

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

**Held in Manzini**

**CASE NO: MNZ 619/07**

In the matter between:

**MARY TSABEDZE**

**Applicant**

**AND**

**SHOPRITE CHECKERS**

**Respondent**

CORAM:

**ARBITRATOR** : **THULANI DLAMINI**  
**FOR APPLICANT** : **S. TSABEDZE**  
**FOR RESPONDENT** : **S. DLAMINI**

ARBITRATION AWARD

**1. Parties and Hearing**

The Applicant in this matter is Mary Tsabedze an adult Swazi female and former employee of the Respondent. The Respondent on the other hand is Shoprite Checkers (PTY) Ltd a company duly incorporated in terms of the company laws of Swaziland and having capacity to sue and be sued in its own name. The arbitration hearing proceeded at different dates between the 19<sup>th</sup> May, 2008 and October 2008 when it was finally completed.

**2. BACKGROUND OF DISPUTE AND ISSUES TO BE DECIDED**

The dispute before the Commission relates to the alleged unfair dismissal of the Applicant by the Respondent in April, 2007, following a disciplinary hearing. It (dispute) was reported to the commission in terms of section 76 of the Industrial Relations Act, 2000 (as Amended) and was referred to conciliation, where, however, the parties failed to reach an amicable settlement of same. As a result of this, a certificate of unresolved dispute was issued and the parties decided to refer the matter to arbitration, hence my appointment to arbitrate herein. I am required to decide whether the dismissal of the Applicant by the Respondent was procedurally and substantively fair or not.

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**2. SUMMARY OF EVIDENCE**

**APPLICANT'S CASE**

**2.1 TESTIMONY OF MARY TSABEDZE.**

The Applicant stated under oath that she was employed by the Respondent as a shelf packer on the 07<sup>th</sup> August 1992. She was in continuous employment until April 2007 when she was allegedly unfairly dismissed by the Respondent following a disciplinary hearing where she had been charged with gross misconduct. The alleged misconduct emanated from an incident where she had used company stock to remove a stain on her uniform without authority. Her evidence was that on the 22<sup>nd</sup> March 2007 she was at work as usual and on this day she and other staff were re-arranging the display shelves. Apparently some sticky substance got stuck on her skirt and left an ugly stain. She then approached one of her colleagues, Gerald Dlamini, for assistance in removing the stain. According to Tsabedze her sole intention in approaching Gerald was to get a bit of some powdered soap (breakages) to remove the stain. However Gerald advised her that powdered soap would not remove the stain and advised instead that she uses a stain remover.

There were two stain removers he allegedly pointed out, one was blue in colour and the other was pink and its brand name was 'vanish'. Tsabedze went on and testified that as she was reading

instructions on the blue container remover Gerald took the Vanish' stain remover, applied it to the stain at the back of her skirt and directed her to rub the stain off, which she did and the stain was removed.

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Then the Regional and Branch Managers approached them and asked what was going on and she explained. She was then called into the Branch Manager's office and she denied having applied the remover herself but instead explained" that it had been applied by Gerald. She was ordered to write a statement on what had occurred and she did. The statement was handed in as part of her evidence and marked exhibit 'A'. In the statement, recorded on 22 March 2007, she states as follows;

"I had a problem of my uniform a skirt which had a stain at the back which I think I sit on top of bostick when we were removing the shelves so the stain was very starbon and I tried to ask one of my colics Gerald Dlamini the stain remover his shelf, he showed me and I started using it to remove the stain at back of my skirt. So Mr Skuman came and said what are we doing during working hrs and I told him I was trying to remove the stain which I had on my skirt. That's all. (Signed Mary Tsabedze)" (sic)

Thereafter she was suspended on a Thursday and informed to come for a disciplinary hearing the following Monday. Apparently she had organised a union official to represent her at the hearing but was advised that she had to secure representation by a co-employee and which she did in the name of Owen Dlamini. The hearing proceeded and Gerald was amongst the witnesses who testified against her. In his evidence at the hearing Gerald denied having applied the remover on Tsabedze's skirt. Apparently after the first sitting the hearing was adjourned to some other day but before the set day she was called to the Branch Manager's office where Mr. Mkhonto, the manager, advised

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her to plead guilty so that the chair person of the hearing could be lenient with her, which she declined to do. The reason she declined was because she was not the one who applied the remover but rather it was Gerald. She was also advised by a Mrs Dube, the Administration Manager, to plead guilty but still she declined to do so. Tsabedze's further evidence was that at the continuation of her hearing she still maintained her innocence but was nonetheless found guilty and dismissed.

She now claims, against her employer, as follows;

- a) Notice pay
- b) Additional notice pay
- c) Severance allowance
- d) Leave pay (10 days)
- e) Pension
- f) Maximum compensation for unfair dismissal.

Under cross examination Tsabedze maintained that the stain remover was applied on her skirt by Gerald and she only rubbed it off thereafter. Under cross examination she also stated that she was forced by the Manager to write the statement detailing the occurrences of the day. When questioned further on how the Manager had forced her, she stated that he told her what to write. When asked further if Mkhonto had dictated to her what to write she first responded by saying she can not exactly recall then later said 'in a way he was dictating because he was forcing me'. It was put to Tsabedze that in fact at the hearing she admitted to having used the vanish and in this regard was referred to page 19 of the minutes where she admits having used the stain remover with the sole purpose of removing the

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stain. To this statement she stated that she confirms having admitted but was 'forced' by the two Managers, Mkhonto and Dube. The Applicant was then referred to page 26 of the minutes of the disciplinary hearing where she states as follows;

"...I contacted different people with different opinions. So those people ended up advising me to deny

that I used the stain remover. It was not my aim to disagree with the charge but as I was being advised by different people I ended up disagreeing (to) what I exactly did/written down in my statement. Therefore I kindly request my company to forgive me, especially for being unfaithfully on the 26<sup>th</sup> March whereby I deny using the vanish..." (sic)

After the evidence and cross examination of the Applicant her representative indicated that they wished to have subpoenaed the Chairperson of the disciplinary hearing, Albert Fakudze. However on the date allocated for the continuation of the arbitration hearing it emerged that the witness could not make it on the day. The Applicant's representative then elected to close the Applicant's case.

That was the Applicant's case.

### **3. RESPONDENT'S CASE**

#### **3.1 TESTIMONY OF SMANGELE DUBE**

This witness introduced herself as the Administration Manager of the Respondent at the Bhunu mall branch. She went on to state under oath that she is familiar with the Applicant's case. According to her she

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spoke with the Applicant and informed her that, in her opinion, if she had pleaded guilty to the charge and apologised for having used company stock without authority maybe she would have gotten away with a caution. Dube went to state that she even made the Applicant an example of two employees who had committed an offence of signing an advance salary without going through the correct procedures. Apparently the two employees pleaded guilty at the hearing and were cautioned. She stated further that she and the Applicant's representative wondered how the Applicant had decided to plead not guilty when she had made a statement admitting to having committed the offence.

Under cross examination this witness was asked on her intentions of advising the Applicant to change her plea to that of guilty. She vehemently denied having advised the Applicant to change her plea, especially because she had already entered her plea of not guilty. According to her she was only informing the Applicant of her opinion and not that she should change her plea. It was put to this witness that the Applicant changed her plea following her advice, and she still denied having so advised the Applicant and still maintained that she was only informing her of her (Dube's) opinion.

#### **3.2 TESTIMONY OF FANIE SCHOEMAN**

This was the next witness to testify on behalf of the Respondent. He introduced himself as the Regional Manager of Shoprite stores in the country. His evidence under oath was that on the 22<sup>nd</sup> March 2007 he was at the Respondents Manzini Bhunu mall branch. As he was walking down the back aisle he noticed the Applicant using on, her skirt, a stain

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remover called 'vanish'. Apparently the stain remover had been taken by the Applicant off the shelf without being paid for yet it was on display for sale to customers. He went on to mention that as a profit oriented business the company makes huge losses from stock that can not be sold to customers because it has either been used or damaged. Under cross examination and re-examination Schoeman maintained that the Applicant applied and used the stain remover on her skirt.

#### **3.3 TESTIMONY OF GERALD DLAMINI**

This witness introduced himself as an employee of the Respondent currently holding the position of shelf packer. He stated under oath that on the 22<sup>nd</sup> March 2007 whilst working in his aisle, in the powdered soap section, he was approached by the Applicant who asked him on what item could best remove a stain on her skirt. He showed her 2 (two) stain removers and recommended the pink coloured one (vanish) as the best. He then left her and went about his normal duties and as such did not see what she did with it. Then the two Managers approached the Applicant and spoke to her.

The Applicant's representative elected not to cross examine this witness. In my capacity as adjudicator in this matter I then questioned the Applicant about the allegation that he was the one who applied the stain remover to the Applicant's skirt and he vehemently disputed such. According to him he only showed her the best remedy for the removal of the stain as per her request. He went on to state that at the time the Applicant was in mourning gowns (abemnyama) following the demise of her husband and in the Swazi culture it is considered taboo to touch a female in such gowns.

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### **3.4 TESTIMONY OF MOSES MKHONTO**

Having been duly sworn in, this witness stated under oath that currently he is employed as a manager of the Respondent's Mbabane shop and that in 2007 he was based at the Respondent's Manzini shop. He went on to state that on the 22<sup>nd</sup> March 2007 the Manzini shop was being re-merchandised. As he was going about his duties he was called by the Regional Manager, Schoeman, to the soaps and spots removals aisle. When they got there they found the Applicant and Gerald, Gerald was packing merchandise in the shelf and the Applicant was rubbing her skirt. Schoeman asked them what they were doing and the Applicant responded by saying she was removing a stain from her skirt and that she had been shown a stain remover by Gerald. This witness was then instructed by the Regional Manager to charge the Applicant. He then called her to his office and instructed her to record a statement about what had happened. He denied having dictated to the Applicant what to write in her statement. He also denied having forced or coerced her into writing the statement but rather that she wrote the statement herself and freely and voluntarily. Mkhonto testified further that the Applicant was well aware that as employees of the Respondent they were not supposed to use merchandise on display for sale to customers as this impacted negatively on profits.

Under cross examination this witness denied having forced or coerced the Applicant into writing the statement. He was asked why Gerald was not charged like the Applicant and his response was that the Applicant had informed him (Mkhonto) that she wanted something to remove the stain on her skirt and Gerald only pointed out the stain remover. He went further and explained that had the Applicant first

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paid for the stain remover there would not have been an issue at all. On the issue of representation he explained that the Applicant had been informed of her right to representation by a co-employee and when she brought somebody not a member of staff that person was turned back as the company's policy did not allow such.

That was the Respondent's case

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

In his closing arguments the Applicant's representative reiterated the contention that the Applicant's dismissal was procedurally and substantively unfair.

As a starting point, Mr Tsabedze, for the Applicant, relied on the minutes of the disciplinary hearing. First he attacks the credibility of Gerald whom he says was labelled as not being a cooperative and credible witness by the chairperson of the disciplinary hearing. He then *referred* me to a statement made by the Regional Manager, Schoeman where at page 16 of the minutes he allegedly said he saw Gerald pouring the stain remover on the Applicant's skirt. He then further argue that the chairperson at the disciplinary hearing in fact concluded that Gerald was the one who applied the remover but instead of exonerating her he found her guilty.

Tsabedze went further to argue that the statement made by the Applicant in which she admits to having committed the offence was not made freely and voluntarily. He stills maintains that she was coerced by Mr Mkhonto and Mrs Dube, and was further threatened by the

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anger of the Regional Manager. He therefore argues that the Applicant changed her plea to that of guilty because of the advice of the two Managers and as such was coerced.

Another line of argument by the Applicant's representative was that the chairperson of the disciplinary hearing unilaterally changed the initial offence the Applicant was facing. His argument is that he added another charge when finding the Applicant guilty in that he said she acted dishonestly by not telling the truth from the beginning of the inquiry.

On the procedural aspect of the dismissal the Applicant's representative argues that the Applicant was not given enough time to prepare for her defence after the initial representative she had secured was turned back.

He further finds that the chairperson of the hearing was not impartial because he failed to notify the Applicant that the hearing would not be proceeding on the next date it had been postponed to, and in the process allowed the two managers to take advantage of the Applicant and coerce her into changing her plea.

Tsabedze also went on about the chairperson having not taken into account all circumstances of the case like the fact that the Applicant sustained the stain in the course of her duties and that she had nothing to gain in removing stain. He also brings to the fore the argument that the sanction meted out on the Applicant was rather a harsh one taking into account all the circumstances of the case.

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- (a) That the reason for the termination was one permitted by section 36; and
- (b) That, taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee".

The provisions of the above quoted section have to be read together with those of section 36 of the same Act, which spells out the fair reasons for the termination of an employee's services.

Perhaps one needs to point out that an arbitration under the auspices of CMAC is a hearing de novo and that the decision of the arbitrator is not reached with reference to the evidential material that was before the employer at the time of its inquiry, but on evidential material placed before the arbitrator during the arbitration hearing. As such in arriving at my decision I will only use evidential material presented to me during the arbitration hearing.

Coming to the case at hand, it is common cause that the Applicant had a problem of a stain on her skirt. She then approached a colleague, Gerald Dlamini, for assistance. She alleges that Gerald showed her a stain remover and thereafter poured it on her skirt and instructed her to rub off the stain, which she did. Against that evidence is a statement she allegedly wrote admitting committing the offence. Interestingly in that statement she does not mention that Gerald applied the stain remover to her skirt. She stated in her evidence in chief and under cross examination that she did not make the statement freely and voluntarily. According to her she was forced by the Branch Manager, Mkhonto, to admit having committed the offence.

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When questioned by the Respondent's representative as to how exactly she was forced she stated that Mkhonto had said she should write what Schoeman had seen them do. Dlamini, for the respondent, probed her further asking if Mkhonto was dictating what she had to write in the confession statement and her response was that he told her to write her statement so that it reflects what Schoeman was alleging to have seen.

I must state that I am finding it hard to comprehend the Applicant's assertion in this regard. In fact she did not strike me as a credible and truthful witness. Her responses under cross examination were not coherent. When it suited her she could not recall some of the occurrences of the day the offence is alleged to have occurred. For instance Dlamini for the Respondent asked her if Mkhonto was dictating the confession she made and her response was that she could not recall because she was confused. Then later on it was put to her that she used the stain remover on her own and without authority from Gerald her response was; that's not true, he gave me permission to use it'. And her response herein is

in line with her statement where she admits having used the stain herself and not that it was applied by Gerald on her skirt, and clearly this was a contradiction in her evidence. When confronted about her admission during the disciplinary hearing, after first having pleaded not guilty, she alleged that she was forced by the branch and administration managers to admit. This I found quite absurd. If indeed she had a clear conscience about not having applied the stain remover herself why not state that in her statement? She alleges that Mkhonto told her to write what Schoeman had seen them do. Then a question which props up is, why did she not write that Schoeman saw Gerald pouring

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the stain remover on her skirt, if indeed that is what happened? Clearly the whole story by the Applicant is a fabrication.

As earlier pointed out, Gerald was called in to testify in this case. His evidence was straight forward and to the point. He admitted having showed the Applicant what best could remove the stain on her skirt but denied having played any part in the application thereof on the skirt. He pointed out that being a Swazi male he could not touch the Applicant since she was in her mourning gowns. I found him to be a truthful and reliable witness. This is the same witness the Applicant and her representative chose not to cross examine, and in terms of practice evidence left unchallenged is taken as is unless there are compelling reasons not to, and there are none in this case. Clearly therefore, for the foregoing I find that substantively the dismissal of the Applicant was fair.

Even on the procedural side it is also my finding that there was nothing amiss. The Applicant was given sufficient notice of the hearing, was allowed representation and reasonable time to prepare herself, so she could present her side of the story.

A question which however lingers on my mind is that of whether the decision to dismiss the Applicant was an appropriate sanction herein? Perhaps as a starting point in this regard one can borrow the words of Tip AJ in *Standard Bank SA Limited v CCMA and others* [1998] 6 BLLR 622 at paragraphs 38-41 where he states;

"It was one of the fundamentals of the employment relationship that the employer should be able to place

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trust in the employee... A breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the employment relationship and is destructive of it".

That decision was followed by Mlambo J (as he then was) in *Metcash Trading Limited t/a Metro Cash and Carry and another v Fobb and another* (1998) 19 IU 1516 (LAC) at paragraphs 16-17 where the learned judge found that in relation to the consumption of a single 250 ml bottle of orange juice "theft is theft and does not become less because of the size of the article stolen or misappropriated".

The principle on which these decisions are based is encapsulated in a dictum of Conradie JA in *De Beers Consolidated Mines LTD v Commission for Conciliation, Mediation and Arbitration and others* (2000) 21 ILJ 1051 (LAC) at paragraph 22 where he states;

"A dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal (or misappropriate) small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise."

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In the present case the uncontested evidence revealed that the Respondent's business received numerous complaints about used items in the shelves and huge losses as a result of shrinkages.

#### **4. CONCLUSION**

Our law of dismissal is governed by section 42 of the Employment Act read 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 was fairly terminated rests with the employer, and it does not only end there but such termination has to be one permitted by section 36. It is therefore my well considered view that in this case the inherent probabilities support the Respondent's assertion that the dismissal of the Applicant was procedurally and substantively fair.

#### **5. AWARD**

In the result I accordingly find that the dismissal of the Applicant was procedurally and substantively fair. And in the circumstances the award I make is that the Applicant's claim against the Respondent is dismissed in its entirety save for the claim for pension. The Respondent's Human Resources office should assist the Applicant in processing and claiming her pension contributions forthwith. I make no order as to costs.

**DATED AT MANZINI ON THIS ..DAY OF JANUARY 2009.**

**THULANI DLAMINI**

**CMAC COMMISSIONER**