



**IN THE CONCILIATION, MEDIATION AND ARBITRATION  
COMMISSION**

**HELD AT MANZINI**

**CMAC REF NO: STK 159/06**

In the matter between:

**BHEKI THWALA**

APPLICANT

AND

**LEWIS STORES**

RESPONDENT

Coram

**ARBITRATOR :**

VELAPHI ZAKHELE DLAMINI

**FOR APPLICANT:**

MR. NDUMISO MTHETHWA

**FOR RESPONDENT:**

MR. ZWELI JELE

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**ARBITRATION AWARD**

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**DATES OF ARBITRATION** : 18<sup>TH</sup> July, 1<sup>st</sup> AUGUST, 29<sup>th</sup>  
November, 2007, 17<sup>th</sup> January, 29<sup>th</sup> July,  
9<sup>th</sup> October 2008 and 18<sup>th</sup> August 2010.

**NATURE OF DISPUTE:** Unfair Dismissal

VENUE: CMAC OFFICE, 4<sup>TH</sup> FLOOR SNAT  
BUILDING, MANZINI

## **1. DETAILS OF PARTIES AND HEARING**

- 1.1 This arbitration hearing was held on the aforementioned dates at the premises of the Conciliation, Mediation and Arbitration Commission's offices (CMAC or Commission) at the Fourth Floor SNAT Co-ops Building, Manzini.
- 1.2 The Applicant is Bheki Thwala, an adult Swazi male of Private Bag Ngonini, Piggs Peak. Bheki Thwala was represented by Mr. Ndumiso Mthethwa, who at that time was from Dunseith Attorneys, Mbabane.
- 1.3 The Respondent is Lewis Stores of P. O. Box 4458 Manzini. Lewis Stores was represented by Mr. Zweli Jele from Robinson Bertram, Mbabane.

## **2. ISSUES TO BE DECIDED**

Whether the Applicant's dismissal was substantively and procedurally unfair.

### **3. BACKGROUND TO THE DISPUTE**

- 3.1 The Respondent operates a retail business dealing in furniture and other household goods of any description, and has outlets in all the major cities and towns in Swaziland.
- 3.2 The Applicant commenced service with the Respondent in January 2000 as a Stock Clerk, but was eventually promoted to the position of Branch Manager, a job he held until he was dismissed in August 2006, on allegations of gross dishonesty and gross negligence. At the time of his dismissal, the Applicant earned E5500.00 per month.
- 3.3 The Applicant reported a dispute for unfair dismissal to the Commission, which was conciliated, however the dispute remained unresolved, and a Certificate of Unresolved Dispute No: 678/06 was issued. The parties referred the dispute to arbitration and the undersigned Arbitrator was appointed to decide same.
- 3.4 The Applicant is seeking the following terminal benefits; Notice pay (E5500.00), Additional Notice (E4,230.60), Severance allowance (E10, 576.50) and Maximum compensation for unfair dismissal (E66 000.00).

### **4. PRELIMINARY ISSUE**

- 4.1 On the 20<sup>th</sup> July 2010, the parties by consent rescheduled the case to the 2<sup>nd</sup> August 2010 at 9:00 am at CMAC offices at

- Mbabane House, Mbabane. CMAC FORM 21, the Agreement to Postpone Arbitration was signed.
- 4.2 On the 2<sup>nd</sup> August 2010, only Mr. Andrias Lukhele attended the matter in Mbabane, however he applied that the matter be postponed again to the 18<sup>th</sup> August 2010 and 24<sup>th</sup> August 2010 at 10:00 am, back to Manzini CMAC offices. Mr. Lukhele assured me that the postponement was by consent.
- 4.3 On the 18<sup>th</sup> August 2010, the parties and their legal representatives failed to attend the arbitration. There was no explanation from both parties for none appearance or non-representation.
- 4.4 Now on account of the non-attendance of the parties and their legal representatives, the delay in concluding the matter and in view of the fact that the evidence on all disputed issues had been substantially led by both parties, I ruled that the case be closed, and that I would issue an arbitration award in terms of Section 17(5) of the Industrial Relations Act 2000(as amended).

## **5. SURVEY OF EVIDENCE AND ARGUMENT**

All the evidence and arguments raised by the parties have been considered, but because the IRA 2000(as amended) requires concise reasons (section 17(5)), I have only referred to the evidence and arguments that I consider relevant to substantiate my findings.

## **5.1 APPLICANT'S CASE**

- 5.1.1 The Applicant was the only witness who testified in support of his case.
- 5.1.2 The Applicant's evidence was that in 2004, whilst preparing for marriage, the couple's marriage officer, Pastor Isaiah Kunene informed him that he wanted a second hand Handigas refrigerator.
- 5.1.3 According to Thwala, he advised Pastor Kunene that the refrigerator would cost E500.00.
- 5.1.4 The Applicant stated that in 2005, his refrigerator broke down such that he purchased a second hand Samsung fridge from Lewis Stores Matata Branch for E500.00. The fridge had been repossessed by the Respondent from a certain teacher from Ndzevane area in the Lubombo Region.
- 5.1.5 It was Thwala's evidence that the fridge did not have shelves, and as such he tried to fit the broken fridge's shelves in the Samsung fridge with no success.
- 5.1.6 The Applicant testified that he then recalled that Pastor Kunene wanted a fridge. He discussed the issue with his wife and they decided to offer the Samsung fridge to Pastor Kunene as a gift, in appreciation of his support during the time Thwala was staying with Pastor Kunene, and also during the preparations for their wedding.
- 5.1.7 Thwala's evidence is that he then visited Pastor Kunene in Siteki with the intention of offering him the Samsung fridge. He asked the Pastor to come to Lewis Stores, Matata. In his mind

- he wanted the gift to be a surprise and as such he did not inform Pastor Kunene about the Samsung fridge.
- 5.1.8 The Applicant's testimony is that, since the fridge was kept at his house, he returned it to the shop so that Pastor Kunene could collect it from there.
- 5.1.9 According to the Applicant, on the 24<sup>th</sup> July 2006, whilst working outside his duty station, he received a telephone call from Mr. Sanele Gina, the then Assistant Regional Controller, who was at the shop. Gina told him that Pastor Kunene was at Lewis Stores Matata to collect the fridge. Thwala authorized the release of the fridge to Pastor Kunene. Gina also knew about the fridge.
- 5.1.10 The Applicant stated that a day later, two charges were preferred against him by the Assistant Regional Controller (Mr. Sanele Gina).
- 5.1.11 The charges were that; firstly that of gross dishonesty in that he had purchased a Samsung fridge for E287.49 using a staff account, then resold it to Pastor Kunene for E700.00 thereby pocketing the balance for personal gain. The second charge was that of gross negligence in that he did not update the staff account, and or advise the Salaries Department to deduct money from the wages of an employee, Boy Kunene, who had exhausted his leave days, such that Kunene was paid his full salary, contrary to the law.

- 5.1.12 On the 25<sup>th</sup> July 2006, a disciplinary hearing was held, wherein Mr. Gina was the initiator and Mr. Thema Letoaba was the Chairperson.
- 5.1.13 The Applicant testified that Pastor Kunene did not testify during the disciplinary hearing, but was called telephonically by the Chairperson and asked questions pertaining the Samsung fridge. He was not allowed to cross-examine the Pastor.
- 5.1.14 The Applicant's evidence is that the initiator only presented a note that was allegedly written by Pastor Kunene. Even though Pastor Kunene acknowledged the note, it was his right to challenge the contents thereof.
- 5.1.15 Thwala denied receiving any amount of cash from Pastor Kunene nor his daughter, as the purchase price for the Samsung fridge. He denied selling the fridge to Pastor Kunene, but stated that it was a gift.
- 5.1.16 Regarding the second charge, the Applicant stated that he had updated the Staff cards to reflect that Boy Kunene had exhausted his leave days. Management was aware that Boy Kunene was sick, such that at one point as a Branch Manager, he requested a relief Porter, but the company declined citing unfair labour practices. He was surprised therefore that he had been charged with the second count.
- 5.1.17 The Applicant argued that there was no evidence that money exchanged hands between him and Pastor Kunene for the Samsung fridge. He was therefore not guilty of the first charge.

- 5.1.18 It was also contended by the Applicant that during the disciplinary hearing the procedure was flawed in that, he was denied the right to cross-examine a crucial company witness (Pastor Kunene).
- 5.1.19 Regarding the second charge, Thwala also argued that the Respondent failed to put the charge with sufficient particularity and also lead evidence to prove it, as such he was embarrassed as to what was the offence that he is alleged to have committed.
- 5.1.20 The Applicant argued that the charges were falsified by Mr. Gina, who wanted to see him dismissed, in retaliation because Thwala had stood up to Gina, when the latter wanted the Applicant to call forty-five (45) debtors. The Applicant had indicated that the job was the responsibility of Follow-up Clerks. Thwala stated that Gina compelled him to resign after this encounter, but he refused.

## 5.2 **RESPONDENT'S CASE**

The Respondent led the evidence of three witnesses, namely Pastor Isaiah Themba Kunene, Thema Letoaba and Sanele Gina.

### 5.2.2 **Pastor Isaiah Kunene**

- (a) Pastor Isaiah Kunene confirmed the nature of the relationship between himself and Bheki Thwala.

- (b)The Pastor also confirmed informing the Applicant that he wanted a fridge.
- (c)It was Pastor Isaiah Kunene's evidence that after the Applicant had advised him that there was a fridge at Matata, he sent his daughter to go and pay E500.00 at the shop.
- (d)Pastor Kunene testified that then on the 24<sup>th</sup> July 2006, he went to Matata Big Bend, to collect the fridge. Upon arrival, he found that the Applicant was not present, he enquired about the fridge and was directed to Mr. Sanele Gina.
- (e)After explaining to Gina, the latter called the Applicant, who authorized the collection. However before he could take the refrigerator, Mr. Gina requested him to write a note, which stated the purchase price and the type of fridge that was bought.
- (f) It was Pastor Kunene's evidence that after a few days, a certain gentleman from the shop called him and asked him some questions, which included whether he had written the note on the 24<sup>th</sup> July 2006.
- (g)Pastor Kunene stated that he did not receive a receipt from Lewis Stores for the purchase, but that was not abnormal given that he was purchasing a second-hand repossessed item, and had paid cash for it. Moreover he eventually collected the fridge and did not encounter any difficulties as everyone in the shop knew about it.
- (h)Pastor Kunene testified that it was an error that he wrote on the note that, he bought the fridge from the Applicant for E700.00. He did not ask his daughter to whom did she gave the E500.00.
- (i) It was the Pastor's evidence that as far as he knew, he purchased the fridge from Lewis Stores and the money was paid to Lewis

Stores. The Applicant happened to be one of the people he requested to look for a refrigerator for him.

- (j) Pastor Kunene stated that he was hearing for the first time at arbitration, that the fridge was given to him as a gift by Thwala. Had he known about this, he would have demanded a refund of the E500.00 he paid to Lewis Stores. After he collected the fridge, the Applicant has never informed him that the fridge was a gift. If Thwala had done so, he would have thanked him for the gift.

### 5.2.2 **THEMA LETOABA**

- (a) He was introduced as the Respondent's Divisional Human Resources Manager. He chaired the Applicant's disciplinary hearing.
- (b) Mr. Letoaba confirmed the composition of the hearing and the charges that were preferred against the Applicant, as stated by the Applicant earlier.
- (c) On the first charge, Mr. Letoaba stated that none of the parties called Pastor Kunene as their witness, even though he was cited by both. He then called him and had a telephone interview, where the Pastor confirmed that he had written the note which incriminated Thwala.
- (d) Mr. Letoaba testified that he did not allow the parties to ask Pastor Kunene any questions, because he was his witness. Moreover since he was called over the cell phone, it was not practical to allow cross examination. However both Gina and

Thwala heard the Pastor's answers, because he was put on loud speaker.

- (e) The Divisional Human Resources Manager stated that, on the first charge he found Thwala guilty as charged, because it had been proved that he profited from the transaction involving Pastor Kunene, yet it was against company policy to purchase by using staff account and then resell the item.
- (f) On the second charge the chairman stated that the Applicant was also found guilty because as a Branch Manager, he had failed to advise Management that a sick employee had exhausted his leave days and the company incurred a huge loss, because it had to pay a full salary to an employee who had not worked for those days.
- (g) It was Mr. Letoaba's evidence that according to the company's disciplinary code, gross dishonesty and gross negligence were category D offences, which carry a dismissal sanction, even for a first offender. Having found the Applicant guilty on both charges, he recommended dismissal.

### 5.2.3 **SANELE GINA**

- (a) Gina corroborated Pastor Kunene on the events of the 24<sup>th</sup> July 2006, except that he denied that he dictated to the Pastor what to write on the note.
- (b) It was Gina's evidence that he became suspicious of the transaction involving the Samsung fridge, after failing to locate its dispatch/ delivery documents. However he released it because the Applicant acknowledged the customer, and the Pastor had written the note.

- (c) Gina testified that after Pastor Kunene had left, he searched for data relating to the Samsung on the computer system by using the item code and discovered that the fridge had actually been purchased by the Applicant using the staff account. He further discovered that the Applicant had only paid E287.49 for the fridge.
- (d) It was Gina's testimony that he concluded that the Applicant had breached company policy and procedure in that, he purchased an item to resell it. He then charged the Applicant for gross dishonesty.
- (e) Gina stated that the company also discovered that, the Applicant was the only one who signed all documents concerning the fridge, yet he was the purchaser. This was contrary to company policy.
- (f) Concerning the second charge, Gina stated that he charged the Applicant for gross negligence, after discovering that he had failed to advise the Head Office that Boy Kunene had exhausted his leave days, having been away from work for two (2) months and five (5) days.

5.3 The Respondent produced the following documentary evidence; Minutes of the disciplinary hearing, a computer printout of the Applicant's purchase account, company policy on delivery of goods, a copy of Pastor Kunene's note, the policy on staff accounts and Boy Kunene's leave applications.

5.4 The Respondent argued that the Applicant manipulated the system in order to commit the act of dishonesty.

5.5 It was further contended by the Respondent that as a Branch Manager, the Applicant was aware of company procedures relating to staff accounts and updating of employee's personal files.

## 6. **ANALYSIS OF EVIDENCE AND ARGUMENTS**

6.1 In terms of Section 42 (1) of the Employment Act 1980, before an employee can challenge the termination of his services, he has to prove that section 35 of the Employment Act applies to him. It is common cause that the Applicant was permanently employed, consequently he has discharged his onus.

6.2 Section 42 (2) of the Employment Act provides that, the employer shall prove that the reason for dismissing 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.

6.3 The Respondent terminated the Applicant's services on the ground that the latter committed gross dishonesty and gross negligence. The particulars of the charges have been set out in detail in the Survey of Evidence above.

### 6.4 **GROSS DISHONESTY**

6.4.1 **John Grogan, Dismissal Jutta and Co Ltd, p 116**, states that dishonesty is a generic term embracing all forms of conduct

involving deception on the part of an employee. The dishonest conduct need not constitute a criminal offence. It can entail an act or omission which an employer is morally entitled to expect an employee to do or not to do. A charge of dishonesty requires proof that the person acted with intent to deceive.

**6.4.2 In Nedcor Bank Ltd v Frank & Others (2002) 7 BLLR 600 (LAC)** at 603, Willis JA remarked that, dishonesty entails a lack of integrity or straightforwardness and in particular, a willingness to steal, cheat, lie or act fraudulently.

6.4.3 It is common cause that the Samsung refrigerator was purchased by the Applicant in December 2005, after it had been repossessed by the company from a Ndzevane teacher.

6.4.4 There is no dispute that apart from the computer printout of the Applicant's account, there is no other document, be it a dispatch or delivery note or a returning goods note, that proved that the fridge was once delivered at the Applicant's home and then later returned to the shop after four months.

6.4.5 Although there is no direct evidence that proves that Pastor Kunene's daughter handed over the sum of E500.00 to the Applicant, as the purchase price for the fridge, there is enough circumstantial evidence to prove that the Applicant actually sold the Samsung refrigerator to Pastor Isaiah Themba Kunene. These are the factors that prove the sale between the Applicant and Pastor Isaiah Kunene;

- (a) There were records that proved that the Applicant bought the fridge for E500.00 using a staff account.
- (b) According to the records, he had only paid E287.49 as at 27<sup>th</sup> July 2006, however he credited himself with E212.50 in January 2006, a transaction which was not authorized.
- (c) Apart from the Applicant, no other employee, including the Stock Clerk, knew that he had taken the fridge home and returned it after four months.
- (d) There was no reasonable explanation given by the Applicant why he preferred that Pastor Kunene collect his gift at the shop instead of his home.
- (e) The refrigerator was at the shop when Pastor Isaiah Kunene came to collect it.
- (f) The Pastor stated that he paid for the fridge, which he had come to collect. He was not aware that the fridge was given to him as a gift by the Applicant.
- (g) The Applicant identified the fridge in absentia, when the Assistant Regional Controller and other employees had failed to locate it.

6.4.6 Although Pastor Kunene changed the version that was written in his note dated 24<sup>th</sup> July 2006, and also never made a follow up from his daughter as to who received the E500.00, I found him to be a credible witness.

6.4.7 Why would Pastor Isaiah Kunene lie against his flock? It is common cause that Pastor Kunene and the Applicant were in good terms, the latter having stayed at the former's home in Siteki whilst undergoing training at Siteki Evangelical Training Institute. Moreover, the Pastor had been the couple's Marriage Counselor and Officer.

6.4.8 The Applicant's version, that the fridge was a gift for Pastor Kunene, suffered a blow when this version was not put to the Pastor by the Applicant during arbitration. It was the Respondent's counsel in re-examination who put it to Pastor Kunene, who confidently replied that he was hearing this for the first time at arbitration. The Applicant did not challenge Pastor Kunene's version, that it was news to him that the fridge was a gift.

6.4.9 In any event challenging the Pastor would have been a contradiction, because the Applicant had already declared that the fridge was supposed to be a surprise gift. However even this statement is not plausible, because from the time of the Applicant's disciplinary hearing to the date of arbitration, the

Applicant has never discussed the issue of the fridge being a gift with Pastor Isaiah Kunene.

6.4.10 In **Sifiso Motsa v Attorney General ( case no: 1888/98) (HC)**, Masuku J. quoted with approval the following remarks from **Small v Smith 1954 (3) SA 434 at 438** per Claassen J:

**“It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case of defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradictions and defending his own character. It is grossly unfair and improper to let a witness’s evidence go unchallenged in cross-examination and afterward argue that he must be disbelieved”.**

**(Emphasis added).**

6.4.11 I find that the Applicant’s version, that he gave the fridge as a gift to Pastor Isaiah Kunene, an afterthought and therefore false.

6.4.12 I also find that the Applicant did act dishonestly by selling the fridge to a third party when he had bought it at a discounted rate.

6.4.13 It is my finding that the staff purchase policy is reasonable and has economic rational. The Respondent has a right to curb practices that if unchecked, would lead to loss of revenue and ultimately lead to retrenchment of innocent employees.

## 6.5 **GROSS NEGLIGENCE**

6.5.1 **John Grogan** Supra at p122, remarks that, the requirements for dismissal for negligence are; that the employee failed to exercise the standard of care and skill that is reasonably required; that lack of care or skill resulted or could have resulted in loss to the employer; that the negligent act or omission could have resulted or resulted in loss to the employer, and the negligence must be gross.

6.5.2 According to the minutes of the Applicant's disciplinary hearing, the Respondent alleged that the Applicant did not report or advise that Boy Kunene was not on duty on the following dates;

“ 08/08/05	= 4 days
31/10/05 - 28/11/05	= 1 month
15/03/05 - 15/03/05	= 1 day
27/09/05 -	= 1 month”

6.5.3 As per **The Central Bank of Swaziland v Memory Matiwane (ICA case no: 110/93)** and **Swaziland United Bakeries v Armstrong Simelane (ICA case no: 117/94)**, in any matter before the Industrial Court and by an extension arbitration, the case has to be heard denovo. I have to consider the evidence led at the disciplinary hearing as well as that led before the arbitration.

6.5.4 At arbitration, the Respondent failed to adduce evidence to prove that Boy Kunene had exhausted his leave days. What was produced was the employee's leave application forms, which were approved by senior management, apart from the Applicant. The forms show that Boy Kunene went on leave for 19 days each, in 2005 and 2006.

6.5.5 The Respondent did not led evidence to prove, that two(2) months, five(5) days leave was taken by Boy Kunene in the same year, as alleged in the minutes. Both Letoaba and Gina simply made bare assertions.

6.5.6 No witness from the Salaries Department testified that Boy Kunene was paid his full salary, yet he had taken two months and five days leave in 2005. Not even salary payment records or the employee's salary slips were produced.

6.5.7 I find that the Respondent has failed to prove the second charge of gross negligence.

## 7 **SUBSTANTIVE UNFAIRNESS**

7.1 Although I have found that the Respondent failed to prove the second charge, however I find that the Respondent proved the first charge of gross dishonesty, consequently the company had a fair reason for terminating the services of the Applicant.

7.2 It is my finding that, being a Branch Manager, the Applicant was in a position of trust and by acting dishonestly, he breached that trust.

7.3 In the following cases, it has been held that dishonesty is a very serious misconduct, that destroys the employment relationship. As such an employee's length of service and clean disciplinary record cannot override the gravity of the dishonesty committed;

**Sidumo & Ano v Rustenburg Platinum Mines Ltd & others (2007) 28 ILJ 2405 (CC); Carter v Value Truck Rental (Pty) Ltd (2005) 1 BLLR 88 (SE); and Council for Scientific Research v Fijen 1996 (2) SA 1 (A).**

## 8. PROCEDURAL FAIRNESS

- 8.1 The Applicant argued that he was denied the opportunity to cross-examine Pastor Kunene, during the disciplinary hearing.
- 8.2 The chairperson Thema Letoaba stated that he did not allow the Applicant and the initiator to question the Pastor, because as he put it, Kunene was his witness.
- 8.3 The attitude adopted by the chairperson resulted in a procedural flaw. Mr. Letoaba was part of the Respondent's machinery. He could not therefore treat Mr. Gina as the only one representing the employer. His was not a Court of Law or Arbitration. As chairperson, whatever act or omission that occurred during the hearing, the Respondent would be vicariously liable.
- 8.4 In **Mshayeli Sibiyi v Cargo Carries (IC case no: 282/03)** the court remarked that the employer should afford the employee an opportunity to challenge adverse evidence.
- 8.5 In **Nkosinathi Ndzimandze & another v Ubombo Sugar Limited (IC case no: 476/05)**, the court observed that, even in circumstances where management is convinced of the guilt of an employee, it is still obliged to ensure that fair disciplinary process is observed.

- 8.6 I find that the manner in which Mr Letoaba conducted the cell phone interview, did materially prejudice the Applicant and influenced the outcome of the hearing to his detriment.
- 8.7 Mr. Letoaba stated that in the absence of the cell phone interview with Pastor Kunene, there was no case against the Applicant, that is why he deemed it necessary to call the Pastor.
- 8.8 From the evidence given by Pastor Kunene at the arbitration, it is clear that Mr. Letoaba's notes, made during the hearing were a misrepresentation of the Pastor's version.
- 8.9 I find that the procedure followed during the Applicant's disciplinary hearing was unfair.

## **9. REMEDY**

9.1 In the exercise of my discretion (section 16(4) IRA 2000(as amended)), in the circumstances I hold that a nominal compensation of two months wages, should be awarded to the Applicant to emphasis to the Respondent the importance of a fair procedure in disciplinary hearings.

9.2 The following order is made:

10. **AWARD**

- 10.1 I find that the Applicant's dismissal was substantively fair, but procedurally unfair.
- 10.2 I order the Respondent to pay the Applicant two (2) months wages in the sum of (E5500.00 x 2) E11000.00, as compensation for his procedurally unfair dismissal.
- 10.3 The Applicant's claims for Notice Pay, Additional notice pay and Severance allowance are dismissed.
- 10.4 There is no order for costs.

DATED AT MANZINI ON THIS 6<sup>th</sup> DAY OF OCTOBER 2010

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VELAPHI ZAKHELE DLAMINI  
CMAC ARBITRATOR