

CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

HELD AT MANZINI SWMZ 183/09

In the matter between: -

THEMBANI MKHONTA & 2 OTHERS Applicants

AND

MILADY'S COMPANY Respondent

ARBITRATION AWARD

CORAM:

ARBITRATOR : Ms. B. Ngcamphalala

FOR APPLICANTS : Mr. D. Jele

FOR RESPONDENT : Mr. S. LaFleur

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1. DETAILS OF PARTIES AND REPRESENTATION

1.1. This matter was heard on various dates at the Conciliation, Mediation and Arbitration Commission's offices (herein referred to as CMAC or Commission) situated at SNAT Building in the Manzini district.

1.2. The first Applicant is Them bani Mkhonta an adult Swazi female of P. O. Box 327 Bhunya. The second Applicant is Cynthia Tsabedze and the third Applicant is Xolile Maduna all of them are adult Swazi females. During the Arbitration the Applicants were represented by Mr. Derrick Jele, an attorney. I shall refer to the Applicants as the Applicants or the employees.

1.3. The Respondent is Milady's Company a company duly registered and incorporated in accordance with the company laws of the Kingdom of Swaziland on P. O Box 706 Manzini. The Respondent was represented by Ms. Sam LaFleur the Respondent's Human Resources Facilitator during the Arbitration. I shall refer to the Respondent as the Respondent or the Employer or the Company.

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2. BACKGROUND FACTS OF DISPUTE

2.1 On the 16th April, 2009 the Applicant reported a dispute at the Commission's offices in Manzini. The nature of the dispute was recorded as an unfair dismissal. The dispute is said to have arisen on the 18th March, 2009 it being alleged by the Applicants that the Respondent had unfairly dismissed them.

2.2 It was alleged by the Applicants that their dismissal by the Respondent was substantively and procedurally unfair in that they were dismissed on allegations of gross misconduct, which misconduct they did not commit. Therefore Respondent had no valid reason to dismiss them and further failed to follow procedure when dismissing them.

2.3 The Commission then appointed a Commissioner to conciliate the dispute, however the dispute could not be resolved and a Certificate of Unresolved Dispute was issued.

2.4 In terms of the Certificate of Unresolved Dispute, the issue (s) in dispute were recorded as;

Reinstatement and/ or alternatively;

- a) Notice Pay;
- b) Additional Notice

c) Severance Allowance Pay

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d) Twelve (12) months maximum compensation

2.5 The Applicants alleged that their dismissal was substantively and procedurally unfair whilst the Respondent, on the contrary, argued that the dismissal of the Applicants were both procedurally and substantively fair, taking into consideration the circumstances of the case.

2.6 As a consequence of the dispute remaining unresolved, the parties were in agreement that the matter be referred to arbitration in terms of Section 85(3) of the Industrial Relations Act 2000 (as amended). I was accordingly appointed Arbitrator on the 5th of June, 2009.

2.7 A pre- arbitration hearing was held wherein the following issues were discussed and agreed upon. It was agreed that the position of the parties during conciliation had not changed. In other words there was no consensus on all the issues. It was further agreed that the parties would exchange documents a week before the hearing, which documents would form part of their evidence. The parties further did not object to my appointment as Arbitrator.

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3. ISSUES TO DETERMINE

3.1 The issue before me that I must determine is whether or not the dismissal of the Applicants by the Respondent was substantively and procedurally fair.

4. SUMMARY OF EVIDENCE

OPENING SUBMISSIONS BY BOTH PARTIES

4.1. Mr. Jele for the Applicants in his opening statements stated that it would be the Applicants' evidence that they were employed by the Respondent on separate days in the positions of Store Associates. The first Applicant being employed as Assistant Manager. It would be their evidence that they were dismissed by the Respondent for breaking a rule that was not in existence at the time. Further that the employer did not suffer any financial prejudice as all the purchases made, were done on the Applicant's accounts which amounts were later deducted from their salaries.

4.2. It would further be their evidence that the termination of their services was not one permitted by section 36 (b) of The Employment Act 1980. The Applicants would also adduce evidence challenging the statements contained on pages 21-36, of the Respondent's bundle of documents, in that the statements were not freely and voluntarily made.

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4.3. It would be their evidence that the said statements were made under duress, as such the statements should be considered to be inadmissible. Procedurally it would be the Applicants evidence that they were not given an opportunity to cross examine any witnesses of the Respondent. Further no witnesses were called by the Respondent in proof of its case.

4.4. The Applicant's representative submitted that evidence would be adduced to prove that the Applicants were denied their right to Appeal despite having done so in writing.

4.5. The Applicants are therefore claiming re instatement together with arrear salaries, notice pay additional notice pay, severance pay and 12 months maximum compensation for unfair dismissal.

4.6. The Respondent in its opening submissions stated that the dismissal of the three Applicants was for dishonesty. The Applicants were each called to a disciplinary enquiry, according to company policy, procedure and good practice. It would be the Respondent's evidence that the Applicants were dismissed after pleading guilty to the charge relating to misconduct.

4.7. It was the Respondent's submission that the evidence of several witnesses would be adduced to prove that there had been continuous misconduct in the store by the Applicants, hence their dismissal.

4.8. THE APPLICANTS CASE

4.8.1. Thembani Mkhonta, the first Applicant was the first to give evidence in support of the Applicants case. She stated under oath that she was employed by the Respondent on the 1st February 2005 as Store Associate and was promoted in April 2009 to Store Assistant earning E3, 700.00 per month.

4.8.2. She testified that she knew the second and third Applicant, who were her co workers. She submitted that the second Applicant was employed as a Cashier and Merchandiser with her own department. Whilst the third Applicant as a partial Cashier and Merchandiser.

4.8.3. In summary it was her evidence that as an employee of the Respondent she had an account with the Respondent. She was allowed to purchase clothes with the account at a discount of 25% on goods that were not on sale which was calculated by the credit officers. The account would then be settled in monthly installments deducted from her

monthly salary. It was her testimony that they were allowed to purchase goods for their children and family members.

4.8.4. It was her evidence that she was in continuous employ until she was dismissed by the Respondent. She testified that she was dismissed after being charged with two offences, namely switching off the machine, in order to purchase goods off line.

4.8.5. She explained being off line, as the system being down therefore not indicating how much the credit the account has. However when the system is switched on it automatically updates itself, and the goods purchased are reflected on that account.

4.8.6. The second charge was that of breach of company policy in that she processed and authorized her own sale transactions, during the period of October 2008 to February 2009. It was her evidence that she was called to a hearing which she attended. However prior to the hearing she testified that they were forced to write statements.

4.8.7. It was her evidence that she wrote two or more statements, the first one having been destroyed by the

Respondent. It was her submission that same were written before they were suspended. She adduced that the second statements were written after being threatened by the Respondent.

4.8.8. It was her evidence that the Respondent forced them to confess to the crime, threatening that if they do not the police would be called. They prepared the statements and signed for them. It is thereafter that they were suspended. The hearing was held on the 12th March 2009, and those present were Ms Elize, Ms Tracy and Mr. Donald.

4.8.9. She submitted that there were no witnesses called by the Respondent, however she was asked to explain what she had done, having confessed to the offences charged. No findings were communicated to her by the Respondent, she was just informed she was guilty.

4.8.10. It was further her submission that in terms of the Respondent's policies and procedures there was no rule prohibiting them from off lining. A memorandum was only issued by the Area Manager after, the alleged offence. Upon receipt of the memorandum they desisted from purchasing goods when the machine was off line.

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4.8.11. The Applicant went on to state that when the machine is off line upon completion of the transaction, when put on line again the information would be reflected on their accounts. Therefore the Respondent did not suffer any financial loss, as it is able to charge them appropriately for goods purchased.

4.8.12. On the second charge the Applicant stated that she was not guilty of the said offence. It was her submission that her supervisor Mr. Dumsani Shabangu was aware of all purchases made by her. She testified that Mr. Shabangu was also charged together with them, and dismissed.

4.8.13. She went on to testify that after the hearings they were told to return on the 18th March 2009, for their outcomes. On the said date they received letters terminating their services. It was her evidence that a letter of Appeal was addressed to the Respondent, to which they got a written response from the Respondent, advising them that the decision of the Chairperson was being upheld, thus their appeal failed.

4.8.14. In closing it was the Applicants' evidence that no terminal benefits were paid to her by the Respondent. It was her testimony that she is currently unemployed, and does not believe she will be employed in the near future. This she

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submitted was as a result of a paper article in the local paper, where it was stated by the Respondent that they had cheated customers, and stole from the Respondent.

4.8.15. She submitted that she was thirty four years old (34), and she would be willing to return to work if she were to be re-instated, if not she prayed that she be paid her terminal benefits in terms of Applicants calculations annexed to their bundle of documents.

4.8.16. The main Applicant was then cross examined. During cross- examination the Applicant was asked who she had purchased the goods for, when the machine was off line. She submitted that she would purchase goods for her family and herself. She was then referred to page 23 of the Respondents bundle of documents, which was her statement.

4.8.17. It was put to her that she had confessed to having bought goods offline for customers, hence her evidence now was untruthful. In response she submitted that she wrote the statement under duress, being told by Ms Elize and Mr. Donald what to write.

4.8.18. She was then asked why she believed that there was nothing wrong with buying goods offline. In response it

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was her testimony that it was not wrong because the Respondent was able to recover its money by deducting it from her salary. The Applicant was asked why if what she was doing was not wrong, she had to switch the computer offline in order for her to purchase goods?.

4.8.19. It was her testimony that they had to put it off line because they did not have any credit, whilst when off line they could purchase goods. She was asked how much was being deducted from her a month, she submitted that a sum of E1, 900.00.

4.8.20. The Applicant was then asked who she made purchases for, to which she stated her children brothers and sisters. She was referred to her letter of employment which states that purchases may be made on the account at a discount for the employee and its spouse.

4.8.21. She submitted that she made purchases for her immediate family only. It was her evidence that the discount was received only on goods not on sale, those that were on sale were bought at the sale price. Therefore when she bought goods for relatives she did so when goods were on discount, with no loss to the Respondent.

4.8.22. The Applicant was asked whether Ms Elize did not read

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her notification to a hearing to her on the hearing date. In response it was her submission that Donald read the notice to her. It was put to her why she had stated that the charges were not read to her when same are contained in the notification which she admits was read to her by Donald.

4.8.22. In response it was her submission that no charges were read to her except the notification. The Applicant was then asked whether the Appeal letters on page 70-72 were the Appeal letters written by them. She admitted to having written the two appeal letters.

4.8.23. It was put to her why she had failed in her appeal to state that they had been forced by the Respondent to write the statements and admit guilt. In response it was her testimony that they were not aware they could include it as a ground of appeal.

4.8.24. The Applicant was then questioned on company policy, whether same permitted her to authorize the purchasing of her own goods. It was her testimony that same was permitted as long as the Manager was aware, and in her instance the Manager was aware. In closing the Applicant was re examined and the next witness was called to give evidence.

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4.8.25. The second Applicant was called to give evidence, Cynthia Tsabedze she gave evidence under oath. It was her evidence that she was employed by the Respondent on or about the 1st October 2002, and was in continuous employment until her services were terminated by the Respondent on the 18th March 2009.

4.8.26. She testified that she was employed as a Stores Associate and earned E2, 790.00 per month. Her evidence was similar to that of the main Applicant so I will not detail same word for word. It was her submission that they were afforded accounts by the Respondent to purchase goods. One of the benefits they received was a 25% discount on all goods bought in store that were not on sale.

4.8.27. They would get 50% on uniform clothing and were only allowed to buy for themselves and their immediate families. She stated that she was dismissed on the 18th March by the Respondent. She narrated what led to her dismissal as follows. It was her evidence that on or about the 23rd February 2009, they were called by the Area Manager Elize Van Haden to a meeting advising them that as of that date no one was allowed to purchase goods whilst the system was off line.

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4.8.28. The same Thursday they were investigated by the Respondent, and called together with the first and third Applicants. It was her evidence that they were told what they had done, that is purchasing goods off line. They were further told that they were buying goods for their friends, they were then made to write statements admitting the offences.

4.8.29. It was her testimony that she wrote two statements, the first was destroyed after Donald told her to write another one and told her what to include. It was her evidence that they were threatened by the Respondent who informed them that they would be taken to the Police.

4.8.30. They were however told that if they co operate they would be given warnings and return to work. It was under that premise that they wrote the statements. She further stated that she was then suspended and called to a hearing. At the hearing she was told to mitigate and not given an opportunity to make submission. She was not given an opportunity to cross examine witnesses from the Respondent, nor was she told to plead to the offences.

4.8.31. Her evidence was similar to that of the first witness, in that she stated that she did buy goods offline. It was her submission that there was no rule prohibiting them from

purchasing goods offline. Further the Respondent was able to recover the amount for the purchases from her salary. She submitted that she Appealed the dismissal however the decision of dismissal was upheld without affording them a hearing.

4.8.32. She further submitted that she had a good working relationship with the Respondent and wished to return to work. She submitted that she is currently thirty two (32) years old, unemployed with three dependants. The first being twelve (12) years old the second five (5) years old and the last three (3) years old.

4.8.33. She prayed that she be reinstated or alternatively be paid compensation in terms of her calculated claim.

4.8.34. The Respondent was given an opportunity to cross examine the Applicant. This witness was asked whether there was no rule as to whom they could purchase goods for. It was her evidence that they could purchase goods for themselves and their family (children). She was asked to explain the process of purchasing when offline.

4.8.35. She explained that if the goods that a customer wished to purchase were above E300.00, they would call head office. It was put to the Applicant that she was aware of

the procedure. To which she responded to the affirmative. Similar questions were put to this Applicant as that of the first Applicant, to which she answered in a similar fashion to that of the first Applicant.

4.8.36. This Applicant was re examined and the third Applicant called. The Applicant was Xolile Maduna who testified under oath that she was employed by the Respondent as a Stores Associate, on the 1st February 2005, and was in continuous employ until her dismissal in March 2009.

4.8.37. She earned a sum of E2, 760.00 per month. She was dismissed after having been charged with buying goods off line. It being alleged by the Respondent that they were deliberately buying goods off line.

4.8.38. It was her evidence that she prepared a statement of the events that had taken place, but was however forced to write a second statement by the Respondent. She was told what to write and threatened with imprisonment if she refused. She was however told that if she co operates she would be given a warning and would return to work.

4.8.39. She was also called to a hearing where she was not informed of the charges against her or given an opportunity to cross examine witnesses. Her Appeal was

dismissed by the Respondent. It was her evidence that she has two dependants her mother and father. She prayed that she be re instated or alternatively be paid her terminal benefits. This Applicant was cross examined by the Respondent. I will not detail the cross examination. She was re examined and the Applicants case closed.

4.2. THE RESPONDENTS CASE

4.2.1. The Respondent called three witnesses to testify on its behalf namely Ms. Magda Hayes, Ms. Elize Van Hedaan and Mr. Donald Glover.

4.2.2. Ms. Magda Hayes testified under oath that she was the Area Manager at Milady's East Gauteng. She submitted that she has worked for the Respondent for over eight years (8). It was her evidence that her role in the matter was that she was the Chairperson at the hearings.

4.2.3. She explained the procedure that she followed during the hearing. It was her evidence that

during any enquiry the Chairperson is provided with a Chairperson's pack. It lays down the procedure to be followed in terms of the law. She submitted that on the date of the hearing she began by stating her name to the parties. She further stated the role that she would be playing during the hearing. It was

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her submission that she then introduced the parties present and explained their roles. She then advised the Applicants of their right to representation, which they declined. She requested whether they would require an interpreter whereat they elected to have Donald interpret for them.

4.2.4. She then proceeded to read the charges to them, and asked them how they pleaded to which they all pleaded guilty. It was her evidence that as Chairperson after the parties had pleaded guilty to the charges, there was no need for her to go into the merits of the case. She allowed this as gross misconduct and dishonesty were involved, and because of the complexity of the matter as it involved a Manager as well.

4.2.5. She was asked what penalty she meted out and how she came to those findings. It was her testimony that dishonesty, touches on the trust relationship between the parties. In terms of company policy gross dishonesty is a dismissible offence hence the recommendation of dismissal of the Applicants.

4.2.6. It was her evidence that she has been conducting disciplinary hearing for the past nine years, having been involved in it with her previous employer. She submitted

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that she afforded the Applicants an opportunity to mitigate. She submitted that she did feel sorry for them, however they had admitted guilt, and in terms of company policy gross misconduct is a dismissible offence. Had she been lenient with them she would have set a bad precedent.

4.2.7. The witness was asked how the conduct of the parties had impacted on the company. It was her submission that same had a negative effect on the company. The company suffered financial loss in that it gave the Applicants a 25% discount. It further had an effect on their clientele.

4.2.8. The witness was asked that it had been alleged by the Applicants that they were not given an opportunity to state their case or cross examine witnesses. It was her evidence that each Applicant was given an opportunity to state her case and cross examine evidence adduced by the Respondent. She submitted that she does not take the threat of one losing a job lightly.

4.2.9. The Applicants were then given an opportunity to cross examine this witness. The witness was asked whether she had followed all procedure in terms of the Chairperson pack. To this she answered to the affirmative

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4.2.10. The witness was asked whether she had copies of the minutes of the hearing. She stated that she did not have a copy, but if it was required she could provide one. She was asked why the Applicants were not provided with copies of the minutes. She submitted that they were entitled to the minutes and could request for a copy.

4.2.11. She was asked whether she was aware that the Applicants were required to sign the minutes of the hearing. It was her evidence that the Applicants were required to sign at the end when receiving their letters. If they were not happy with the process then they did not have to sign.

4.2.12. It was put to the witness that she did not know how to conduct a hearing as she failed to provide the Applicants with minutes or permit them to sign the said minutes. This was denied by the witness. The witness was asked what evidence she had that the Applicants had pleaded guilty because they were denying this allegation.

4.2.13. She testified that the evidence of the individuals at the hearing including the interpreter. It was put to the witness that the minutes would be of assistance, but because they were not provided the evidence of the Applicant suffices.

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It was further put to her that they had not been asked to plead, but that she had solely relied on their statements.

4.2.14. The witness was asked whether there was a rule prohibiting the Applicants from off lining the system. It was her response that there was no such rule prohibiting the off lining of computers, however the fact that you have to do this indicates that such action is against policy.

4.2.15. The witness was re examined and the next witness called. The 2nd witness called was Ms. Elize Van Hedaan, she submitted under oath that she was the Area Manager and had worked for the Respondent for five (5) years. She previously worked for Foschini for the past seven (7) years.

4.2.16. The area which she currently controls is the far East Mpumalanga where she controls ten 10 shops and Swaziland where she controls two (2) shops. She was asked to explain what the Applicants positions were. It was her evidence that the first Applicant was second in charge to the Store Manager the other two employees were Store Associates that would sometimes work on the tills.

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4.2.17. The role of the second in charge is to act as Store Manager when the Manager is away with full authority. She then narrated the events that led to the dismissal of the Applicants, it was her submission that whilst at the Ermelo store she received a phone call from the central credit office. The individual she spoke to asked whether she was aware that a certain Associate within the store had a balance of E 17,000.00, and was buying on credit every second day. The name of Maureen Matsebula was given.

4.2.18. She submitted that she was shocked by this information and immediately called head office and requested a copy of the salary's schedule. This was to check how much the individual installment was because with a balance that high she could not be earning much. Upon checking the salary it was evident that she was not earning much it was discovered that three other employees had the same problem.

4.2.19. She stated that she immediately called the Stores Manager and requested that he forward the staff members account numbers. The numbers were faxed through, and upon examining them she discovered that the accounts including Maureen's were very high. It was

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her evidence that she proceeded to call the credits department, and spoke to Laret. She requested her to email the status of the account numbers as far as she could go back.

4.2.20. Upon receipt of the information she discovered that the individuals were buying on almost a daily basis, sometimes twice in one day. Further she discovered that this was reflected in all the accounts. She proceeded to phone the Operations Manager and informed him of this irregularity. He informed her to request to see all the clothes they bought. His immediate thought was that they were running a shop within the country.

4.2.21. It was her testimony that she proceeded to call Donald, and told him that she would be coming through on the Thursday. Indeed she picked up Donald and proceeded to the store in Manzini. Along the way she had called Dumsani and had requested him to place the sale dockets for the past few months in the office for her.

4.2.22. When she got to Manzini she went through the dockets with Donald, they were trying to establish whether they could pick up any irregularity. It was her testimony that they discovered that

most of the transaction were done whilst the machine was off line.

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In some instances the transactions were done at the same time on three different tills, all under the floor limit of E300.00.

4.2.23. From the evidence it seemed one individual was not involved, Khulile, so she was called to shed some light on what was happening. When Khulile was asked she stated that she was not aware of what was happening as she was not always on the machine. At the time she had thought Khulile was innocent. She then called in one of the casuals in store to establish what she knew.

4.2.24. The individual when asked stated that they were given instruction that when a cash customer comes in they should inform them. The customer would give the cash to them and they would use their account. Whoever's account was used would get the money.

4.2.25. It was her testimony that she together with Donald decided to call Thembani and Cynthia to explain as Maureen was on leave. Together they asked them where the clothes were as no one could have so many clothes where did they keep them. Thembani stated that they bought for family and friends. She submitted that she requested to be taken to these family members.

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Having had a similar case whilst at Foschini she requested Donald to phone the police to accompany them to the relative's homes.

4.2.26. She however could not get an address from Thembani. She then proceeded to recall Khulile, to ask her to explain what was going on. She pointed fingers at Thembani and Cynthia so they were questioned again. It was the second time around that Cynthia confessed to having taken money from customers.

4.2.27. She then requested her to explain how they were doing this. It was her testimony that Cynthia explained that they would switch off the modem then process transactions off line because they did not have credit. They would then take the cash from the customers. She thanked Cynthia for her honesty and asked Thembani whether that was true and she agreed.

4.2.28. She then requested that they put everything in writing and to proceed home since it was late. The following morning she proceeded with the investigations, whilst in store Cynthia requested to see her in the office. There she explained that everyone was involved in the practice of switching off the modem. It was then that she requested

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Donald to provide her with another form in order for her to prepare a proper statement in the conference room. She proceeded to write a proper detailed statement.

4.2.29. Then she proceeded to call Dumsani who the witness also confronted and he confirmed what was going on. He was also requested to write a statement. Lastly, Thembani and Cynthia were called in and they also confessed again, and were requested to write a detailed statement on what had transpired.

4.2.30. The witness proceeded to detail the spread sheets that were used as evidence against the Applicants that detailed the discount afforded to each Applicant. Thus indicating how much money was lost by the Respondent. Further she submitted that the action of the Applicants had a negative effect on the store.

4.2.31. The witness further averred that the Applicants had used their knowledge over the years to manipulate the Respondent's system, against company policy. In closing the witness stated that hearings were held for the Applicants and they were all subsequently dismissed.

A few weeks later a telephone call was received from an individual, who stated that he knew that one Nhlanhla from Cuthbert's was involved in fraud.

4.2.32. It was her evidence that she informed him that he could fax the information to him and she would give it to the area manager. The following day she was called by Donald informing her of an article in the paper where it was alleged she had stated certain information.

4.2.33. During cross examination the witness was asked whether there was a rule prohibiting the Applicants from buying for family members. She stated that there was as the company prohibited one from purchasing for family members. It was put to the witness that in fact employees are allowed to purchase items for family members.

4.2.34. The witness was further asked whether items on sale were subject to discount, to which she answered no. It was put to her that the Respondent was therefore able to recover the whole amount owed. In response she submitted that eventually it would as the amount was divided according to the account held.

4.2.35. The witness was asked several other questions during cross examination which I believe are not important to the issue at hand. The cross examination was completed and the witness re examined.

4.2.36. The last witness to be called was Mr. Donald Glover the Mbabane Stores Manager. It was his evidence under oath that he has worked for the Respondent for one and a half years in Mbabane and six months in Manzini. He submitted that he knew the Applicants Thembani having worked as second in charge, and the other Applicants as Store Associates.

4.2.37. It was his evidence that he was called by the Lines Manager requesting that he accompany her to Manzini. When they got to the store she had explained that there were certain employees who had exceeded their credit limit excessively. They proceeded with investigations asking the Applicant what they knew one by one.

4.2.38. I will not detail his evidence word for word as same is similar to the second witness's evidence. Eventually the truth was told and the Applicants confessed to having exceeded the limit by buying when the machine was off line. Statements were prepared by the Applicants. As more investigations were conducted the Applicants were

requested to prepare detailed statements as to what had truly transpired. It was discovered that the Manager was also involved. The Applicants were suspended and charged and thereafter called to a hearing.

4.2.39. It was his evidence that he was requested to interpret for the Applicants at their instance. The hearings were concluded and the Applicants dismissed. A few weeks later he received a call from a gentleman he did not know asking him about the Cuthbert's matter. He referred all questions to the Lines Manager. A few days later an article was in the paper about the incident involving the Applicants.

4.2.40. During cross examination the witness was asked how many statements were written by the Applicants. It was his evidence that Cynthia had written three together with Thembani and Xolile two. He was asked why the Respondent had not included the other statements. He submitted that they were investigating when new evidence came up and requested them to include it in their statements.

4.2.41. The witness was asked whether he was in attendance when the Applicants wrote their statements. He stated that he was not in attendance. It was put to him that Elize

had submitted that he was in attendance, to which he denied being in attendance. The same issue of the Applicant being allowed to buy goods for family members was debated together with the issue of which goods discount was given too. I will not detail that cross examination, however the witness's response was similar to that of the witness before him.

4.2.42. The witness was asked whether he had been requested by the Applicants to interpret, he submitted that he was called in by the Chairperson and advised that the Applicants had requested him to interpret.

4.2.43. The witness was thereafter re examined and the Respondent closed its case. It was agreed by the parties that closing submissions would be done in writing and delivered at the Commission's offices on the 25th of September 2009.

4.2.44. In closing it was the Applicants submission that their dismissal was both substantively and procedurally unfair, and they prayed that they be paid their terminal benefits and maximum compensation for unfair dismissal. On the contrary it was the Respondents closing submission that the Applicants were dismissed for gross misconduct, after acting dishonestly. Their dismissals were procedurally and

substantively fair hence the Applicants claims should be dismissed in its entirety.

5. ANALYSIS OF THE EVIDENCE

5.1. It is common cause that at the date of dismissal the Applicants were employees to whom section 35 of The Employment Act of 1980 applied. No advancements were made by the Respondent to indicate that the Applicant were not an employees to whom section 35 of The Employment Act 1980 applied. In the circumstances the Respondent bears the onus of proving;

- a) That the reason for the termination was one permitted by Section 36 of The Employment Act 1980; and
- b) That, taking into account the circumstances of the case, it was reasonable to terminate the services of the employee.

See Section 42(2) of the Employment Act 1980

5.2. It is also common cause that the Respondent discovered that the Applicants were purchasing goods on their accounts whilst the machine (computer) was off line. It is further common cause that the Applicants would switch off the modems in order to facilitate the machine to be off line.

Evidence has been adduced by the Applicants that they did authorize their own transactions, however they averred that the Manager was aware.

5.3. The Applicants have advanced evidence that no prejudice was suffered by the Respondent as it was able to get all money due to it from the purchases, by deducting monthly installments from the Applicants monthly salaries.

5.4. Further the Applicants aver that there was no rule prohibiting them to purchasing goods when the machine was off line. Therefore the Respondent erred in dismissing them because no offence was committed by them. They aver that substantively the Respondent had no ground to dismiss them as they committed no offence.

5.5. They have submitted that the statements produced by the Respondent as proof that they confessed to committing the offences charged with should be ruled inadmissible. The Applicants have submitted that same were written by them under duress by the Respondent who threatened to take

them to the police.

5.6. They submit that further the dismissal was procedurally unfair as they were not afforded an opportunity to Appeal their dismissal. I will now analyse the evidence adduced by

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the Applicant. The Applicants gave evidence in a forthright manner. They admitted to having purchased goods off line, however none of them seemed to see any wrong doing in their actions.

5.7. This seemed to puzzle me as they admitted that the reason they did this was because they had no credit. If one has no credit then logic dictates that one should pay off the account in order to access more credit. Further the act of limited credit is placed as a safety measure to ensure that individuals do not overspend. Further it safeguards the Respondent from financial loss.

5.8. The fact that the Applicants had to switch off the modem to purchase goods is an indication that they were breaking company policy that of sticking to ones credit facility. Further they were using their knowledge to out smart the Respondent in the process exposing the Respondent to financial loss.

5.9. Of debate was whether the policy allowed the Applicants to buy for their family members or not. I am compelled to believe that the intention of the policy was to include all family members, I do not believe the interpretation of the company contract of employment excluded the Applicants

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from buying goods for their family. Whilst the Applicant dwelt on that point, it failed to disrepute the Respondents allegation that the Applicants use of their credit was excessively high. The words of one of the witnesses was that they were purchasing goods every second day.

5.10 From the evidence adduced it is evident that the Applicants were buying large quantity of goods, thus raising suspicion.

Further their act of purchasing goods when the machine was off line, was a fraudulent act towards the Respondent. It was the Applicants submissions that there was no rule prohibiting them from purchasing goods off line. The question is, can every company code contain all the offences that an employee can commit.

5.11 It is not practical to expect a company to spell out each offence in its code, however society appreciates that certain offences are against public policy. Whether a code spells out theft as an offence or not, an employee found stealing cannot be condoned on the grounds that the offence does not appear in the code.

5.12 I am further convinced that the statements made by the Applicants were not written under duress however the Applicants were induced to confess. The relevance of

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confession In the employment context was considered in,

OK Bazaars v CCMA & Others (2000) 21ILJ 1188(LC)

5.13 The employee confessed to stealing items of stock from the company; however the commissioner found that the employees were induced to confess to having stolen small items. The case in hand is similar, the Applicants were induced to confess on the promise of a lenient sanction. The statements therefore are admissible as evidence.

5.14 The Applicants have advanced evidence that their dismissal was also procedurally unfair in that they were not afforded an appeal. However, they seemed to contradict their assertion as they each submitted that they wrote a letter with their grounds of appeal to which the Respondent responded and stated that it had considered their ground of appeal. It further advised that it was dismissing the appeal and upholding the Chairpersons decision.

5.15. I therefore fail to understand why the Applicants aver that they were not afforded an opportunity to appeal. No further evidence was adduced to enlighten me on their assertions.

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5.16. I am of the view that the Applicants have failed to adduce enough evidence to prove that their dismissal was both procedurally and substantively unfair.

5.17. The question that I am called to answer is whether the Applicant's dismissal was substantively and procedurally fair taking into account the circumstances of the case.

5.18. The Respondent bears the onus of proving that the dismissal of the Applicants was procedurally and substantively fair.

5.19. Based on the evidence adduced by both parties, and taking into consideration, the evidence adduced the Respondent has proven on a balance of probabilities that the dismissal of the Applicants was both procedurally and substantively fair.

5.20. Grogan in his book Workplace Law, 9th edition, 2007 at page 122 states;

"That a dismissal must not only be for a fair reason, but also that it must be affected in accordance with a fair procedure".

5.21. The procedural fairness and substantive fairness of a dismissal are independent criteria. A dismissal is unfair if the employer failed to follow a fair procedure, no matter how compelling the reason for the dismissal may have been.

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However it does not follow that a minor procedural lapse by an employer will render a dismissal procedurally unfair.

5.22. Grogan in his book Dismissal, Discrimination & Unfair Labour practices, 2nd edition, 2007 at page 300, defines dishonesty as a generic term embracing all forms of conduct involving deception on the part of the employee.

5.23. In the case of Nedcor Bank Ltd v Frank & Others (2002)23ILJ 1243 (LAC), the Labour Court went on to further broaden the definition to include "a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently."

5.24. The actions of the Applicants went to the core of the relationship between themselves and the employer, the issue of trust, their actions breached this relationship justifying their dismissal.

5.25. From the evidence adduced it is evident that the Respondent has proven on a balance of probabilities that the dismissal of the Applicants was both procedurally and substantively fair.

See: Joseph Sangweni v Swaziland Breweries Industrial Court case No. 52/2003 and Mshayeli Sibiya v Cargo Carriers Industrial Court case No.282/03.

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8. CONCLUSION

8.1 Our law on dismissal is governed by section 42 of The Employment Act of 1980 (as amended) in conjunction with section 36 of the same Act. In terms of section 42(2) of the said Act, the onus to prove that an employee's services were fairly terminated rests with the employer. It does not end there but further the employer must prove that such termination is one permitted by section 36.

8.2 It is my view that in this case the termination of the Applicants' services were procedurally and

substantively fair taking into account the circumstances of the case.

8.3 It is therefore my finding that the Applicants have failed to prove on a balance of probabilities that their dismissal by the Respondent was both procedurally and substantively fair. Therefore the Applicants claims are dismissed in their entirety.

DATED AT MANZINI ON THIS THE 8th DAY OF APRIL, 2010

BANELE NGCAMPHALALA

CMAC ARBITRATOR