated that the Applicant stopped working for the Respondent in 2004.
- 4.44 She testified that she saw two loan application forms belonging to Alvit Dlamini and Andreas Dube. She stated that she did not personally know Dube so she did not take particular notice of his form. As she knew Dlamini she took notice of his form which stated that he was self employed yet she knew him as a medical doctor.
- 4.45 She stated that according to practice a member's loan application was approved by the credit controller of the place where the member is based but Dlamini's application was approved in Manzini yet he was from Mbabane which was an anomaly. The loan form

also stated that Dlamini had once applied for a loan yet to the best knowledge of the witness, RW2, he had never done so.

- 4.46 She then gave her personal version of the process leading to getting a loan with the Respondent. She stated that a member filled in a loan application form in his/her branch and took it to the cashier for assessment. The loan form is then taken to the head office for further assessment either by the credit controller, assistant accountant or loans officer.
- 4.47 The assessment, she said, took the form of comparing the information in the form with what is in the computer. If some information is lacking in the form the assessor has to fill in the missing information. The assessor also checks whether the holdings are correct as per those appearing in the computer and make the necessary corrections.
- 4.48 The member's loan history and repayment is also checked. From the assessor the form was taken to the manager who then made recommendations after having perused the loan form on the basis of the comments appearing on the form made by the assessor. From the manager, she said, the form is taken to the credit committee or the board depending on the kind of loan.
- 4.49 She testified that an audit exercise was conducted which revealed a lot of anomalies in the operations of the Respondent. There was discovered a suspense account which had accumulated a large figure. She stated that she does not remember anything about the problem of the accuracy of the records in the Respondent's computer system.

- 4.50 Finally she testified that the Respondent kept its records in two ways, in the members' files and the computer system. These assisted the staff members in carrying out their duties and they reported when they failed to get the necessary information. She stated that the Respondent had back-up systems to guard against loss of information. She conceded that it was hard for the assessor to verify the member's signature as the computer system did not have a specimen.
- 4.51 Under cross examination it was put to her that she was contradicting RW1 in so far as making corrections was concerned as RW1 had stated that making corrections was prohibited. The witness, RW2 stated that she testified about what she knew. When it was suggested under cross examination that it was not only the credit controller who made assessments she stated that according to her knowledge only the credit controller made assessments.
- 4.52 She conceded under cross examination that there was a problem with finding members' files after the head office had been moved from Bhunya to Malkerns. She also conceded that Brian Qwabe was sentenced but she had no knowledge of the circumstances of his arrest, trial and conviction.

5. ANALYSIS OF THE EVIDENCE AND ARGUMENTS

- 5.1 The dismissal of an employee is governed by **Section 36** as read with **Section 42(2)** of the **Employment Act 1980 (as amended)**. **Section 36** enumerates the fair reasons for the termination of an employee's services and **Section 42** deals with the burden of proof. Some establishments like the Respondent

have disciplinary codes which govern wrong doing in the work place.

- 5.2 In the matter before me the Applicant was dismissed for having allegedly committed four indiscretions. An appeal hearing was held which exonerated the Applicant in all but one of the charges i.e. gross negligence and the appeal chairperson recommended that the Applicant be dismissed for that offence.
- 5.3 It is not in dispute that during the disciplinary hearing no evidence was led save the submissions of the initiator. It is further not disputed that the two members of the Respondent whose accounts were allegedly used when committing the alleged acts of fraud by the Applicant were never called to lead evidence and the Respondent's witness number one stated that Alvit Dlamini prepared an affidavit that was never produced before me.
- 5.4 As already alluded to above, **Section 36** deals with the fair reasons for the termination of an employee's services and the Code has to be in line with the provisions of the **Employment Act 1980(as amended)** for it to be enforceable.
- 5.5 The Applicant, in his evidence which was never disputed, testified that he applied to be furnished with further particulars for him to be able to prepare adequately for his hearing through a letter sent to the Respondent and before the disciplinary chairperson. He testified to the effect that his request for further particulars was refused and he was told that he would be given the documents to be used during the hearing should he request for same.
- 5.6 The question that begs an answer is this that why were the documents not given to him pursuant to the letter he sent as he had already indicated that he needed them to prepare for his

hearing? It is my considered view that from this instant there was no fairness in the hearing as the Applicant could not prepare himself well for the hearing due to Respondent's refusal to furnish him with further particulars.

5.7 **John Grogan** in his book **Workplace Law 10th Edition** at page 237 under subtitle **3.2 The employee must be made aware of the charge(s)** writes this in line 2:

"This requirement flows from the need for adequate preparation. Accused employees cannot prepare a defense if they are ignorant of the charges they are required to answer."

5.8 Another aspect worth addressing is the notice given to the Applicant before the hearing was held. The Applicant testified that he was served on the 2nd August 2004 with a notice to attend a disciplinary hearing on the 4th August 2004. He stated that on the 4th August 2004 the hearing could not proceed and was postponed to the 5th August 2004.

5.9 To me that was not sufficient notice for the Applicant to prepare his defense adequately taking into account the number and complexity of the charges he was facing which resulted in his dismissal.

5.10 **The Code of Good Practice: Termination of Employment** published in terms of **Section 109** of the **Industrial Relations Act 2000 as amended** provides as follows in **Clause 11.4** titled **Fair Procedure**:

"The employee is entitled to a reasonable time to prepare for the hearing and to be assisted at the hearing by a fellow employee who may be a trade union representative. Other

forms of representation may be agreed through a collective agreement between the parties.”

- 5.11 The Applicant testified that he applied to have the hearing postponed to another day as he had no representative. He told the disciplinary chairperson that he desired outside representation as the members of staff that could represent him had an interest in the hearing and had played a role in the investigations. The disciplinary chairperson refused the application for postponement on the ground that the hearing was not a court of law and that the Applicant could represent himself.
- 5.12 Representation in a disciplinary hearing is a requisite for a fair hearing. The disciplinary chairperson was and is still a labour consultant who is well versed on legal issues yet the Applicant was a simple accountant. The initiator was the Respondent’s treasurer who was superior to the Applicant. Obviously the refusal to allow outside representation rendered the field not to be level and justice was not seen to be done.
- 5.13 Coming to the hearing, the chairperson became the prosecutor and the judge as he was the one who was assisting the initiator, Glenrose Dlamini, in putting forth the Respondent’s case. In actual fact no evidence was led to prove the offences allegedly committed by the Applicant save the submissions made by the initiator and documents that were not availed to the Applicant.
- 5.14 RW1 in her evidence stated that the affidavit prepared by Alvit Dlamini was used as part of the evidence. It is a given fact that an affidavit cannot be cross examined and as such the Applicant was not given the chance to challenge the evidence of the affidavit. He could not challenge what was said by the initiator, Glenrose

Dlamini, as she was not called as a witness but was merely making an opening statement stating what the hearing sought to establish and prove.

5.15 From the foregoing it is my considered view that procedurally the dismissal of the Applicant was not fair. He was not accorded adequate notice to prepare himself, he was not allowed a postponement to secure representation, the chairperson descended to the fray to become the prosecutor and no evidence was led to prove the charges preferred against the Applicant.

5.16 Coming to the substance of the offences, I wish to investigate whether the Applicant committed any wrong when assessing the loan applications and also address myself to the events that occurred after the Applicant had been dismissed. RW1 made a bold statement that there was a syndicate that was defrauding the Respondent and the Applicant was a party to it.

5.17 The Applicant gave a detailed background on the processes that are followed for the acquisition of a loan from the Respondent. His version was not disputed by the Respondent save on the assessment of the loan application form. The Applicant's version was that it was not his exclusive duty to do the assessment as all the parties that came into contact with the loan form had to assess it yet RW1 stated that it was the duty of the Applicant to assess.

5.18 RW1 stated that the other officers who dealt with the loan form acted on the comments made by the Applicant to make recommendations. She said that it would be tautological for them to make their own assessment. When it was suggested to her that the loan form had columns where every officer was to make

comments on the assessment she did not come out clearly why that was so.

- 5.19 The evidence led by the Applicant also touched on the commission of inquiry conducted on the affairs of the Respondent. He stated that the commission found that the computer system was not up to date which was confirmed by RW2 thus there was information that would be lost during the course of the Respondent's operations. He stated that the information like loan history of members was up to date for a period of two years and thereafter it was not reflected thus making his work difficult.
- 5.20 He also stated that he relied on information provided by the cashiers as he did not come into contact with the members and their personal files were inaccessible as the filing system was a mess after the transfer of the head office from Bhunya to Malkerns thus making it difficult to verify signatures of the members.
- 5.21 There was evidence which was not disputed to the effect that a certain Brian Qwabe, a husband to the cashier Nelsiwe Qwabe, had been convicted and sentenced in relation to the same loan forms. RW1 had alluded to the existence of a syndicate and opined that the Applicant was a member of that syndicate without giving any proof of that. To me this is proof that the Applicant did not commit the offences he was charged with taking into account the source of the information in the loan forms.
- 5.22 In terms of **Section 42(2)(b)** of the **Employment Act 1980 (as amended)** the Respondent should have proven that under the circumstances of the Applicant's alleged transgressions it was reasonable to terminate his services. It is my considered view that

the Respondent has failed to discharge the onus of proof herein and the dismissal of the Applicant was not substantively fair.

6. AWARD

6.1 The Applicant testified that since his dismissal he has not yet procured new employment. He had children who were at tertiary institutions when he lost his job. He had to rely on the income of his spouse. He had worked for the Respondent for about five blemish free years.

6.2 The Applicant further stated that the loss of his job affected him personally in his self esteem as the head of the family. It also affected his family as the revenue generated by him and his wife drastically dropped.

6.3 Consequently I issue the following award:

6.3.1 That the Applicant's dismissal was both substantively and procedurally unfair.

6.3.2 That the Respondent is ordered to pay the Applicant the following:

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|-----------------------------|--------------|
| a) Notice pay | E3, 598-23 |
| b) Additional notice pay | E2, 056-13 |
| c) Severance pay | E5, 140-33 |
| d) Nine months compensation | E32, 384-10. |

6.4 The total sum of E43, 178-80 should be paid to CMAC offices on or before the 10th February 2017.

DATED AT MANZINI ON THE DAY OF JANUARY, 2017.

NCAMISO MANANA

CMAC COMMISSIONER