



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

Held in Manzini

REF: MNZ 706/07

In the matter between;

Nonhlanhla Ngwenya

Applicant

AND

Pimentas KFC (Pty) Ltd

Respondent

CORAM;

ARBITRATOR : THULANI DLAMINI

FOR APPLICANT: SELF

FOR RESPONDENT: M. SIBANDZE

ARBITRATION AWARD

1. Parties and Hearing

The Applicant in this matter is Nonhlanhla Ngwenya an adult Swazi female and former employee of the Respondent.

The Respondent on the other hand is Pimentas KFC (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 15th October, 2008 and March 2009, when it was finally completed. The parties had agreed that closing submissions (written) were to be submitted by the second week of December 2008, when the Commission officially closes for end of year. However by the first week of February 2009, the Respondent's representative had still not submitted its closing submissions. Upon inquiry it emerged that the Respondent's representative had sent a copy of the submission by fax to a wrong number. It was not until I personally contacted the Respondent's representative that the anomaly was rectified and the submissions finally sent to the correct number.

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 on the 19th September, 2007. 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, 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.

3. SUMMARY OF EVIDENCE

APPLICANT'S CASE

3.1 TESTIMONY OF NONHLANHLA FAITH NGWENYA

The Applicant stated under oath that she was employed by the Respondent as a Cashier on the 06th December, 2006 and that at the time of her dismissal her monthly salary was the sum of E1,344.40. She went on to state that on the 25th August 2007 at around 11:00am her sister came to the shop and asked for permission to speak to her which was granted. She attended to her sister and after she was done she resumed her duties. On that day she was detailed as a packer. Her sister then joined the queue of customers to be

served. Interestingly the queue she joined was the one in which the Applicant was serving as a packer. She (sister) ordered 'streetwise two' and two mini loaves. According to the further evidence of the Applicant, before the sister ordered she went to the manager's office to ask for authority to give to her sister one of her two daily pieces (apparently they are entitled to two pieces of meat a day). And she did not find the manager. She then went back to pack. When it was her sister's turn to be served she packed her 'street wise two' (which consists of two pieces of meat and a small portion of chips) and the two mini loaves and then added an extra piece of meat. She however did not make the cashier aware that she had added an extra piece of meat. According to the Applicant she had intended to inform the manager when he returned about the extra piece and that she was going to forfeit one of her two daily pieces.

It was the Applicant's further evidence that she was then called by the Restaurant General Manager, Romano De Sousa, who inquired about the extra piece she had given to her sister. He then accused her of having stolen the extra piece and told her to go home and that she would be contacted in due course. She understood this to be a suspension. She was contacted by telephone after two weeks and given a formal suspension letter which accused her of stealing the extra piece and two mini loaves.

A hearing was convened and it culminated in her dismissal. She appealed against the sanction of dismissal but was unsuccessful hence her decision to lodge a dispute with the Commission. She feels her dismissal was unfair in that the sanction imposed is rather harsh taking into account that the extra piece she gave to her sister was her own entitlement for the day. She now claims reinstatement or alternatively notice pay and maximum compensation for unfair dismissal.

Under cross examination from Sibandze on behalf of the Respondent the Applicant confirmed that she was aware that she first had to seek for permission or authority from the manager before giving her piece out to somebody else. When cross questioned further if she had looked for De Sousa to seek for his permission she answered in the negative. When asked why she did not speak to Romano her response was that she knew that he would not accede to her request because they were not in good terms. She was also cross questioned on the procedure followed when one wanted to take his/her pieces for the day and she stated that it was either one took the pieces or swiped first and take the pieces after. And in both scenarios a till slip had to be signed. She vehemently denied that by giving the piece of meat to her sister without permission she was being dishonest.

That was the Applicants case.

RESPONDENT'S CASE

3.2. TESTIMONY OF ROMANO DE SOUSA

This witness introduced himself as the Restaurant General Manager at the Respondent's President Centre branch in Manzini during the period in question. He stated under oath that he remembers the circumstances which led to the Applicant's dismissal. According to him, on a certain day in August 2007 he noticed the Applicant packing 'streetwise 2' with an extra piece of chicken and two mini loaves. However in the till she only rang the 'streetwise 2' and not the rest of the items. He then called a shop steward and they went to observe what the customer had ordered as she was eating in. Indeed the shop steward confirmed that she was having streetwise two with an extra piece plus two mini loaves and further that the customer was the Applicant's sister. According to the further evidence of De Sousa the Respondent's management had stopped the practice of giving away employees daily pieces of meat because of shortages suffered as a result of it. He finally denied that he was not in good terms with the Applicant as she had alleged.

Under cross examination, the Applicant asked her if he was sure that she was the one who rang the till on the day and this witness on pondering on the question stated that after careful recollection he now remembered that infact the Applicant was packer on the day and that she gave the instruction to the teller on what to ring. The applicant further enquired as to why the slip was not taken from the customer to confirm what had been rang on the till and De Sousa's response was that it would have been rude to hassle the customer. Otherwise nothing much came out of the Applicant's cross examination of this witness.

That was the Respondent's case.

4. ANALYSIS OF EVIDENCE AND ARGUMENTS

In her closing submissions (written) the Applicant started off by recounting how she had worked under a certain Gwaju Dlamini as the Restaurant's General Manager and that then her working conditions were very good. Then De Sousa came into the picture after the transfer of Gwaju to another branch, and her work conditions went on a slump for worse. She then related the incident of 25 August 2007 when her sister came to the shop. She admits having added an extra piece to the streetwise two, but seeks to justify her deed by saying it was one of her two daily pieces. She further

confirms that she gave the order to the cashier without informing him about the extra piece. Be that as it may, she however feels her dismissal by the Respondent was unfair and harsh in the circumstances especially because she had a clean disciplinary record with the company. She feels she should have been, at the least, been given a warning as opposed to an outright dismissal. She accordingly claims for reinstatement or alternatively notice pay and maximum compensation for unfair dismissal.

On the other hand the Respondent's representative started off by reciting what he considered to be crucial aspects of the case at hand. He brought it to the fore that the Applicant informed the cashier to ring a 'streetwise two' and did not inform him about the extra piece and the two mini loaves. He also highlights the fact that the Applicant argued that she felt her dismissal was rather a harsh.

Sibandze further points out that the question before the Commission is:

- a) whether the Applicant's conduct amounts to misconduct,
- b) whether the conduct aforesaid is within Section 36 of the Employment Act and
- c) finally, if it was reasonable in the circumstances to dismiss the Applicant?

It was argued by Sibandze that the Applicant's contention that she intended to inform the Manager is not credible because she did not make any effort to locate De Sousa and inform him about the issue of the extra piece. Sibandze also submitted that 'more importantly the Applicant, if it is true that she could not find the Manager, could have informed the cashier in order to secure a witness' to her assertions. Instead, so the argument continued, she only informed the cashier about streetwise two. He argued further that the most probable explanation herein is that the Applicant had no intention of telling the Manager about the extra piece. Sibandze's argument was that it was therefore fair to terminate the Applicant's services because she was guilty of misconduct in the form of dishonesty as classified under Section 36 (b) of the Employment act. This especially because the Respondent depends on the very items, the Applicant gave out to her sister in generating its income. As such the Respondent prays that the Applicant's claims be dismissed.

The question which remains to be answered in relation to this case is whether the Respondent has shown that in terminating the services of the Applicant it has satisfied the requirements of section 42 (2) of the Employment Act. Section 42 (2) provides;

“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”.

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.

Coming to the case at hand, it is common cause that the Applicant was an employee of the Respondent and was dismissed following a disciplinary hearing. The charge preferred against her was that of dishonesty it being alleged that she had committed theft by stealing one piece of chicken and two mini loaves. It is also not in dispute that the Applicant gave the items aforesaid to her sister and same were not ringed on the till by the cashier. The duty was upon the Applicant to inform the cashier what to ring since she was assisting him as his packer. Interestingly after she

packed all the items she only informed the cashier that the item she had packed was only 'streetwise two'. Clearly she was telling an untruth when she did so. And she seeks to justify this by saying she had intended to inform the Manager, Yandile, that she had given one of her pieces to her sister. Countering against this assertion by the Applicant is the undisputed fact that the Restaurant General Manager, De Sousa, was present in the shop at the time but she chose not to inform him, despite him (De Sousa) being above the Manager. The allegation by the Applicant that De Sousa used to ill-treat her and as such she could not report to him is such an absurd and flimsy excuse. If she felt she could not report to De Sousa the least she could have done was to inform the cashier about the extra piece and the mini loaves as alleged, which she also failed to do. The only probable conclusion is that she was being dishonest.

Another factor which makes me find against the Applicant herein is that under cross questioning from the Respondent's representative she stated that the procedure for taking one's share of the pieces of meat was that after swiping a till slip had to be signed as proof that the employee in question had taken his/her pieces for the day. And there is no evidence before me that she signed the slip. This clearly flies in the face of her allegation that she had intended to inform the Manager when he returned.

Van Niekerk in his work on **'Unfair Dismissal'** 2004 edition, states at page 43 that in recent Labour Appeal Court (South African) decisions the court has constantly emphasised the necessity of a relationship of mutual trust and confidence in the employment relationship and has upheld dismissals for dishonesty even when relatively small amounts have been involved. There is also the unreported Industrial Court of Appeal judgement of **Royal Swaziland Sugar Corporation V Paul Mavundla case no. 5/2006** where at paragraph 24 it is opined as follows;

“Routinely, lowly paid workers such as shelf packers, are dismissed, and fairly so, when items of small value are stolen. Value of stolen items cannot be determinative just as the period of service of the offending employee should not be”

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 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 ILJ 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."

In the case of **Sindi Mabuza V Nedbank Swaziland Limited (Unreported Industrial Court case no. 45/2002)** the court per Nkonyane AJ stated as follows at page 16;

"It is not enough for the respondent to merely say that the applicant was dismissed in terms of section 36 of the Employment Act. The respondent had to also prove that taking into account all the circumstances of the case, it was reasonable to terminate the service of the Applicant"

In light of the foregoing *dictum* by the Honourable it is my finding that the Respondent in this case has proved on a balance of probabilities that taking into account all the circumstances of the case it was fair to dismiss the Applicant herein. Based on the totality of the evidence before me the Applicant's application therefore should fail and as such be dismissed.

5. 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 both procedurally and substantively unfair.

6. AWARD

In the result I accordingly find that the dismissal of the Applicant was procedurally and substantively fair. And that is the award I make.

DATED AT MANZINI ON THIS DAY OF APRIL 2009

THULANI DLAMINI
CMAC COMMISSIONER