



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

**HELD AT MANZINI**

**SWMZ 210/13**

In the matter between:-

**SPHELELE NDLOVU**

**APPLICANT**

And

**PARMALAT SWAZILAND (PTY) LTD**

**RESPONDENT**

CORAM:

**Arbitrator** : Commissioner Nonsikelelo Dlamini

**For Applicant** : Ephraim B. Dlamini (Labour Law Consultant)

**For Respondent:** Zwelakhe Hlophe (Magagula & Hlophe Attorneys)

**Nature of Dispute:** Unfair Dismissal

**Dates of Hearing:** 20<sup>th</sup> February, 2017; & 21<sup>st</sup> February, 2017; 14<sup>th</sup> March, 2017; and 12<sup>th</sup> May, 2017.

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**ARBITRATION AWARD**

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**1. DETAILS OF THE PARTIES AND REPRESENTATION**

- 1.1 The Applicant is **Sphelele Ndlovu**, an adult male female who was represented by a labour law consultant Mr. Ephraim B. Dlamini situate in Mbabane during the course of these proceedings.
- 1.2 The Respondent is **Parmalat Swaziland(Pty) Ltd**, a company duly registered according to the company laws of Swaziland, represented during these proceedings by Mr. Zwelakhe Hlophe an attorney from Magagula Hophe Attorneys in Mbabane.
- 1.3 The arbitration hearing was held at CMAC- Manzini office and had five (4) sittings as follows: 20<sup>th</sup> February, & 21<sup>st</sup> February 2017; 1<sup>st</sup> and 14<sup>th</sup> March, 2017; 5<sup>th</sup> and 12<sup>th</sup> May, 2017.

## **2. ISSUE TO BE DECIDED**

- 2.1 The issue for determination is whether or not the Applicant was unfairly dismissed from the Respondent's employment, in terms of **Section 35** of the **Employment Act, No. 5 of 1980**.

## **3. BACKGROUND TO THE ISSUE**

- 3.1 The Applicant is an ex-employee of the Respondent, having been employed as a Packer in August, 2008 and allegedly unfairly dismissed on the 13<sup>th</sup> February, 2013. At the time of termination of employment she was earning a basic wage of **E1 627.00**. Applicant was dismissed for two offences; the use of derogatory language in the workplace and secondly for threatening violence/ victimization on through a letter dated 8<sup>th</sup> February 2013. She then appealed the decision of the disciplinary hearing through her letter dated 20<sup>th</sup> February 2017 and the decision to dismiss her was upheld.

3.2 The Respondent admits the former employment relationship between the parties, as verbal and casual in August 2008 until January 2010 wherein a written employment contract was signed by parties. It is further agreed by the Respondent that the Applicant was employed as a Packer and earned the monthly wage submitted in her evidence. The Respondent denies that the Applicants dismissal was unfair, it alleges that the Applicant's dismissal was fair in terms of section 36 and 42 of the Employment Act 1980, she was dismissed after a disciplinary hearing presided by an independent Chairperson where she was then found guilty and dismissed. It, further denies that denies that the Applicants' termination was procedurally and substantively unfair stating that an appeal hearing was conducted for the Applicant and the decision to dismiss her was upheld. Respondent's application, therefore, was that the Applicant's application be dismissed in its entirety.

#### **4. SUMMARY OF THE EVIDENCE AND ARGUMENTS**

##### **The Applicant's Version;**

4.1 The most important and relevant aspects of the Applicant's evidence who testified as the sole witness to the proceedings are that Applicant was engaged verbally in 2008 as a Packer, that she was employed as a casual employee. She further submits that she was then given a written contract to sign in 2010, that during the two periods there was no broken service hence her employment was continuous.

4.2 The Applicant testified under oath to the fact that she was suspended, charged and latter on dismissed on the 13<sup>th</sup> February, 2013 following a disciplinary hearing that had been held on the 6<sup>th</sup> February, 213 at the Respondent's business premises situate at

Matsapha. The misconduct for which she was dismissed was the use of derogatory language in the workplace and threatening violence / victimization of a co-worker-one Mr. Mzwandile Nhleko, offences she had committed on 21<sup>st</sup> and 31<sup>st</sup> January 2013, 2010 at the work place and during working hours.

- 4.3 The charge sheet tabulating the misconduct had been delivered to the Applicant on the 31<sup>st</sup> January, 2013. During the disciplinary hearing, which was chaired by an independent person, the Applicant testified that she pleaded not guilty to the alleged misconduct. She was found guilty after the process of the disciplinary where witnesses were called to testify, a verdict of dismissal was meted through a written letter dated the 8<sup>th</sup> February, 2013.
- 4.4 She further testified that she filed an application to be heard in an appeal hearing on the 20<sup>th</sup> February, 2013, her appeal was duly prosecuted and the dismissal verdict was upheld.
- 4.5 The denied Applicant confirmed even during her evidence in this arbitration that she did in fact did not use derogatory language nor did she threaten to instill violence on Mr. Mzwandile Nhleko, a co worker. She further denied that Mr. Nhleko was her supervisor neither did she admit that there was any disagreement between herself and Mr. Nhleko which would lead her to commit the wrongful conduct alleged. She confirmed to the affirmative that her supervisor was Patience Gule. The Applicant rebutted all allegations even during cross examination that she never used the word ***“uyanginyela”*** meaning you are messing up with me during working hours directing them to Mr. Nhleko. The Applicant further denied that she has abandoned her responsibility at work as a Packer and was busy with her mobile cell phone, hence Mr. Mzwandile Nhleko instructed her to attend to the machine as it had stopped working. She alleged that

her mobile cell phone was in the locker as they (employees) had been warned against the use of cell phones during working hours. The Applicant therefore challenges the substantive fairness of the dismissal in those aspects.

4.6 The Applicant testified that her that she did not have a good working relationship with Mr. Nhleko, and that they had not been in talking terms for a period of a year. When the Applicant was questioned in cross examination the reasons the made the relationship sour, her explanation was that Nhleko did not accept excuses by the Applicants for refusing to work overtime. When she was also questioned whether she did report to Patience Gule the incidence of the 21<sup>st</sup> January 2013, she responded that she did not as she was not sure where Patience was on that day.

4.7 The Applicant further challenges the procedurally fairness of the dismissal alleging, alleging that Mr. Mzwandile Nhleko did not prefer charges against the Applicant as her supervisor which is evidence submitted by the Respondent. It was further argued by the Applicant that during the disciplinary hearing the chairperson led the witness as opposed to the complainant. Her argument was further that no evidence was submitted to prove her guilty of all the offences alleged.

#### **The Respondent's Version;**

4.8 The Respondent, through the testimony of Mr. Lindizwe Dlamini its Returns Clerk (RW1), gave evidence to the fact that it is true the Applicant was dismissed but for the correct reason, being the acts of using derogatory language and threats of violence against Mr.Mzwandile Nhleko (a co-worker) and, pursuant to a fair disciplinary

procedure in that a fair disciplinary hearing and an appeal hearing were afforded to the Applicant.

- 4.9 It was Linidizwe Dlamini's testimony that following the unacceptable conduct by the Applicant against Nhleko on the 21<sup>st</sup> and the 30<sup>th</sup> January, 2013 the Applicant was suspended and advised to collect a charge sheet on the 31<sup>st</sup> January, 2013 something which she did.
- 4.10 It was the testimony of the witness (RW1) even during cross examination that he was present at work at the Production Department and normal production had stopped as the employees waited for the Applicant to load the machine with the required material in order for production to resume. Applicant uttered the words **"uyanginyela"** to Mr. Nhleko who was enquiring as to why the Applicant was sitting and paging her phone instead of attending to the machine as it had stopped working. He further testified that he was at a distance of approximately three (3) meters away from the incidence scene, and heard very well the words uttered as he neither heard a hearing or an eyesight problem.
- 4.11 Dlamini also testified that on the 30<sup>th</sup> January, 2013 the Applicant went out of the production area and on her return grabbed Mr. Nhleko by his clothes in an attempt of a fight. When cross-examined as to whether by any chance he would have a grudge against the Applicant, Lindizwe responded to the negative.
- 4.12 The next employee to testify in support of the Respondent's case was Mzwandile Nhleko (RW2), who swore under oath that he was employed at the Respondent's company as a Line operator and the Applicant was employed as a Packer. He further explained that his job was to oversee the movement of the packing line just like a captain

and give instructions and orders should the need arise, that he had an authority to command other employees to maintain working order.

- 4.13 He testified on the events of the 21<sup>st</sup> January 2013, when he discovered that the production line where the Applicant was working had stopped moving, this was due to the fact that the Sphelele was playing with her mobile phone instead of loading cartons to the machine. He then gave her an instruction to fetch cartons and load to make the production line move, but the Applicant's response was **"uyanginyela"** meaning you're messing up with me and that only Musawenkhosi has the authority to give her an instruction. According to RW2 the Applicant decided to follow that instruction after a lapse of ten minutes.
- 4.14 It was Nhleko's evidence that on the 22<sup>nd</sup> January, 2013 before resuming his morning duties he reported the previous day's incidence to the Production Manager, Patience Gule who instructed him to write a report which he wrote and submitted. He further testified that on the 30<sup>th</sup> January, 2013 during working hours at the Production Department, the Applicant came carrying an envelope and held Mr. Nhleko by his clothes and asked in provocation from Mr. Nhleko **"yini lamanyala lowabhalile"** meaning what garbage have you wrote?.Nhleko testified that he did not give the Applicant a response.
- 4.15 He further testified that the relationship between the Applicant and himself was not good as sometimes he would give instructions to the Applicant which she did not adhere to nor followed. During cross-examination the witness testified that he had reported to his former Manager Mr. Jerome Dlamini that his working relationship with the Applicant was not a good one.

- 4.16 The third witness to testify in support of the Respondent's case was Musawenkhosi W. Dlamini (RW3). He testified that he knew the Applicant as a factory worker for the Respondent and that he was the overseer in the disciplinary hearing held against the Applicant, ensuring that the disciplinary process is conducted professionally and that the Applicant is informed of all her legal rights including her right to call witnesses and secure representation.
- 4.17 It was the testimony of RW3 that prior to the disciplinary hearing he had received a report that there was a need to have counseling sessions for the Applicant and Patience Gule as their working relationship was not in good terms. He further testified that after the disciplinary hearing the Applicant was afforded an opportunity to appeal and the appeal hearing was held where the dismissal was upheld.
- 4.18 During cross examination the witness RW3 testified that he performed his role in checking whether the charges laid against the Applicant and the disciplinary hearing was conducted in line with the disciplinary code and procedure of the Respondent Company. It was also his testimony that Lindizwe Dlamini was called in the disciplinary hearing to testify as a witness and the Applicant was given an opportunity to cross examine the witness.
- 4.19 Therefore Respondent's submission was that the burden of proving the fairness of the Applicant's dismissal in terms of Section 36 (b) of the Employment Act, 1980 has been successfully discharged warranting a dismissal of the application.

## **5. ANALYSIS OF THE EVIDENCE AND ARGUMENTS**



5.1 The Applicant's claim against the Respondent is for compensation pursuant to an alleged unfair dismissal. **Section 42(1) of the Employment Act of 1980 (the Act)**, provides that an employee who sues an employer for the termination of her services must first prove that she was an employee to whom **Section 35 of the Act** applied. Put differently, the employee must prove the following: that she had completed probation; that she was required to work more than twenty-one hours per week; that she was not a member of the immediate family of the employer; and lastly, that she was not engaged for a fixed-term whose term of engagement had expired. The Applicant alleges that he was in continuous employment since August 2008 until the date of her dismissal on the 8<sup>th</sup> February 2013. No evidence was led by the Respondent to dispute these allegations except for submitting that the Applicant was engaged verbally as a casual employee in 2008 until she was made to sign a written contract on the 4<sup>th</sup> January, 2010.

5.2 Therefore the Applicant has submitted sufficient evidence that she was a permanent employee and was not negatively affected by the other standards prescribed by **Section 35 of the Act**; consequently she has discharged her onus. **Sections 42 (2) of the Act** provides that an employer has the onus of proving that the reason for terminating the services of an employee was one permitted by **Section 36 of the Act**; and that taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee.

5.3 It is the Respondent's evidence that the Applicant was dismissed for acts of violence against a co-worker, named Mzwandile Nhleko on the 21<sup>st</sup> January, 2013 whom she verbally assaulted/insulted through the use of derogatory language and also physically assaulting same on

the 30<sup>th</sup> January, 2013 at the Respondent's business premises situated at Matsapha.

- 5.4 According to **JONH GROGAN DISMISSAL DISCRIMINATION AND UNFAIR LABOUR PRACTICES, SECOND IMPRESSION 2007, pages 239- 241**, states that there are limits to the language which employees are permitted to use to express their views. Swearing and invective are generally considered misconduct which may in certain cases justify dismissal. He further writes in page 241 that; the legal requirements for assault are the intentional and unlawful application of physical force, however slight, to the body of the complainant or a threat that such force will be applied. Assault according to Grogan is generally accepted as a valid reason to dismiss in any given circumstances of employment.
- 5.5 On the question of substantive unfairness of the dismissal, the Applicant led evidence that she never uttered any derogatory language neither did she ever threaten Mr. Nhleko with any form of violence. The Applicant further submitted that it was a norm that she and other employees would tell or crack jokes amongst each other and that she was not aware that Mr. Nhleko was being offended by such jokes.
- 5.6 From the foregoing arguments the Respondent's evidence through RW1, was that on the 21<sup>st</sup> January 2013, production stopped and the Applicant was questioned by Mr. Nhleko as to why she was sitting and busy with her phone instead of loading the machine with cartons to enable production to resume. The Response from the Applicant according to the witness to quote verbatim she said **"uyanginyela"** and you do not have authority to question me that, I only take instructions from Musawenkhosi. The witness further testified that on

the 30<sup>th</sup> January 2013, the Applicant left the production area and on her return she grabbed Mr. Nhleko's clothes inciting a fight.

5.7 This argument was maintained by RW2 and RW3 respectively notwithstanding the disputed evidence by the Applicant. This then deters the rejection of the Applicant's arguments, first when the Applicant was asked during cross-examination whether she had insulted Mr. Nhleko her response was to the negative, and further submitted that as employees they would joke amongst each other. Then again she emphasizes that she has not been in talking terms with Mr. Nhleko for over a year because they did not have a good relationship and lastly during re-examination the Applicant testified that she does not recall what transpired on the 21<sup>st</sup> January, 2013 during working hours. Therefore, so goes the argument as RW2 also testified that he did not have a good relationship with the Applicant. In my view the Applicant's evidence is insincere as it is two faced.

5.8 It is further common cause that consequent to this act of misconduct, disciplinary charges were preferred against the Applicant and disciplinary proceedings were conducted which culminated to her dismissal. In line with the provision of **section 42** of the **Employment Act 1980** as amended, the dismissal of the Applicant shall not be considered fair unless the Respondent proves that (a) the reason for such termination was one that was permitted by section 36; and (b) that taking into consideration all circumstances of the case, it was reasonable to terminate the services of the Applicant, therefore onus then lies on the Respondent to prove that the dismissal of the Applicant was fair procedurally and substantively. The evidence submitted before me clearly adduces that the Applicant was dismissed for reasons permitted by Section 36(b) of the Employment Act, 198.

- 5.9 ***Le Roux and Van Niekerk : The South African Law of Unfair Dismissal, paragraph 8.4, as cited in the Zephania case ,supra, on page 20,*** reverberates the same attitude as above by saying; “ assault is another of those forms of misconduct which has an impact both at the individual level and at the level of the enterprise. For the person against whom the assault was perpetrated, the act constitutes a gross violation of integrity and dignity. Where the assault assumes a serious form, dismissal may be warranted even for first offender”.
- 5.10 I note with the evidence submitted by the Respondents through its witnesses that the Applicants action was not not so grave as the was no evidence proving any form of injury on Mr. Nhleko save to mention that the Applicant grabbed him with his garments inciting a fight. I have adopted the decision of the Industrial Court of South Africa put it in **MAWU v Feralloys Limited (1987) 8 ILJ 124 (IC) at 137C**, “*assault can vary from a mere touch to the infliction of serious harm.*” It shall not be overlooked that the Applicants violent action was not a result of provocation; it was a total disobedience and a refusal to perform a task. I shall not deal with those issues as they were raised as evidence in this arbitration nor did they form part in the Respondents charges against the Applicant.
- 5.11 I have considered the fact that at the time the Applicant was dismissed she had worked for less than five years. Having said that I hold the view that in the case of **Zephania Ngwenya v Royal Swaziland Sugar Corporation, 262/201 IC** on page 16 the **Honorable President of the Industrial Court Peter Dunseith**, made reference to the case of **Jabhane James Mbuli v Mhlume Sugar Company ( IC case No7/1990)** “*....where an employee has had a long record of good service in the past....this is a factor which*

*may be taken into account by the court in judging the reasonableness of management's decision to dismiss.*" –per Hassanali AJP. In the current case the Applicant did not have a long service of employment to be considered, and neither did she submit any evidence concerning the type of record she maintained while in the Respondent's undertaking.

- 5.12 It is without any doubt proven that the Applicant's conduct resulted in work stoppage as production came to a halt for some time until the cartons were loaded in the machine, and with the evidence submitted before me it has been proven that the Applicant did use offensive verbal language against a co-employee and also threaten violence. As pointed out above, the requirement of our law is that the employer must prove that the employee committed an act of misconduct so severe as to warrant dismissal.
- 5.13 In *casu* therefore, I find that the Respondent, Parmalat Swaziland (Pty) Ltd has proved on a balance of probabilities that the Applicant, Sphelele Ndlovu, committed an act of serious misconduct in the form of acting with violence to warrant his dismissal. In other words, the finding is that the dismissal of Applicant was substantively fair. Indeed violence, threats of violence and ill-treatment of fellow employees is strictly prohibited by our **Employment Act**. And such acts can never be approved in any employment relationship. **The Employment Act** provides under **section 36(b)** that; it shall be fair for an employer to terminate the services of an employee if that employee is guilty of violence, threats or ill-treatment towards the employer or other employee of the undertaking.
- 5.14 The Applicant did not at anytime submit evidence that her actions were a result of provocation despite submitting in her evidence that she was had not been in talking terms with Mr. Nhleko for a period

over a year. **See *Zephania Ngwenya vs Royal Swaziland Sugar Corporation, 262/2001 IC.* On pages 13-14** where the learned judge cited that "provocation alone cannot render assault lawful, unless it can be shown that provocation amounted to self defense or caused the Applicant to lose cognitive control over his actions."

5.15 I shall then look at the procedural aspect of the dismissal. The Applicant submitted in her closing statements that the Chairperson on the disciplinary hearing turned to be a prosecutor and also that the chairperson led the witnesses instead of the complainant. I have also noted that in her appeal letter she raised a point that the chairperson was an employee of the Respondent Company and had an interest in the matter. During cross examination the Applicant did not raise any evidence to support these allegations against the chairperson, yet her submission positively contended that she did have knowledge of the chairperson but did not have a problem with having him chair the disciplinary hearing and that the disciplinary hearing was procedurally fair .The Applicant was given an opportunity to be heard in an appeal hearing and the decision to dismiss her was upheld. Having read the findings and recommendations of chairpersons from the minutes of the disciplinary hearing, I cannot find the irregularities complained about. If the Applicant was not satisfied with the chairperson of the disciplinary hearing on the grounds that he was employed by the Respondent Company, it would have been proper for her to make an application to have the chairperson recues him from the matter.

5.16 In making my decision I have also considered the fact that the Applicants action was a negative response in satisfying her obligations as an employee when production came to a stop and the aggravating factor was that she acted violently instead of correcting

a work related occurrence. Infarct her violent actions were not spontaneous but premeditated as she failed to show penitence for her actions even after being called by the Patience Gule, The Production Manager on the 30<sup>th</sup> January, 2013, concerning the occurrence of the 21<sup>st</sup> January, 2013. It is also my belief that, as it was stated by the South African Appeal Court in the case of **SACCAWU V EDGARS GROUP OF COMPANIES(1993) 2 LCD 91 ILJ**, that “an employer is entitled to set reasonable standards to which an employee must comply.”

5.17 It is my finding that the Applicants dismissal was procedurally fair. I make the following order.

## **6. AWARD**

- 6.1 I find that the Applicant’s dismissal was substantively and procedurally fair.
- 6.2 The Applicant’s claims are accordingly dismissed.
- 6.3 There is no order for costs.

**DATED AT MANZINI, ON THIS .....JULY, 2017.**

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**NONSIKELELO DLAMINI**  
**CMAC ARBITRATOR**