



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

**HELD AT MANZINI**

**SWMZ 566/09**

In the matter between:-

**DUMSILE DLAMINI**

**APPLICANT**

And

**OK BAZAARS (PTY) LTD  
T/A SHOPRITE CHECKERS**

**RESPONDENT**

CORAM:

**Arbitrator** : Mr. Knowledge Manana

**For Applicant** : Mr. Ntobeko Piliso

**For Respondent** : Mr. Sabela Dlamini

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**Arbitration Award**

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**PARTICULARS OF PROCEEDINGS AND REPRESENTATION**

- 1.** The arbitration hearing was held at the CMAC Offices 4<sup>th</sup> Floor SNAT Building, Manzini.

- 2.** The Applicant **Dumsile Dlamini** was represented by Mr. Ntobeko Piliso from **Piliso, Simelane And Partners**, a firm of attorneys based on the 3<sup>rd</sup> Floor SNAT Building, Manzini.
- 3.** The Respondent on the other hand was represented by Mr. Sabela Dlamini, from **Magagula & Hlophe Attorneys**, 1<sup>st</sup> Floor Development House, Mbabane

### **Issue To Be Decided**

- 4.** The issue to be decided is whether the Applicant was unfairly dismissed by the Respondent.

### **Background Information To The Dispute**

- 5.** The Respondent operates a chain of Supermarkets in almost all the four regions of Swaziland.
- 6.** The Applicant commenced service with the Respondent on the 1<sup>st</sup> February 1983 as a cashier and was later promoted to the position of Administration Clerk, a position she held until she was dismissed on the 04<sup>th</sup> August 2009 on charges of gross misconduct.
- 7.** At the time of her dismissal the Applicant was earning a monthly salary of E3600.00.

- 8.** Pursuant to her dismissal, the Applicant lodged a dispute with the Commission (CMAC) seeking reinstatement or alternatively maximum compensation for unfair dismissal.
- 9.** The dispute was certified unresolved after conciliation and I was subsequently appointed to arbitrate, hence this arbitration award.

### **Survey Of Evidence And Argument**

- 10.** I have considered all the evidence and argument made by the parties but will only refer to the evidence and argument that I consider to be necessary to substantiate my findings and decide the dispute.
- 11.** On the 10<sup>th</sup> July 2009 during the early hours of the morning, the Applicant sent a female security guard to bring an electric kettle to her duty station as she wanted to boil some water.
- 12.** The Applicant's directive was questioned by a male security officer Mr. Mduzuzi Mkhathshwa who challenged the female security officer's decision to take the kettle to the Applicant's duty station when she knew very well that in terms of the company policies, water could only be boiled in the staff canteen. I shall refer to Mr. Mkhathshwa as such or as the security officer interchangeably.

- 13.** Despite the security officer's opposition, the Applicant eventually managed to get the kettle to her office and fulfilled her wish of boiling some water. She however still felt offended by the security officer's challenge to her directive and sought to confront him.
- 14.** When the female security officer returned to fetch the kettle, the Applicant refused to give it to her. She demanded that it be fetched by Mr. Mkhathwa in person.
- 15.** Mr. Mkhathwa did not fetch the kettle. However, the Applicant later caught sight of him as he was passing by the Goods Receiving Department. She confronted him. According to the Applicant, she only wanted to know why he had refused to give her the kettle.
- 16.** Mr. Mkhathwa's response was that it seemed the Applicant had a problem or was generally problematic. In the Applicant's own words he is quoted to have said; "*vele unenkinga wena mfati wena.*"
- 17.** The Applicant was reportedly angered by this statement which she perceived to be rude and socially unacceptable. She then violently charged towards the security officer, with a clear intention to assault him.
- 18.** She was however, restrained by fellow employees who dragged her away from the security officer before she could lay her hands on him. The security officer quietly

removed himself from the scene without attempting to fight or talk back to the Applicant.

**19.** After some few minutes, roughly plus or minus twenty minutes, the Applicant left her duty station and went looking for the officer. She was carrying the kettle. It had some hot water in it.

**20.** She found the security officer at the Customer Exit Point in the upper floor where he was in the company of a fellow security officer named Sipho Nkambule. They were conducting a search on a customer.

**21.** The Applicant is said to have violently shoved the kettle to the security officer but was told by the said Sipho Nkambule that she was disturbing them as they were working.

**22.** She then retreated and waited for them to finish. Upon finishing, the security officer tried to walk away from the Applicant without success.

**23.** The Applicant grabbed him by the front of his uniform after which she then spilled the water over his upper chest area. She then grabbed him by his belt and violently dragged him towards the Staff Entry Point. This happened in full view of the Respondent's staff and customers.

- 24.** In an attempt to free himself and to scare the Applicant away, Mr. Mkhathshwa is said to have pulled out his spray gun, and threatened to use it on the Applicant. The Applicant was not deterred.
- 25.** Mr. Mkhathshwa testified that being a person who was aware of the potency of the spray gun and the devastating effects it would have had on the respondent's staff and customers, he could not bring himself to pull the trigger.
- 26.** Upon arrival at the staff entry, the Applicant released the security officer, grabbed the spray gun and sprayed him. It was then that the already humiliated and scalded security officer got an opportunity to run away from the Applicant's anger.
- 27.** The fumes from the spray gun are said to have caused panic, discomfort and disturbance to the Respondent's customers and staff as it was fired within close proximity to the shop floor.
- 28.** The officer was later found in the bathroom by his colleague Mr. Sipho Nkambule who then helped him wash the spray gun chemical off his face.
- 29.** Mr. Mkhathshwa suffered serious body burns on his upper chest. Due to the serious nature of his injuries, the officer had to attend hospital for bandage change every

Tuesday for about five weeks. He was left with a noticeable scar which was shown to the Arbitrator in the presence of all parties during the arbitration.

**30.** The Respondent preferred charges against the Applicant and dismissed her after a properly constituted disciplinary hearing.

**31.** The Applicant and the security officer are also said to have preferred criminal charges against one another. The Applicant was found guilty as charged whereas the security officer was acquitted. Their respective cases were tried by a competent court of the land.

**32. Rule 15** of the Respondent's Company Rules displayed in the staff canteen discourages employees from engaging in any form of assault or physical violence on or off the company premises.

**33.** This warning proscribes violence and or assault against fellow employees or any other individual involved with the company in as much as it also prohibits employees from using abusive, insensitive, socially unacceptable, derogatory and offensive language.

**34.** Mr. Mkhathwa is said to have once played a pivotal role in an investigation that resulted in the dismissal of some employees, particularly the Applicant's son one Khonza Hlophe, for stealing from the Respondent.

**35.** The Applicant, in a consistency challenge, testified that there were two other employees who were once involved in separate incidences of workplace violence but were not dismissed.

**36.** At first, the Applicant challenged both the procedural and substantive aspects of her dismissal. She later changed and dropped her procedural challenge and remained with the substantive challenge to her dismissal

### **Analysis Of Evidence And Argument**

**37.** According to **JOHN GROGAN, DISMISSAL DISCRIMINATION & UNFAIR LABOUR PRACTICES, SECOND IMPRESSION 2007 on page 241**, the legal requirements for assault are the intentional and unlawful application of physical force, however slight, to the body of the complainant or a threat that such force will be applied. Assault is, according to Grogan, generally accepted as a valid reason to dismiss the assailant.

**38.** Coming closer to home, according to **SECTION 42 OF THE EMPLOYMENT ACT OF 1980 AS AMENDED**, the dismissal of the Applicant shall not be considered fair unless the Respondent proves:

- a) That the reason for the termination was one that was permitted by Section 36; and



b) That taking into consideration all the circumstances of the case, it was reasonable to terminate the services of the Applicant.

**39.** In line with the above section of the law and in light of the evidence adduced including the Applicant's own admission, there remains no question that the Applicant did assault the security officer.

**40.** Not only did she scald him, grab him by his belt and drag him all the way to the staff entry, she also used a dangerous weapon on him. She sprayed him with a very potent spray gun. This clearly shows, without any doubt, that the reason for the Applicant's dismissal was one that is permitted by **Section 36 of the Employment Act** as aforementioned.

**41.** The Respondent's attitude to assault was well known by the Applicant as it was clearly spelt out in the **Company Rules** which were pinned up in the staff canteen for every one to read. This was quite ably attested to by the security officers who also alluded to the fact that the Respondent would also hold weekly meetings where the significance of its rules would, amongst other things, be emphasized.

**42.** In my opinion, and based on the above, the rule against violence was a well known one in as much as it was also a reasonable one. The fact that the Respondent took

the contravention of this rule very seriously was evidenced by the number of hearings where the Applicant represented fellow employees who had contravened same.

**43.** The fact that some or most of those employees were not dismissed is of no consequence as each case may differ on its merits. More so because, in the two mentioned cases, there were elements of provocation and lack of intention to injure or harm the victim. Furthermore, in both cases the victims were in actual fact the aggressors and were assaulted or injured in self defense. The same cannot be said with this case.

**44.** While the Applicant may argue that she was provoked by the security officer, this argument can not take her case any further. The reason for such being that, other than her own averments, there was no evidence adduced to prove that she was in all reality provoked.

**45.** Even if there was such evidence, I doubt if the Applicant's assault on the security officer can be said to have been commensurate with the effect that the alleged statement would have on a normal person, under normal circumstances.

**46.** The facts of this case are such that the Applicant can not, reasonably be said to have momentarily lost control and attacked the officer in a fit of rage.

**47.** The Applicant's attack on the security officer, who did not even attempt to fight or talk back to his assailant, appears to have been well planned and calculated.

**48.** It was also well punctuated. It came in three different stages, with two of the most crucial ones being separated by a considerable amount of time, time that was sufficient enough for the Applicant to regain cognitive control in the event she had lost it. **See: ZEPHANIA NGWENYA V ROYAL SWAZILAND SUGAR CORPORATION, 262/2001 I.C on pages 13-14.**

**49.** Having said that, it would appear that the Applicant had more than enough time to brood over the purported or perceived insult or provocation and carefully crafted her revenge plan. No amount of persuasion or restraint could prevent her from executing her well calculated evil plan. **See: JOHN GROGAN supra on page 242.**

**50.** Particular note should be made of the fact that after having refused to return the kettle, the Applicant somehow managed to keep the water hot enough to scald a person despite the fact that she had purportedly boiled the water in the early hours of the day, not very long after she had reported for work. I find this to be very strange, to say the least.

**51.** In my view, the Applicant's action to assault the security officer in the manner that she did indicates that she had all along harbored a deep seated intention to occasion

harm to the security officer. The issue of the kettle only provided a spark to an already fueled rag.

**52.** With the above said, and in the absence of a proper explanation as to what really prompted the Applicant's rage, that the Applicant's actions could be attributed to the security officer's involvement in the dismissal of the Applicant's son, remains not too far off a possibility.

**53.** That the Applicant, an elderly woman could, despite having been restrained and probably reprimanded by onlookers from assaulting a grown man, still pursue him like an enraged Spanish bull and assault him for such petty and idle remarks is clearly beyond me.

**54.** One thing however, that is perfectly clear is the fact that the Applicant's conduct was not a spontaneous and unpremeditated reaction to any provocative remarks by the security officer.

**55.** The crisp issue that now remains to be determined is whether it was fair and reasonable for the Respondent to dismiss the Applicant under these circumstances.

**56.** The extract from John Grogan's work, that I referred to earlier on, finds corroboration in the decided case of **NATIONAL MINE WORKERS & OTHERS V EAST RAND GOLD AND URANIUM CO LTD (1986) 7 ILJ 739 (IC)**, where the court held as thus;

*“Any material breach of the employment contract by an employee justifies his dismissal. Assault, being a form of misconduct, is tantamount to a material breach and gives the employer the right to terminate the employment contract.”*

**57. LE ROUX AND VAN NIEKERK: THE SOUTH AFRICAN LAW OF UNFAIR DISMISSAL**, paragraph 8.4, as cited in the **ZEPHANIA CASE, supra**, on page 20, echoes the same sentiments as above when he says;

*“Assault is another of those forms of misconduct which has an impact both at an individual level and at the level of the enterprise. For the person against whom the assault was perpetrated, the act constitutes a gross violation of integrity and dignity. Where the assault assumes a serious form, dismissal may be warranted even for a first offender”*

**58.** I note that the Applicant had worked for the Respondent for close to thirty years. I note further that in her long service with the Respondent, she had a clean unblemished record. I also note that the Respondent did not adduce any evidence to indicate that the Applicant’s actions irreparably destroyed the employment relationship and trust.

**59.** I have, on the other hand, also considered the effect of the unjustified assault on the hapless security officer who had tried by all means to remove himself from harm’s way.

**60.** I have also considered the negative publicity that this incident brought to the Respondent, her staff and customers who found themselves having to protect themselves from the permeating spray gun fumes.

- 61.** I am of the view that it would be a grave injustice to order the Respondent to retain the Applicant merely because of her long service.
- 62.** Having said that, I will proceed to state that I hold the view that this dispute is distinguishable from the decided case of **ZEPHANIA *supra*** where the case of **MHLUME SUGAR COMPANY v JABHANE JAMES MBULI, INDUSTRIAL COURT APPEAL CASE NO.1/1991** was cited with approval. In that case the court conceded that fighting at work was an established category of misconduct for which a single offence could justify dismissal. It however considered the long service of the Applicant and found that the dismissal was not fair.
- 63.** May I state, however, that in that case, the Applicant's employment was **not** single handedly salvaged by his long service on its own. There were other factors that the court considered. Amongst others, the court also considered that his attack on his fellow employee was spontaneous and unpremeditated in as much there were no weapons used during the assault. Furthermore, the court also considered that the assault in that case, unlike with the one at hand, did not result in serious injury.
- 64.** When finding in the Applicant's favor, the court observed that the Applicant had lost his temper and overreacted when he was provoked by his subordinate.
- 65.** The court also noted that the victim was a person who was in the habit of coming to work drunk and generally, did not

behave like a normal human being and that he was later dismissed for smoking dagga at work.

- 66.** The same can not be said about the dispute at hand.
- 67.** When coming to my decision, I have also considered the fact that, unlike most employers in misconduct dismissals, the Respondent did not withhold the Employer's contribution from the Applicant's pension pay out subsequent to her dismissal. This is commendable. It indicates that the Respondent did not want to profit out of the Applicant's lapse in judgment but was compelled by circumstances to terminate the services of her long serving employee.
- 68.** I agree with the Respondent that to retain the Applicant after her exhibited conduct would definitely send a wrong message to the other employees. It can also undermine the company's efforts to preserve and protect its property and lives of staff and customers.
- 69.** I verily believe, as it was stated by the South African Appeal Court in the case of **SACCAWU V EDGARS GROUP OF COMPANIES (1993) 2 LCD 91 ILJ**, that "an employer is entitled to set reasonable standards to which an employee must comply."
- 70.** I accordingly find that the Respondent is entitled as an employer to determine the standard of conduct that it requires from its employees. As an Arbitrator I can only intervene if those standards result in unfairness.

**71.** I hold the view that there was no ascertainable unfairness in the circumstances that led to the Applicant's dismissal. I shall, therefore, not intervene.

**Award**

**72.** I find that the Applicant's dismissal was procedurally and substantively fair.

**73.** I confirm the dismissal.

**74.** I make no order as to costs.

**SIGNED AT MANZINI ON THIS ..... DAY OF DECEMBER,  
2010.**

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**KNOWLEDGE MANANA  
CMAC ARBITRATOR**