IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 12/2004**

In the matter between:

NANA MDLULI **Applicant**

and

CONCO SWAZILAND LIMITED **Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**SIPHO MADZINANE**
FOR RESPONDENT	**:**	**ZWELI JELE**

J U D G E M E N T – 24/03/2009

1. The Applicant was employed by the Respondent in March 2001 as a Customer Services Representative ("CSR"). She resigned from her employment by letter dated 1st September 2003 and reported a dispute in terms of section 85 (1) of the Industrial Relations Act 2000, alleging that she had been constructively dismissed. The dispute was certified as unresolved after conciliation by the Conciliation, Mediation and Arbitration Commission, and the Applicant has applied to the

Industrial Court for determination of the unresolved dispute. She is claiming payment of statutory terminal benefits and maximum compensation for unfair dismissal. Two other claims for car allowance (running and capital) were not canvassed in evidence nor persisted in by the Applicant.

2. The Respondent admits in its Reply that the Applicant resigned from its employ but denies that she was constructively dismissed.

3. Section 37 of the Employment Act 1980 provides as follows:

"When the conduct of an employer towards an employee is proved by that employee to have been such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves his employment, whether with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by his employer."

4. In order to qualify for the relief she has claimed, the Applicant is required to establish, on a balance of probabilities, that the conduct of the Respondent towards her was such that she could not reasonably be expected to continue in her employment. The test for establishing a constructive dismissal was well-formulated in the following terms by the South African Labour Appeal Court in **Pretoria Society for the Care of the Retarded v Loots (1997) 18 ILJ 981 (LAC):**

"When an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfill what is the employee's most important function, namely to work. The employee is in effect saying

that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned."

5. We shall now analyze the circumstances and events leading to and surrounding the resignation of the Applicant in order to determine, in the light of section 37 of the Act and the test expounded above, whether she has discharged the burden of proof resting upon her.

6. The Applicant is a woman aged 38 years. Her duties as a CSR involved servicing the Respondent's customers and ensuring that their product requirements were fulfilled. The Applicant worked closely with the Respondent's production, marketing and dispatch teams, and she was the contact point for customers' orders and queries. She was given her own portfolio of customers, and she was responsible for maintaining a high level of customer satisfaction by arranging transport and delivery of the correct product within the appropriate time line.

7. The Respondent produces beverage concentrates at its plant in Swaziland, and its product is shipped to bottler customers around the world, including Africa, Europe and Australasia. Different bottlers have different requirements with regard to the constituents and quantities of the product.

8. When the Applicant was first employed as a CSR, she attended an intensive internal training course for 2 weeks to introduce her to the relevant computer systems and fundamentals of her job. She was

given a portfolio of 13 customers in South Africa, and in the beginning she worked closely with a mentor learning how to service the needs of these particular customers. Since these customers were within the common customs and monetary area, shipping and export formalities were relatively simple and straightforward, and delivery was effected by road transportation.

9. An appraisal of the Applicant's performance, carried out by her supervisor the Customer Services Manager Khanyisile Simelane at the end of March 2003, indicates that the Applicant's performance successfully met the Respondent's expectations in all areas. The Applicant was rewarded with a merit salary increase of 11.7%.

10. Khanyisile Simelane testified for the Respondent that during this appraisal the Applicant stated that she was ready to undertake more challenging responsibilities. This was never put to the Applicant whilst she was in the witness box, but such a statement would certainly be consistent with our impression of the Applicant as an ambitious and serious-minded person who set high personal standards and placed great store on being valued as a high performer.

11. In about February 2003 one of the CSRs left the company. She had been handling a portfolio of customers from Kenya, New Zealand and Australia. A CSR from Ireland called Aine Walsh was brought in to relieve her temporarily until a replacement had been recruited. In March 2003 the Applicant was designated as the replacement.

12. Compared to the Applicant's South African portfolio, this new foreign customer portfolio involved new and varied product specifications and different lead times. It also involved different and more complex

shipping and export documentation and transport logistics, because the product was dispatched to these customers by sea. A new skill of virtual packing of the transport container by spreadsheet was required. The portfolio was also regarded as highly sensitive because the New Zealand and Australia bottlers had been dissatisfied with previous poor service they alleged to have received from the Respondent's sister plant in Ireland. The Respondent was now supplying these customers, who had to be handled with special tact and care.

13. The Respondent's Training Policy requires that training shall precede any transfer to a new area or new role. The Applicant duly trained a new CSR to take over her South African portfolio, but she complains that she was given inadequate training to equip her to meet the challenges of her new portfolio.

14. It is common cause that Aine Walsh, who relieved the CSR that left the company, was herself not familiar with the service requirements of these particular export customers, and she received continuous training for two weeks during which she also "shadowed" the CSR who was leaving whilst she serviced her customers. Aine was then supposed to train the Applicant to take over from her before she returned to Ireland in early April 2003.

15. The Applicant says she did not receive the necessary training, for the reason that up until Aine left she was not released from her daily duties servicing the South African bottlers. She was unable to find time in her busy daily schedule to receive training or to "shadow" Aine. On 4th April 2003, when the Applicant was about to assume her new duties she sent a somewhat desperate email to her manager Khanyisile Simelane which states as follows:

"*Khanyi*

I am finding it very difficult to undergo training and at the same time carry my daily duties (as normal). When I agreed to take over Australia, New Zealand and Kenya I thought I would be freed from my duties so as to fully concentrate on training and hand-over.

You have said I should make time to spend with Aine, so as to get trained. Its not working I cannot spend a bit of time training. When handling ones customers there is no spare time.
In as much as I am a CSR and familiar with the programmes that are used on a daily basis i.e. Prevail and MFG/PR. The other things are very new to me container optimizing spread sheet, performer invoice, consolidating containers and the products are not the same as the ones sold to South Africa.

I only think it's fair that I be given enough time for training. Take for example Aine had two weeks training (bear in mind that she is also a CSR) without any other duties to perform. She was concentrating on training and working closely to Khosi.

These customers are very sensitive there is more room for error. So basically what I am saying is that I feel I have not had enough time to be trained and am not ready to take over yet.

Please review my situation."

16. The Applicant testified that despite her unequivocal statement that she was not ready to assume her new duties, and her plea to be given time for training, Khanyisile insisted that she take up the new role and promised to supervise her closely as she performed her new duties.

17. Khanyisile in her evidence insisted that the Applicant had received adequate training before the new job was handed over to her. This suggestion is patently untrue. It is obvious from emails sent by Aine that she had not even commenced training the Applicant by 2nd April

2003. In response to Applicant's email of 4th April stating that she has not had enough time to be trained, Khanyisile emailed back: ***"Point taken,*** *let's discuss the handover today"* (emphasis added). At a subsequent meeting on 18th July 2003 (which we deal with in more detail below) Khanyisile expressly acknowledged the Applicant's concern that she had received inadequate training.

18. Khanyisile was unable to produce any Training Register entry recording any training that Applicant received before taking up her new role. She produced a draft shipping manual for Australia which she referred to as Aine's "training programme." This document merely sets out the customer profile and supply procedures for a single bottler customer, and cannot by any stretch of the imagination be regarded as a training programme. The Applicant says she did receive this draft shipping manual from Aine but it was not properly explained to her.

19. Khanyisile agreed that she prevailed upon the Applicant to commence her new job on the assurance that she would closely supervise and mentor her. This was in breach of the Respondent's Training Policy, which expressly provides that the Applicant had to be trained to competency level 2 before she could assume her new job/role. Competency level 2 is defined as competency to "*perform without supervision (fully trained)",* yet Khanyisile required her to "*perform under supervision*", which is competency level 1 and insufficient in terms of the policy to qualify the Applicant to assume her new role.

20. In our view the Applicant was thrust unprepared into a position of great responsibility and sensitivity without proper training and contrary to the Respondent's laid down policies.

21. On 22nd April 2003 the Applicant sent an email to Aine in which she commented in relation to her new duties,

> "I'm trying not to drown. I have had two complaints ……. I am getting used to the idea of filling-in containers… I didn't find it *too difficult, Khanyi cross checked my work, and was happy with it…."*

22. The Applicant testified that the optimism she expressed in this email belied the true position. She had to learn everything through trial and error. She found the new documentation complex, she was still learning to pack virtual containers on her computer, and she was not familiar with the complex process of preparing orders for delivery. Her inexperience and lack of training meant that all her duties took too long and she felt overloaded with work. She often had to work as late as 10 p.m. To compound her difficulties another CSR was absent on extended sick leave and Khanyisile allocated some of her duties to the Applicant as well.

23. The Applicant testified that she verbally raised her concerns with Khanyisile on a number of occasions and expressed that she was floundering in the absence of proper training. She said her concerns were simply ignored. The situation was intolerable to her and she was forced to raise a grievance with the Human Resources Department, which bears overall responsibility for the training function of the Respondent in terms of the Training Policy.

24. The Human Resources Department convened a meeting on 18th July 2003, attended by the Applicant, Khanyisile and Bonginkosi Nsingwane, the Human Resources Officer. The minutes of this meeting

record that the Applicant raised concerns about her inadequate training and her work overload. The minutes record that *"she expressed her grief that this has caused a lot of frustration, corroded her confidence and self esteem to the extent that she is currently taking medication to deal with the stress. She regards this as grossly unfair and that under the circumstances she is bound to fail in meeting the requirements of her job."*

25. The minutes record that Khanyisile acknowledged the Applicant's concerns, and it was resolved that two interventions would be made to address the Applicant's grievance:

25.1. Khanyisile would develop a training schedule to guide the Applicant's performance and document her competencies for the job.

25.2. The Kenya customer accounts would be handed over to another CSR, Gabsile, and the Applicant would develop a two weeks training plan for this purpose.

26. Khanyisile told the Applicant to seek help from her whenever she faces performance problems, and in this regard it was agreed that the Applicant would complete her skills gap analysis and annotate all her critical areas of development.

27. The Applicant said that after this meeting she prepared a training programme for Gabsile and she trained her during the period 6-15 August 2003 to take over the Kenya bottlers. However Khanyisile did not prepare any training programme for her. From the 18th July until

she went on leave on 15th August 2003 she received no further training whatsoever.

28. On about 11th August 2003 the Applicant received a complaint of short supply from a New Zealand customer. She notified Khanyisile of the complaint on 15 August 2003 and confirmed that there had been a short-shipment, which she had arranged to make good. On the same day she proceeded on 2 weeks leave.

29. On returning from leave on 1st September 2003, the Applicant received an email from Khanyisile with regard to the customer's complaint. Khanyisile had sent this email at 20:27 hours on 15 August 2003 after the Applicant had proceeded on leave. The email contained a stern reprimand for not paying attention to detail when containerizing orders and failing to cross check the accuracy of her work. The email concludes:

"*This serves as a verbal warning for you to pay due diligence when handling your orders going forward. This warning will be documented and filed as per disciplinary procedure. If this re-occurs, it will result in a more severe disciplinary action."*

30. The Applicant said that the order for which she received this warning was dispatched before the meeting of the 18th July 2003. Khanyisile had acknowledged on the 18th July 2003 that the Applicant was inadequately trained and overloaded with work, so she regarded the issue of a verbal warning as grossly unfair and evidence of bad faith. Moreover, according to the Applicant, Khanyisile herself had

supervised and cross-checked the defective order, so the warning made the Applicant a scapegoat for Khanyisile's own shortcomings.

31. Khanyisile in her evidence did not deny that she supervised and cross-checked the order, but she said the Applicant made errors when entering the order into the system, and this was the responsibility of the CSR, not the manager.

32. In the view of the court, when Khanyisile assigned a competence level 1 employee without adequate training to handle a sensitive and complex portfolio on the basis that she would closely supervise and cross check her work, Khanyisile assumed full responsibility for any errors that occurred. Having acknowledged on 18th July 2003 that the Applicant was inadequately trained and overloaded with work, it was grossly unfair for her to reprimand the Applicant and give her a verbal warning. Although we do not believe Khanyisile deliberately set the Applicant up to fail, she was responsible for the Applicant's shortcomings. By documenting the verbal warning she was indeed making the Applicant a scapegoat for her own failings. An employee in the position of the Applicant would reasonably regard the verbal warning as a stab in the back.

33. At the same meeting on 1st September 2003 Khanyisile raised a further accusation against Applicant. According to the Applicant Khanyisile accused her of failing to enter an order into the system, and said she was giving her a written warning for this. She told her the documentation for the warnings would be served on her later. The Applicant testified that she felt victimized. She had not been given

any hearing before these two warnings were conveyed to her. Her performance record was now spoiled, despite her repeated requests to be properly trained. She felt very frustrated and upset.

34. The Applicant proceeded to the office of the Human Resources Manager Fazoe Gamedze. She complained to him that she was now receiving warnings even though she had not received the promised training. She says he offered her no assistance. She then decided that she had no alternative but to resign.

35. The Applicant wrote a letter of resignation on the same day and delivered it to Khanyisile. The letter was copied to the Supply Chain Manager, the Human Resources Manager and the Human Resources Officer. It reads:

"Due to continuous pressure that I am subjected to that has resulted to two warnings from you, a formal verbal warning and a 1st written warning (both given to me on the same day 01/09/2003 I still await to sign the two warnings as per our meeting this morning) I hereby tender my resignation effective today 1st September 2003.

This is despite the fact that I have on several occasions voiced out that I am under pressure because of workload and that there was inadequate training given to me when I took over Australia, New Zealand and Kenya customers. I am forced to tender my resignation."

36. Khanyisile in her evidence denied giving the Applicant a 1st written warning and said that according to the company disciplinary policy a

1st written warning could not be issued without a prior disciplinary hearing. The court has listened carefully to Khanyisile's evidence in chief on this issue. She does not say she told the Applicant that a disciplinary hearing would be held. What she told the Applicant was that the consequences of her poor performance "*might lead to a warning*" and that "*documentation as per the disciplinary procedure'* would be served on her. She says that the Applicant came back to her office around midday (before resigning) and asked for the documents, and she stated that they were not ready.

37. Khanyisile says when she referred to documentation she meant a notice to attend a hearing, which would have to be prepared in conjunction with the Human Resources department. However she never conveyed this to the Applicant.

38. It is clear from her letter of resignation that the Applicant genuinely believed that she was being sanctioned without a hearing by a 1st written warning. It is not easy for the court to determine whether this belief was due to a misunderstanding because Khanyisile did not express herself clearly, or whether Khanyisile did in fact sanction the Applicant and later realized that this was contrary to company policy.

39. If there was a misunderstanding, then it is difficult to understand why Khanyisile did not immediately respond to the letter of resignation and make it clear that she had not intended to give a 1st written warning. Instead she waited for 3 days, and then served a notice to attend a disciplinary hearing on the Applicant. In the notice she states that the Applicant's resignation cannot be accepted "*because the reasons you*

have cited as compelling you to resign are unfounded and there is a pending disciplinary hearing that you have to attend."

40. The reason the Applicant cited as compelling her to resign was the continued pressure of work due to her inadequate training and workload. By stating that these reasons were unfounded Khanyisile simply confirmed the Applicant's belief that the Respondent had no intention of giving her the training she required.

41. The Applicant's letter of resignation stated that her employment was terminated with immediate effect. It appears that she continued to report for work under the erroneous impression that she had to serve out a period of notice. The Respondent for its part rejected the resignation and acted under the erroneous belief that its acceptance was required. It is trite law that resignation is a unilateral act that does not require the employer's acceptance in order to bring the employment contract to an end. See **Simon Dludlu v Emalangeni Foods (IC Case No. 47/2004).**

42. The Respondent pressed ahead with a disciplinary charge of "*negligence in carrying out or failure to carry out duties."* The Applicant quit the company before the hearing took place. Nevertheless she was found guilty as charged in her absence and given a 1st written warning.

43. Regarding this neglect of duty for which the Applicant was given a 1st written warning, it was alleged that she failed to inform Gabsile, the CSR who relieved her whilst she was on leave, about a pending order for Australia. The Applicant testified that she did hand over the order to Gabsile, and Gabsile was not called to deny that. It was also alleged

that the Applicant failed to enter the order into the weekly shipping schedule, and to arrange data loggers. The Applicant said she had thought Gabsile would prepare the weekly shipping schedule since she was on leave during the week before shipping. She also said she left it to Gabsile to collect the data loggers from previous shipments. In our view the evidence on this issue simply reinforces the Applicant's claim that she was not properly trained and she was not familiar with all the aspects of her new job. Her shortcomings with the order in question arose from her inexperience and lack of training. Fault for this must again be laid at Khanyisile's door.

44. This disciplinary hearing was a pointless exercise since the employment contract had already terminated. Nevertheless the minutes of the hearing are revealing. In her testimony at the hearing Khanyisile makes no mention whatsoever of the Applicant's lack of training or the resolutions taken at the meeting of 18th July 2003. On the contrary, asked whether there had been any discussions with the Applicant about her performance, "*Mrs. Khanyi Simelane noted that she has held talks with Nana about her performance. The talks have been provoked by a number of logged service defects rates resultant from Nana's negligence in carrying out her duties."* In our view Khanyisile's failure to disclose to the chairman the true reasons for the Applicant's performance failure is a further indication that she refused to recognize the problem that she had herself created, and that she had no intention of taking steps to solve it.

45. After the Applicant had been away from work for a few days, the Respondent - still labouring under the erroneous belief that she was an employee - served her with a fresh disciplinary charge of absenting herself from work. The Applicant responded by letter to say that her

forced resignation still stands, and she again complained about her lack of training, work overload and inexperience. In response, the Human Resources Manager stated:

"We also wish to place on record that the allegations relating to training (or the lack of it), work overload and inexperience are without justification. We are satisfied that you were adequately trained for the job and this was conceded by you, we are also satisfied that the workload was reasonable in the circumstances…."

46. Assuming that this is not mere posturing and expresses the true attitude of the Human Resources Manager, it is not surprising that the Applicant received no assistance from him before she resigned. Like Khanyisile, he refused to pay attention to the Applicant's problem and he had no intention of ensuring that the Applicant received the training promised to her at the meeting of the 18th July 2003.

47. The Respondent has argued that Khanyisile could not prepare a training schedule for the Applicant until the Applicant herself prepared her own skills gap analysis, as she had agreed at the meeting of the 18th July. There is nothing in the evidence or the minutes of the meeting that convinces us that Khanyisile required this analysis before she could prepare a training schedule. As the Applicant said in her evidence, how could she be expected to analyse the skills she needed for a job with which she was not familiar? What she required was training in the procedures and requirements of the job, not her own competencies. She was certainly not asked to prepare the analysis before she received 'training' from Aine. In our view the Applicant's failure to prepare the analysis does not excuse Khanyisile's failure to prepare and implement a training schedule.

48. Mr. Jele for the Respondent has referred us to the case of **Aldendorff v Outspan International Limited (1997) 18 ILJ 810,** wherein it was stated: *"Where employees could reasonably have lodged a grievance regarding the cause of their unhappiness and failed to do so before resigning, they may be hard put to persuade the court or arbitrator that they had no option but to resign."*

See also **Jameson Thwala v Neopac (Swaziland) Limited (Unreported IC Case No. 18/1998)**

49. In **LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre and others (2008) 29 ILJ 356 (LC)**, Basson J added a qualification to this principle:

> "Where it appears from the circumstances of a particular case that an employee could or should reasonably have channeled the dispute or cause of unhappiness through the grievance channels available in the workplace, one would generally expect an employee to do so. Where, however, it appears that objectively speaking such channels are ineffective or that the employer is so prejudged against the employee that it would be futile to use these channels, then it may well be concluded that it was not a reasonable option in the circumstances."

50. The question the court must ask is whether the conduct of the Respondent was such that an employee in the position of the Applicant could reasonably be expected to continue in her employment. In the view of the court, it was reasonable for the Applicant to conclude that the Respondent would never *"reform or abandon the pattern of creating an unbearable work environment"* - see **Pretoria Society for the Care of the Retarded v Loots** (supra at paragraph 4). The

Applicant had a valid complaint of unfair conduct on the part of the Respondent. She raised the grievance with her supervisor to no avail. She then referred the grievance to the Human Resources Department. The Respondent says this was not correct in terms of the grievance procedure – she should have approached Khanyisile's supervisor. The grievance procedure has not been placed before the court. We do however note that the Human Resources Department has overall responsibility for training at the Respondent's enterprise. In our view it was appropriate and correct for the Applicant to refer her grievance to the very department that had the responsibility and authority to resolve it. Yet after resolving the grievance on paper this same department failed to follow through and ensure that the undertakings of the 18th July were kept and training was carried out. In the meantime the Applicant was expected to perform her duties to a standard for which she had not been equipped, and when she failed to meet this standard she was punished. We have already found that the issue of the verbal warning was oppressive and done in bad faith. The Applicant's belief that she had immediately thereafter been issued with a 1st written warning – a belief which we cannot find was unreasonable in all the circumstances – must have increased her sense of injustice to an intolerable degree. When her appeal to the Human Resources Manager for help was met with indifference, the Applicant was entitled to conclude that the Respondent had no genuine intention of addressing her intolerable working conditions. The subsequent conduct of Khanyisile and Fazoe Gamedze indicates that this was a reasonable and accurate conclusion.

51. It is absurd to suggest that the Applicant should have followed the grievance procedure up the ladder to the Supply Chain Manager or the

Managing Director himself. She was entitled to expect her fundamental need for training to be recognized and addressed in good faith by the managers tasked with that very function, without intervention from on high. It is the finding of the court that the Applicant could not reasonably have been expected to continue in her employment, having regard to all the circumstances of the Respondent's conduct. Her services are deemed to have been unfairly terminated by the Respondent.

52. The Applicant is entitled to payment of her statutory terminal benefits, namely notice and additional notice and severance allowance. With regard to compensation for unfair dismissal, we take into consideration the following factors:

- the Applicant had worked for the Respondent for a relatively short period of time;
- before her employment was made intolerable by the Respondent's failure to give her proper training, the Applicant had a clean disciplinary record, and she had been appraised as meeting the standards and expectations of the Respondent. We accept that she was a good performer and that she had a fruitful career ahead of her with the Respondent if her prospects had not been frustrated;

the Applicant's self-confidence was undermined by the Respondent's conduct and she endured considerable stress due to her intolerable working conditions;
the Applicant was unable to find alternative employment for a period of about 12 months.

We award the Applicant 10 months salary as compensation for unfair dismissal.

53. Judgement is entered against the Respondent for payment to the Applicant as follows:

Notice pay	E 11 648.28
Additional notice pay	2 119.66
Severance allowance	5 297.90
Compensation	116 482.80
	E 135 548.64

The Respondent is also ordered to pay the Applicant's costs.

The members agree.

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PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT