

IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

HELD IN MANZINI SWMZ 78/09

In the matter between:

Thuli Motsa Applicant

AND

**OHN Investment (Pty) Ltd Respondent
t/a Central Filling Station**

CORAM:

**Arbitrator Mr Robert S. Mhlanga
For Applicant Mr D. Msibi
Foe Respondent Ms Gcebile Lubisi**

ARBITRATION AWARD

VENUE : ENGULENI BUILDING MANZINI CMAC OFFICES, GROUND FLOOR

1. DETAILS OF HEARING AND REPRESENTATION

1.1 The Applicant is an adult Swazi female and she was duly represented by Mr David Msibi.

1.2 On the other hand, the Respondent Company was represented by Ms Gcebile Lubisi.

2. BACKGROUND OF THE DISPUTE

2.1 The dispute at hand arose from the alleged unfair dismissal of the Applicant by the Respondent. The Applicant was dismissed by the Respondent following a disciplinary hearing against the Applicant.

2.2 Subsequently the Applicant reported a dispute to the Commission in terms of Section 76 of the Industrial Relations Act, 2000 (As amended).

2.3 The dispute was conciliated upon, but it was not resolved, as a result a Certificate of Unresolved Dispute was accordingly issued by the Commission. The parties by consent referred the dispute to Arbitration, and I was duly appointed to arbitrate in this matter.

3. ISSUE TO BE DECIDED

The issue to be decided herein is whether or not the Applicant's dismissal was fair and reasonable in the circumstances of the case.

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4. SUMMARY OF EVIDENCE

4.1 APPLICANT'S CASE

THULI MOTSA'S TESTIMONY

4.1.1 The Applicant, Thuli Motsa gave her testimony under oath. She testified that she was employed by the Respondent on the 1st March, 2004 as a Petrol Attendant. She said that she was later promoted by the Respondent to be a cashier. She stated that she worked for one (1) year as a Petrol Attendant before her promotion.

4.1.2 The Applicant testified that on the 13th December, 2008 her services were terminated by the

Respondent. The Applicant stated that at the time of her dismissal, she was earning E1, 419-00 per month.

4.1.3 The Applicant, prior to her dismissal, was subjected to a disciplinary enquiry, wherein, she was charged with three (3) counts of misconduct namely;

- (a) First count she was charged with till shortages in that on the 29th October, 2008 whilst she was on shift three the till shortage was E331-30, and again on the 30th October, 2008, on the same night shift she was short by E300-50, and lastly on the 4th November, 2008, on the same shift she was short by E1880-00.
- (b) Second count, the Applicant was charged with failure to ring on the till a large packet of simba chips and three (3) loose cigarettes. It was alleged that on the 5th November, 2008 at about 3:15am she sold a large packet of simba chips,

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but she did not ring it on the till nor did she collect the money for same. On the same date, that is, 5th November, 2008, it is alleged that the Applicant sold three (3) loose cigarettes, but again she failed to ring it on the till.

- (c) Third count the Applicant was charged with failing to properly account for sales, in that "on the 5th November, 2008, there were several occasions when she received money from customers/attendants but did not bother to check if the money received was correct, which action could result in shortages in her till".

4.1.4 Following the disciplinary hearing, the Applicant was found guilty on all the three (3) counts. But the Chairman recommended that the Applicant be dismissed for count 1, whilst given a written warning for counts 2 and 3 respectively.

4.1.5 The Applicant testified that, she appealed against the initial decision hereof but unfortunately, on appeal the initial verdict was confirmed or upheld.

4.1.6 The Applicant stated that she was not in good terms with her supervisor. She said that the tension between her and the supervisor had been going on for more than six (6) months. The Applicant stated that she reported this to the Respondent's management. She alleged that, firstly, she lodged her grievance verbally, but seeing that there was no response, she then wrote three (3) letters as a follow up; again the Respondent failed to respond to her letters and or address her grievance.

4.1.7 It was the Applicant's testimony that due to the fact that she was not in good terms with her

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supervisor (coordinator), in the process the company procedures pertaining to safe drops were breached. The Applicant explained that it was the company procedure that a cashier was required to make regular deposits into the safe of monies in her custody or in the till which amounted to E2, 000-00. She said that as per the company procedure, she would first count the money, record it and then the supervisor or coordinator would double check it by counting it again in her presence and if satisfied, she would sign the safe drop and thereafter deposit the money into the keyless safe.

4.1.8 The Applicant further stated that, in her case, the aforesaid procedure was no longer followed, because the supervisor used to count the money alone and or in her absence. The Applicant also testified that she used to be informed on the following day, when for instance, she had a shortage. The Applicant said that she could not figure out as to what caused the shortages. She said the issue of shortages was a cause for concern for all the staff, such that this issue was raised with the management in a meeting. She said that no solution to the issue of shortages was found. The Applicant denied that she was short as alleged in the charge sheet.

4.1.9 The Applicant testified that due to the recurring shortages, she even requested the management to take her back to her previous position of being a petrol attendant. She said that the Respondent's management refused because it felt that this would be tantamount to a demotion, which would be in contravention of the law.

4.1.10 With regard to the shortage of E1, 880-00, the Applicant testified that in actual fact, on the day in question she forgot to make a safe drop of the sum of E2, 000-00. She said that she left the said sum of money on the table when she knocked off. The Applicant suspected that the money might have been taken by the supervisor, more so because they were not in good terms. The Applicant alleged that her supervisor was never questioned about the loss of the said sum of E2, 000-00.

4.1.11 On the other hand, the Applicant testified that another thing which might have contributed to her shortages, could be fatigue or exhaustion and or work-related stress, due to the fact that she was over worked, because one of the cashiers was on leave. She also alleged that another thing is that the till or cash register used to have technical faults which resulted in wrong screening of the price of the items, and this could also lead to till shortages. On the other hand the Applicant admitted that as a cashier, she was accountable for the money in her custody and care in terms of the company procedure.

CROSS EXAMINATION

4.1.12 Under cross examination the Applicant testified that she had been a cashier for about 3 years at the time of her dismissal.

4.1.13 The Applicant also testified that, as per the company (Respondent) procedure, a cashier should make a safe drop once the money in his or her till amounts to E2, 000-00. In other words, a cashier should not keep money in the till which

was in excess of E2, 000-00 at any given point in time.

4.1.14 The Applicant admitted, under cross examination that the safe drop procedure should be adhered to at all times. The Applicant also stated that the procedure regarding a safe drop is that, as a cashier she would first count the money and she would have to fact it into E100-00 determination. The supervisor or coordinator would also count the money, and then she or he would sign the safe drop form before depositing same into the keyless safe.

4.1.15 It was put to the Applicant that she breached the safe drop procedure in that she failed to make a safe drop of the sum of E2, 000-00 which went missing in the office. In response, the Applicant denied this.

4.1.16 The Applicant was asked if she was short by E1, 880-00 on the 4th November, 2008. In response, the Applicant denied that she was short by E1, 880-00. The Applicant insisted that she forgot the money (E2, 000-00) on the table when she knocked off on the date in question. She said that it was also incumbent upon the supervisor as well to ensure that the money was deposited into the safe.

4.1.17 The Applicant also admitted that Annexure "J" was written by her. Annexure "J" is a letter which was written by the Applicant wherein she explained about the missing sum of E2, 000-00, as per the Respondent's request. It was then put to the Applicant that she was short by E1, 880-00 as it is evident in Annexure "J".

4.1.18 Under cross examination the Applicant admitted that she knew the company procedures pertaining to safe drops.

4.1.19 The Applicant was asked if the tension between her and her supervisor (coordinator) affected her work. In response, the Applicant stated that the tension affected her work because the supervisor used to count the money in her absence, hence the shortages.

4.1.20 The Applicant testified that she reported the bad working relationship between her and the

supervisor, to the Respondent's management. She said that unfortunately the management failed to intervene, hence their differences remained unresolved. However, the Applicant conceded that she did not have copies of the three letters by which she communicated her grievance to the Respondent.

4.1.21 During cross examination the Applicant admitted that she was aware of Annexure "D". Annexure "D" contains or sets the procedures applicable to all Forecourt cashiers. It was put to the Applicant that she failed to comply with these procedures, in particular clauses (i), (ii) and (v). The Applicant disagreed with this; she maintained that she complied with the said procedures.

4.1.22 With regard to the disciplinary hearing, the Applicant testified that she received the charges in time and she had time to prepare for the hearing. She said that during the hearing she was represented by a fellow employee, Sibusiso Gamedze. She also stated that she was advised of her right to call her own witnesses; as well as

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her right to cross examine the Respondent's witnesses.

4.1.23 The Applicant also testified that the appeal proceedings were presided by a different Chairman. Again she was represented during the appeal hearing; and all her rights were explained to her.

4.2 RESPONDENT'S CASE

4.2.1 The Respondent also led one witness to buttress its case and that was Mr Noel Ormesher, who is the Respondent's Director.

4.2.2 Mr Noel Ormesher testified under oath, and he said that he is the Respondent's Director. Mr Ormesher confirmed that the Applicant was employed by the Respondent as a cashier. He admitted that initially the Applicant was employed as a Petrol Attendant, but she was promoted to the position of a Cashier. This witness explained that the duties of a cashier mainly are to collect the money from the petrol attendants and to ring it on the till. He said during the night shift a cashier also serves as a Shop Assistant at the Mini Shop.

4.2.3 Mr Ormesher testified that on the 29th October, 2008, the Applicant was working in the night shift (also known as shift 3) and on this date she was short by E331-30. On the 30th October, 2008, again the Applicant in the night shift had a shortage of E300-50. On the 4th November, 2008 the Applicant was found to be short by E1, 880-00. Even on this day, she was on shift 3 (night shift). On this day (4/11/08), Mr Ormesher alleged that the Applicant issued a large packet of

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simba chips without ringing this item on the till, and she also failed to collect the money for this item from the customer.

4.2.4 Mr Ormesher also stated that on the same day, the Applicant sold three loose cigarettes, and she failed to ring same on the till.

4.2.5 During his testimony, Mr Ormesher explained what a safedrop is. He said a safedrop is a printed document, it is in bookform and it is numbered. He stated that a cashier records in this document all monies taken from the till, which needs to be deposited into a safe. He said that a cashier must also complete a banking sheet, wherein the summary or total sum of money taken from the till is recorded. It is Mr Ormesher's evidence that both the cashier and the supervisor must sign the banking sheet, after the supervisor has checked or counted the money. This witness further stated that a cashier, who was on the nightshift, is required to make out a safedrop slip for the money that would be in the till at the knock off time. Mr Ormesher referred me to Annexure "E", being the safedrop procedures.

4.2.6 Mr Ormesher further stated that a cashier is responsible and or accountable for all the money which is in his or her custody at any given point until a safedrop is made. Mr Ormesher said that it is the responsibility of a cashier to make a safe drop namely; a cashier would have to count the money, fill all the necessary documents or forms; then the supervisor/coordinator is expected to count the

money again, and then sign the safe drop to acknowledge that it is correct. Once all

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that has been done, the supervisor/coordinator will deposit the money into the keyless safe.

4.2.7 It was Mr Ormesher's testimony that on the 4th November, 2008, the Applicant breached the safe drop procedure in that she failed or omitted to make a safe drop of the sum of E2, 000-00. In other words, the Applicant allegedly failed to account for the aforementioned sum of money. Mr Ormesher stated that the Applicant admitted that she forgot to make the safe drop. He referred me to Annexure "J", being a copy of a letter written by the Applicant wherein she explained about the shortage of E1, 880-00.

4.2.8 Mr Ormesher testified that subsequently an investigation regarding the loss of the aforesaid money was carried out by the Respondent. Following the investigation, a disciplinary action was instituted by the Respondent against the Applicant. This witness stated that three (3) charges were preferred against the Applicant as stated above. Mr Ormesher further stated that the disciplinary hearing was properly and fairly conducted. However, he said that the Respondent did not call any witness to testify on its behalf during the disciplinary hearing.

4.2.9 Mr Ormesher said that the Applicant was found guilty on all the three charges. But the Chairman recommended a dismissal on the first count. He stated that the Applicant lodged an appeal against this decision, but her appeal was not successful as the initial verdict was confirmed and/ or upheld.

4.2.10 With regard to the alleged differences between the Applicant and her supervisor, Mr Ormesher

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testified that he was not aware of this because it was not reported to him.

CROSS EXAMINATION

4.2.11 During cross examination, Mr Ormesher testified that the Applicant was given an in-house or internal training on her new job of being a cashier.

4.2.12 Mr Ormesher was asked whether the Applicant was given a job description upon her appointment as a cashier. He said that the Applicant was only given the forecourt procedures. But however, it was put to him that the Applicant was never furnished with any written procedures.

4.2.13 Mr Ormesher was also asked if these procedures are consistently applied to all the Respondent's employees (cashiers). His response was in the affirmative. On the other hand, this witness was asked by the Applicant's Representative, as to what are the duties of a supervisor or coordinator at his workplace. Mr Ormesher stated that the supervisors are there to ensure that the petrol attendants and cashiers perform their duties efficiently. In short, the supervisors perform the supervisory role.

4.2.14 Mr Ormesher stated under cross examination that it is the responsibility of the cashier to present safe drop to the supervisor or coordinator for double checking and signature. Mr Ormesher said that the supervisor is responsible for depositing money or safe drop into the keyless safe.

4.2.15 The Applicant's representative further asked from Mr Ormesher whether a disciplinary action can be taken against a supervisor who fails to perform his

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for her duties as laid down in the procedures. In response, Mr Ormesher stated that definitely disciplinary measures can be taken against any supervisor for dereliction of duty.

4.2.16 Mr Ormesher maintained under cross examination that he was not aware of the alleged sour relationship between the Applicant and her supervisor, Mumcy. He said that he learned about this for

the first time during the initial disciplinary hearing. When this witness was asked whether the supervisor was called during the disciplinary hearing to clarify the issue of the bad working relationship; he answered in the negative.

4.2.17 Mr Ormesher was further asked, if he was aware that a new arrangement was made by the Applicant and her supervisor, to the effect that the Applicant used to leave the money on the table and the supervisor would come later, in the absence of the Applicant to count the money and then deposit it into the safe. Noel Ormesher said that he was not aware of the alleged arrangement.

4.2.18 With regard to the shortages as reflected in the Respondent's Annexures namely; Annexure "F", "H" and "I", Mr Ormesher, admitted that the Applicant was not the only one who had shortages on the dates reflected on the aforementioned Annexures. He also admitted that the other employees who were short on the relevant dates were not charged or disciplined for such shortages.

4.2.19 It was put to Mr Ormesher that the Respondent's rules or procedures pertaining to shortages were not consistently and equally applied to all the

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Respondent's employees, due to the fact that the other employees who were also short were never disciplined. In response, Mr Ormesher stated that it all depended on the size of the shortage concerned, and he said that if the shortage is of a substantive amount, and where there is no good explanation given by the employee concerned, a disciplinary action will be taken against that employee. He mentioned that the Applicant's shortages were substantial, hence the disciplinary enquiry against her.

5. ANALYSIS OF EVIDENCE AND SUBMISSIONS

5.1 In the present case the issue which falls for determination is whether or not the Applicant's dismissal was fair and reasonable in the circumstances of the case.

5.2 It is common cause that in casu, procedural fairness is not in dispute. It is not in dispute that the Applicant was subjected to a disciplinary enquiry prior to her dismissal herein. The disciplinary enquiry was in any opinion properly constituted. It is also common cause that the onus of proving the fairness of the termination of the Applicant's services lies with the Respondent, as per the provisions of section 42 (2) of the Employment Act 1980 as amended.

5.3 On the other hand the Applicant bears the onus to prove that at the time of her dismissal she was an employee to whom section 35 of the Employment Act 1980 applied. It is not in dispute that the Applicant was an employee in terms of the aforesaid section 35.

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5.4 In her closing submissions, the Applicant contends that her services were procedurally, substantively, unlawfully and unreasonably terminated by the Respondent.

5.5 It is the Applicant's submissions that the Chairman of the disciplinary hearing misdirected himself both in law and in fact by finding her guilty of a dishonest Act, whereas she was charged for shortages, which is equivalent to poor work performance. She submits that she was never charged with a dishonest Act. She also contends that the Respondent failed to prove that she stole any money to warrant her dismissal in terms of section 36 (b) of the Employment Act, 1980. (The underlined is my emphasis).

5.6 The Applicant further argues that she was selectively or discriminately charged for shortages in that her fellow employees, who also had shortages during the period in which she had shortages, were never subjected to any disciplinary enquiry (The underlined is my emphasis). She submits that these employees were treated with kid gloves.

5.7 On the other hand the Applicant submits that the whole process was procedurally unfair, because both the Chairman of the initial hearing, Mr Simelane and Mr Tsabedze, the Chairman of the appeal hearing are all working for Maduduza Zwane Labour Law Consultants and Associates. Therefore their

findings could not differ.

5.8 Overall the Applicant submits that the Respondent "did not prove its case as per the

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provisions of section 42 (2) (a) and (b) of the Employment Act 1980.

5.9 In light of the foregoing submissions the Applicant prays for her reinstatement and failing which; the payment of the following terminal benefits namely; (a) Notice pay (b) Additional notice pay (c) Severance allowance and compensation for unfair dismissal (12 months).

5.10 On the contrary the Respondent submits, with regard to the disciplinary hearing, "that all procedures necessary for conducting a fair hearing were followed in this case. The Respondent further contends that, "the Applicant was informed of the hearing in good time and was further afforded an opportunity to call and cross examine witnesses". It is the Respondent's submission that, two independent chairpersons conducted both the initial and the appeal hearings. It is also asserted that the Applicant was represented during these disciplinary proceedings; and that all her rights were explained to her.

5.11 It is further submitted by the Respondent that the Applicant's act of leaving the money on the table and forgetting to make the safe drop led to the shortage of E1, 880-00. It is submitted that by so doing, "the Applicant committed an offence which destroyed the Respondent's confidence in the Applicant's integrity or suitability for the employment in question".

5.12 It is contended that, "the Respondent therefore could not have been expected to continue entrusting its property (money and stock) into the care of the Applicant, who cared less about it".

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5.13 The Respondent disputes the Applicant's allegation that she was not in good terms with the Supervisor, because there is no evidence, documentary or oral to corroborate this allegation.

5.14 In light of the foregoing submissions, the Respondent prays that the Applicant's application be dismissed.

5.15 Reverting to the question which I am called upon to determine herein; it is the Respondent's responsibility to discharge the onus placed on it by section 42 (2) (a) and (b) of the Employment Act 1980 (as Amended). Section 42 (a) and (b) of the Employment Act 1980 (as Amended) provides that "The services of an employee shall not be considered as having been fairly terminated unless the employer proves:-

- (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."

5.16 As already stated above, the Respondent bears the onus to prove the fairness of the termination of the applicant's services. In its endeavor to discharge such onus, the respondent led the evidence of its Director, Mr. Noel Ormasher. Mr. Ormasher represented the Respondent as the "prosecutor" during the initial disciplinary hearing, which was held on the 21st November 2008, as well as the appeal proceedings which were held on the 23rd January 2009 at the Respondent's workplace.

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5.17 In short, the Respondent through Mr. Ormasher's testimony, tried to demonstrate or show that the Applicant's dismissal was both procedurally and substantively fair.

5.18 In his evidence in chief, Mr. Ormasher recounted the events which led to the Applicant's dismissal (from investigation through to the disciplinary proceedings and the resultant sanction of dismissal). In his evidence, the witness demonstrated that the Applicant's dismissal was procedurally

fair. In my opinion, the disciplinary enquiry was properly constituted. It is not in dispute that the Applicant was duly charged with three counts of misconduct namely; Shortages which occurred between the period from the 29th October, 2008 to the 4th November, 2008. Under cross examination the Applicant admitted that she was duly notified of the hearing; she was represented therein by a fellow employee, Sibusiso Gamedze and that her right to appeal was fully explained to her; and she appealed against the initial verdict. But however, I want to point out that in the interest of justice, it is not appropriate to have both the chairman of the initial hearing and appeal chairman coming from the same company, as this may cause a strong suspicion of irregularity in the whole proceedings.

5.19 It is common cause that on the 4th November, 2008, while the Applicant, was working on the night shift (shift 3) she failed to make a safe drop of the sum of E2, 000-00, thus causing a shortage of E1, 880-00. In other words the Applicant failed to deposit the sum of E2, 000-00 into the safe before she knocked off. According to Annexure "J", being the Applicant's handwritten letter, dated 11th November, 2008, the Applicant explained that, "on

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the 4th November, 2008, I was E1, 880-00 short. I do not recall exactly what happened, what I can remember is that I made 2 safe drops before we changed the shift and I sorted some hundred amounting to E2, 000-00. But I did not write it down on that side, I took it to the office with the other cash and I forgot to safe drop the E2, 000-00..... I left it on the table in the office".

5.20 It is the Respondent's case that the Applicant breached a rule or procedure pertaining to safe drops, which is applicable to all cashiers in that on the 4th November, 2008; she failed to make a safe drop of the sum of E2, 000-00, hence the shortage of E1, 880-00.

5.21 I accept that there are procedures or rules pertaining to safe drops which are applicable to both cashiers and coordinators or supervisors at the Respondent's work place as set out in Annexure "E". Annexure "E" contains safedrop procedures for shop and forecourt cashiers. I am convinced that the applicant knew or was aware of these procedures. From the evidence led herein, it is clear that the Applicant breached one of these procedures namely; the procedure relating to the making of a safe drop. On the 4th November 2008 she failed to make a safe drop of a sum of E2000.00, and this is not in dispute as well, because the Applicant as per Annexure "J" admitted it.

5.22 With regard to the aforesaid violated rule or procedure; a question which begs for an answer is, whether the rule was applied consistently or not. The respondent would like me to believe that this rule was applied with consistency to all its employees, in particular shop/ forecourt cashiers

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and coordinators (supervisors). On the other hand, the applicant argues that the safe drop procedure was not applied consistently in that the supervisor, Mumcy Ngcamphalala was never charged or disciplined, yet she failed to discharge her supervisory duties. It is alleged by the applicant that, for more than six months both herself and the supervisor were no longer sticking to the safe drop procedure.

5.23 The applicant alleged that because of the tension between her and the supervisor, the latter was no longer double checking or counting the money in her (Applicant) presence; but she used to do it alone after the applicant had knocked off. Evidence was led by the applicant that the supervisor/coordinator and herself had their own arrangement wherein, the Applicant used to count the money and then leave it on the table in the office; then the supervisor/coordinator would count the money in the absence of the Applicant, and thereafter deposit it into the safe. These allegations were not denied or refuted by the Respondent because the Respondent failed to call the supervisor to rebut these allegations against her. Even during the disciplinary hearing, the supervisor was not called to dispute the allegations. Therefore, these allegations remain unchallenged, and as such I believe them to be true.

5.24 In Annexure "E" pertaining to safe drop procedures; it is stated that "safe drops are to be made out by the shop /forecourt cashiers and entered into the appropriate banking sheet in numerical sequence. Safe drops are to be checked and signed for by the coordinator. Once the safe drop is

signed as correct it is the responsibility of the coordinator to drop the monies in the keyless

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banking safe". Regard being had to this procedure, it is my considered view that the supervisor was also responsible for the loss of the sum of E2, 000.00 which caused the shortage of E1, 880.00. In my opinion, the Respondent should have charged the supervisor as she was equally guilty of the dereliction of duty in that she failed or neglected to supervise the applicant and yet she was obliged to do so.

5.25 Therefore it is my considered view that the aforesaid safe drop procedure was not consistently applied. With regard to the shortages incurred on the 29th October, and that of the 30th October 2008, there is no specific rule or procedure and or policy, oral or written which regulates such shortages. There is no laid down rule or procedure which stipulates a disciplinary action to be taken against a cashier who is short. Mr. Ormesher testified that, a disciplinary action can be taken against a cashier whose shortage is of a substantial value and who has failed to give a satisfactory explanation in justification of such a shortage. Mr. Ormesher's explanation is not acceptable as it is clear that there is no rule in place in this regard. No minimum value of shortage is set by the Respondent for purposes of a disciplinary action. In other words there is no disciplinary rule and or agreed procedure which stipulates the type of circumstances and misconduct which can lead to a dismissal if the employee is found guilty.

5.26 Section 44 of the Code of Practice (promulgated under section 109 of the Industrial Relations Act 2000, as amended) stipulates that, "Management should make known to each employee:-

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- (a) The disciplinary rules and the agreed procedure; and
- (b) The type of circumstances which can lead to
- (c) suspension or dismissal.

5.27 It is common cause that the applicant was not the only one who had shortages on the 29th October, 30th October and 4th November 2008, but the Respondent never took any disciplinary action against the other cashiers who also had shortages.

6. Conclusion

6.1 In light of my foregoing analysis, it is my conclusion that the Respondent has failed to discharge the onus of proof in terms of section 42(2) (a) and (b) in terms of the Employment Act 1980 in that the Respondent failed to prove on the balance of probabilities that the applicant was fairly dismissed. The evidence led herein reveals that the Applicant was unfairly treated by the Respondent in that she was discriminated against in terms of disciplinary action. The supervisor failed to discharge or execute her duties as a supervisor. She failed to ensure that the Applicant who was her subordinate always adhered to the company procedures. Surprisingly, the applicant's supervisor, Mumcy Ngcamphalala was neither charged nor disciplined for her dereliction of her duties.

6.2 The Respondent failed to justify the inconsistency in the implementation of its own rules and or procedures. As stated above, the Respondent charged and disciplined the Applicant only for shortages incurred on the 30th of October and 4th November 2008; yet on the 30th October, Busi

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was short by E196-38; Thulani was short by E106-55. Again on the 4th November 2008, Happy's shortage was E86-42, Busi was E161.60 short and Thulani was E79.33, as per Annexures "F" and "I".

6.3 In the case of Sindi Mabuza v Nedbank Swaziland Limited Case No. 45/2002 at pages 14 and 15, the court in its analysis of evidence stated that;

"the Applicant was junior and under the supervision of Comfort Khumalo. As a supervisor Comfort had an extra duty to exercise caution that no fraudulent accounts are opened. His responsibilities as a

supervisor were over and above that of the Applicant. It is not clear to the court why a lesser charge was not preferred against her in the circumstances of the case. It seems to the court that the Applicant was discriminated against in terms of the charges".

The court in this case was of the view that "because of the disparity in the treatment of officers, it cannot be said that the dismissal of the Applicant was fair".

6.4 The court in its ultimate decision in the Sindi Mabuza's case (supra) at page 17 stated that;

"Taking into account all the circumstances of this case, it was not fair for the Respondent to dismiss the Applicant only, in the circumstances that showed that both the Applicant and her supervisor were equally guilty of negligence. In the circumstances of this case the Respondent was clearly unreasonable and discriminatory".

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6.5 Likewise, in the present case, it is my finding that the applicant was unfairly discriminated against because the respondent charged and disciplined her only, yet her supervisor was equally guilty and as such she ought to have been charged and disciplined as well. The supervisor had an extra duty to ensure that the safedrop procedure was complied with at all times.

6.6 In casu, it is also my finding that the disciplinary hearing against the Applicant was unfair in that the applicant was wrongly found guilty of committing a dishonest Act in terms of section 36 (b) of the Employment Act 1980, as amended, yet no evidence was led by the respondent to prove the commission of this offence. The applicant's charges were mainly based on till shortages caused by the applicant's negligence as opposed to shortages caused by dishonest act or misappropriation of money on the part of the applicant. It is my view that the chairman misdirected himself in this regard. Even in the charges, there are no specific allegations to the effect that the applicant misappropriated the money (shortages).

6.7 In his findings, the chairman stated that, "the offences of till shortages are serious offences. They border around dishonesty". Then the question is, if till shortages borders on dishonesty, why then the other employees who also had shortages were not charged and disciplined. It serves no purpose to discipline the Applicant alone, yet there are other "dishonest" employees who are still a threat to the respondent's business. They are still entrusted with the respondent's money, yet they also had shortages. The chairman of the disciplinary enquiry failed to apply

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his mind on the facts before him, because if he did, he would not have come to this irrational sanction of dismissal.

6.8 In casu, based on the court's reasoning in the above case of Sindi Mabuza v Nedbank Swaziland Limited, and having taken into account the evidence led before me, and the entire circumstances of this case; it is my conclusion that the Applicant's dismissal was unfair and unreasonable. Therefore, the Applicant's application succeeds.

6.9 Now I am required to determine an appropriate remedy in this case. The applicant prays for reinstatement and failing which, the payment of the following terminal benefits; (a) Notice pay (b) Additional notice (c) Severance allowance and 12 months wages' as a compensation for unfair dismissal.

6.10 It is my considered view that reinstatement will not be a suitable relief, when one takes into account the circumstances surrounding the dismissal of the Applicant. During cross examination, Mr. Ormesheer, the Respondent's Director stated that the Respondent would not consider reinstating the applicant.

6.11 Therefore, it is my decision that the Respondent shall pay the Applicant seven (7) months salary as compensation for unfair dismissal. In my opinion this is a fair and equitable compensation, regard being had to the entire circumstances of the case, especially the unfair treatment meted out to the

Applicant by the Respondent. I have also taken into account that the Applicant is currently unemployed.

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7. Award

7.1 In light of my foregoing conclusion, and taking into account the circumstances of the case; I hereby make an award that the respondent should pay the Applicant the following terminal benefits;

- (a) Notice pay E 1,419.00
- (b) Additional notice E 654.92
- (c) Severance allowance E 1,637.40
- (d) Compensation (7months' salary) E 9,933.00

Total E13, 644.32

7.2 The Respondent is directed to pay the applicant the sum of E13, 644.32 (Thirteen Thousand Six Hundred and Forty Four Emalangi, Thirty Two Cents) within 30 days from date of receipt of this award.

Dated at Manzini on this 19th day of October 2009
Robert S. Mhlanga

CMAC Commissioner

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