

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 170/2000

In the matter between:

REBECCA GWEBU

1st APPLICANT

BUSISIWE DLAMINI

2nd APPLICANT

and

CASH BUILD SWAZILAND (PTY) LTD

RESPONDENT

CORAM:

NDERI NDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR APPLICANT:

M.MKHWANAZI

FOR RESPONDENT:

N. J. HLOPHE

JUDGEMENT

12/02/02

The two Applicants Rebecca Gwebu and Busisiwe Dlamini were dismissed by the Respondent on the 27th January, 1999 on allegations that they had removed floor tiles worth Emalangeneni Five Hundred and Sixty Rands to wit twenty six (26) crates without paying for them in contravention of the company policy.

A disciplinary hearing conducted by the Respondent found them guilty as charged. The conviction was upheld by an appeal tribunal and the decision to dismiss both of them was confirmed.

It is common cause that both applicants had no previous record of misconduct.

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The first Applicant was employed by the Respondent in September 1988 and was in continuous employ thereafter until the date of dismissal. An attempt by the Respondent to contest the date of employment of the first Applicant was discredited by the Respondent's own admission in the replying papers and by the evidence of Mr. Malaysa Mavimbela, the shop manager that indeed maybe the applicant was confirmed in 1992 though employed earlier. The court upon consideration of all the facts of the case finds that the Applicant was employed in September, 1988. She was a chief cashier at the time of dismissal.

The second Applicant was employed on the 1st January, 1995 and was in continuous employment until the date of dismissal. She worked as a cashier.

The two Applicants allege that the dismissal was unfair both in substance and in procedure and was contrary to the provisions of the Employment Act, 1980 for the reasons summarized as follows:

That on the 11th August, 1998, at about 9.15a.m. the 1st Applicant visited the Respondent's Mbabane shop to buy cement whilst she was on leave. As she went out of the tills, she noticed tiles on a trolley next

to the till but on the opposite side. She enquired about the tiles from the 2nd Applicant who had bought the tiles since she was aware that they were old tiles that had been in the shop for a long while.

The 2nd applicant informed her that she had bought the twenty-six boxes of tiles on a discount authorized by the Manager Malaysa Mavimbela.

She asked the 2nd Applicant if she would sell to her some as she wanted to make a strip of tiles. The 2nd Applicant informed her that she could take thirteen (13) boxes at the marked down price of E20 per box. She further allowed her to pay the purchase price later. At the time of the conversation there was a cashier, the end controller and three (3) shop assistants and they overheard that conversation.

The End Controller and the shop assistants loaded the thirteen (13) boxes to her car. Then the end controller, entered the manager's office, which was next to the till and the 1st Applicant overheard him explain to the Manager

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that she was about to leave with some of the tiles which he had given to the 2nd Applicant.

The manager came out of his office, stood next to the till and authorized that she takes the tiles already loaded in the car.

On the 15th August, 1998 she paid the M1 value of 13 boxes of tiles to the 2nd Applicant in the sum of E260.00. This narration is fully corroborated by the 2nd Applicant in her testimony.

The 2nd Applicant went on to narrate how the transaction was initiated with the Manager and the oral agreements she had with him concerning the payment of the tiles.

She told the court that the tiles in question were considered obsolete by the Respondent, and new stock was brought in. She negotiated a marked down price with the manager in line with customary courtesy given to the employees of the Respondent. The manager allowed her to buy them at a discounted price of E20 per box. She did not have money then, so she did not take the tiles immediately upon conclusion of the negotiations.

The following day, the manager inquired why she had not removed the tiles and threatened to sell them to someone else. It was then, the manager allowed her to take the tiles and pay later. With the help of one Nhlabatsi, a shop assistant she moved the tiles to the till area.

It was then that the 1st Applicant came to buy cement and noticed the tiles, next to the till. She agreed to share the tiles with the 1st Applicant. The shop assistant and end controller, via the cashier loaded some of the tiles in the 1st Applicant's van. The manager consented to the removal without immediate payment upon an enquiry made by the end controller.

The same day in the afternoon she took her share of the tiles and on the 15th August, 1998, she received E260.00 in payment of the tiles she gave to the 1st Applicant. She added E200.00 and handed over the money to the manager because he was to mark the price down as agreed and pay it to the cashier to ring the till. The manager had no problem with that. At the time she was Acting Chief Cashier since the 1st Applicant was on leave,

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The 1st Applicant returned to work in the month of August, subsequently there were stock takes done and a shortage was discovered of numerous items including the tiles.

A shortage workshop was conducted wherein all the employees were called in one by one and queried on possible causes on shrinkage. After the workshop, the employees were given a general warning by the

Regional Manager and it was agreed that a new page would be opened from then onwards aimed at improving the shrinkage levels at the shop.

On the 20th January, 1999 a day after the workshop, the Applicants were given a notice to attend a disciplinary hearing. The two Applicants told the court that most of the employees had blamed the stock shortage on the laxity of the shop manager. He was not happy about this and hence the two suggested that the measure of charging the applicants was taken as a retaliatory measure inspite that the manager had authorized removal of the tiles without payment and that he had infact been subsequently paid cash for the marked down tiles but had negligently failed to pay in the amount into the cash register and the sum of E460 was discovered in his drawer after the disciplinary hearing that had found the Applicants guilty of removing goods from the shop without payment contrary to company policy.

The charge reflected that they had taken the tiles on the 6th November, 1998 without payment yet this transaction had been done on the 6th August, 1998. The panel however stated that it was immaterial when the goods were taken.

The Applicant's further told the court that it was not the first time the manager had accorded the staff similar concessions. Example was given of timber that the 2nd Applicant had been allowed to take and pay later. This was not denied by the manager.

The 2nd Applicant insisted that she had given the money for the payment of the tiles on a Saturday the 15th August, 1998 in the afternoon stating that the entry in the disciplinary hearing minutes that she had done so on the 22nd August, 1998 was an error.

She told the court that when the money was discovered in the manager's drawer, the 1st Applicant called the chairman of the disciplinary hearing to tell him that indeed the money paid to the manager was found in his drawer. The discovery was made in the presence of the Applicants' representative

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Sifiso. She denied that she had planted the envelope with the money in the manager's drawer adding that since the time they were served with notice to attend a disciplinary hearing, they were on suspension and had no opportunity to enter the manager's office.

She denied further that her act of removing the tiles amounted to theft stating that she had due authority to remove the tiles from the shop by the manager and she had done so in his presence, the end controller and other staff.

The Applicants called Elijah Lukhele as AW3 to testify in support of their case. He was the stock controller of the Respondent's shop since 1991. He was still working as such at the time of his testimony.

He told the court that in August, 1998, he was still the stock controller. He discovered that twenty-seven (27) boxes of tiles were missing during a stock take. He reported to the cashier and end controller. He was informed that the manager had authorized removal of the tiles. The manager confirmed this and told him that he was going to mark them down because new stock had been brought.

Lukhele told the court further that he did not make any adjustment in respect of the tiles since no payment had been made in respect thereof. He said this was not the first time this had happened. Stock at times would be taken out and payment made later.

Mr. Lukhele did three subsequent stock takes and asked the manager about the tiles. The manager told him that adjustments would be done.

In December a large shortage of stock was discovered. This also happened in January 1999. The Regional Manager visited the shop to conduct a shrinkage workshop. The causes of the shortage were explored with every employee being interviewed.

Mr. Lukhele told the court that he had indicated that the indiscipline of the manager was a cause of the shortage. That he allowed goods to be taken out on quotation without payment. All staff including the manager were subsequently given warning letters. They were told to start afresh and improve the company's performance and that no one would be victimized.

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A week later, when the manager informed him he wanted to discipline the Applicants for taking the tiles, he reminded him that the issue had been dealt with, They were however charged and the Manzini branch manager Paul Gladwin prosecuted them. He was not called as a witness to testify in the matter.

He denied that the tiles were taken in November 1998 stating that it was in August. He prepared a count sheet and gave it to the manager on the same day. The sheets were signed for by himself and the manager as an indication that the tiles were removed. On the date of the hearing, he showed the manager the signed sheet and he took the papers away. He did so to make the manager aware that the charges were unfounded. He told the manager not to charge the Applicants but he went ahead and did so. The manager replied that in the shortage workshop people reported that he was indisciplined and it was then time to show that he had discipline.

He explained that there were three stock takes in September for August, October for September and in December for November, He denied that his testimony was concocted because he was disgruntled.

AW4 was Bernard Mdluli who at the material time worked as a cashier. He was on duty when the tiles were removed and he was requested not to ring them on the cash register. The tiles were loaded into a car. The end controller asked for a till slip from him and he explained to him what had happened. The controller went to the manager's office to enquire about the tiles. The two came out, together and the manager authorized the release of the tiles stating that he was going to mark them down. Another batch of tiles was left in the shop. At the time of his testimony he had been dismissed from his employment. He denied however that he was making a story because he was dismissed. He insisted that the tiles were taken in August, 1998 and not in November. He insisted also that the manager was present when Rebecca removed the tiles.

The manager testified as RW1. He told the court that the shop had a huge stock loss and when he made investigations he discovered that tiles were missing. He remembered he had given the tiles to Busisiwe. He had allowed her to take them at a marked down price of E20 per box since he had received new stock. He had asked her to pay before taking them or else he would give them to a customer. It was during a stock take in November that'

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he discovered that the tiles were not paid for though the tiles had been taken earlier. He thought this had happened in August but he was not sure.

He said he was not present when the tiles were taken and that until the discovery, he thought they had been paid for. He added that he did not allow removal of stock without payment as this was contrary to company policy. He denied having authorized Applicants to pay later and denied having received E460 in payment of the tiles on the 15th August, 1998.

When asked if 1st Applicant was employed in 1988, he said maybe she was - confirmed in 1992. He denied that the two Applicants were owed the number of leave days claimed though he did not know whether any leave days were owed at all.

He told the court that the money allegedly found in his drawer must have been planted since he had received no money from the Applicants.

The manager appeared to contradict himself as to when he actually discovered the non-payment. The appeal record indicates that he had noticed on the same day whereas he told the court that it was after a stock take much later.

Paul Gladwin testified as RW2. He was the branch manager for Cashbuild Manzini. He chaired the disciplinary hearing against the Applicants. He told the court that the Applicants were represented by Sifiso Simelane.

The case according to him was one of contravening company policy by taking goods without payment which was a dismissible offence. There was contention as to when this had occurred but he said the date was immaterial. He said that the 1st Applicant did not deny the charge. She said she got the goods from the 2nd Applicant and paid for them later and had been made to understand that the manager had accepted that arrangement.

He found the two Applicants guilty as charged. They both appealed and their appeal was dismissed. He said that the allegation of the money paid to the manager was made after the hearing. He explained that it did not matter if the manager had authorized the removal of tiles without payment since the Applicants knew that was contrary to company policy but the manager in any event had denied authorizing the removal prior to payment. He said

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inspite that the two applicants had no previous warnings, the offence committed was serious hence the dismissal.

He denied that there was evidence of similar authorization by the manager concerning timber.

He said nothing was in favour of the Applicants other than their clean record.

He added that the end controller had told him that he allowed the tiles to be removed after he had spoken to the manager who then gave him the authority to release the goods. The end controller, inspite of the fact that still worked for the respondent was not called to testify before court on this aspect of his evidence which appears to corroborate the evidence of AW1, AW2, AW3 and AW4.

The end controller, Dumisa Mavimbela was not disciplined for his role in the transaction according to this witness.

Upon a careful consideration of the evidence by the Applicants, the testimony in support of their case and the evidence in support of the Respondent's case, the court has arrived at the following objective facts:

1. That the 2nd Applicant negotiated with the manager RW1 to buy 26 boxes of out dated tiles, at a marked down price of E20 per box.
2. That RW1 verbally authorized the marked down sale of the tiles to the 2nd Applicant.
3. That the 2nd Applicant did not collect the tiles immediately as she did not have money and RW1, upon inquiry from her why she had not removed the tiles, allowed her to take the tiles and pay later.
4. That the 1st Applicant who was on leave at the time came to buy cement from the shop and while there negotiated to buy 13 boxes of tiles from the 2nd Applicant.
5. That the 1st Applicant removed the tiles with the permission of the cashier, end controller and the manager, (RW1) who was at the shop at the time.

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6. That on the 15th August, 1998 a few days after taking the tiles, the first Applicant paid E260 to the 2nd Applicant in consideration of the 13 boxes of tiles she had bought from her.

7. That RW1 received E460 from the 2nd Applicant as payment for the tiles but he failed and or neglected to mark down the tiles and document the payment of the received amount which the court accepts was recovered from his drawer.

The court regards the credibility of RW1 as suspect and his account of what -actually happened untrue. The evidence of the two Applicants was well corroborated by AW3, AW4. The stock controller especially who was still working for the Respondent cast very credible aspersions on the conduct and testimony of RW1.

The court believes that RW1 authorized the mark down and removal without payment of the 26 boxes of tiles but beat an about turn after his administrative skills were questioned during the shrinkage workshop conducted on the 19th January, 1999.

The evidence that since August, 1998 he had known this transaction but only charged the two Applicants on the 20th January 1999 after the shrinkage workshop is telling on his bonafides.

The court rejects his evidence concerning the transaction in its totality and accepts the version narrated by the witnesses for the Applicants.

RW2, the manager for the Manzini branch of the Respondent told the court that it did not matter whether RW1 had authorized the removal of the tiles to be paid for later or not since this was contrary to company policy. This was a gross misdirection on his part as it was on the basis that he found the applicants guilty as charged and dismissed them from their employment.

He disregarded the long service given to the Respondent by both Applicants and took lightly their clean record up to the time of this transaction.

It is noteworthy that the 1st Applicant was a chief cashier for about five years and the 2nd Applicant was a cashier, they had held positions of trust in the Mbabane shop for considerable long periods worthy of recognition in

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evaluating whether it was reasonable or not to dismiss them in the circumstances of the case.

The court finds that in the circumstances of the case, the Applicants could not be found liable for removing goods prior to payment if this was done with the express authority of the branch manager. We indeed find that this was the case here and the reactionary conduct of the branch manager as evidenced by the delay to act only helped to fortify the Applicants' case:-

Minor discrepancies concerning who was present when an envelope containing E460 was recovered from RW1's office is not sufficient to discredit the consistent accounts given by the Applicants and their witnesses concerning the events of 6th August 1998, 11th August, 1998 and subsequent events.

The court finds the two Applicants credible witnesses worth of believe and their accounts, consistent and very reasonable taking into account all the circumstances.

The Respondent has in the circumstances failed to show that the dismissal of both Applicants was for a reason contained under Section 36 of the Employment Act. The removal was done above board with full consent of the manager, end controller and cashier on duty at the time and thus could not be construed as a breach of the prevailing policy at the Mbabane shop. Each case must be judged on its own merits. It was also most unreasonable to dismiss the Applicants in the circumstances considering their long service, clean record, responsibilities at home and the overall circumstances of the removal of the tiles in

question.

The 1st Applicant is married with three children. At the time of dismissal she earned E2500 per month. She got alternative employment in May 1999. Currently she works for Consumer Credit and earns E2,300 per month. She got no terminal benefits upon dismissal and seeks the same and in addition maximum compensation for unfair dismissal. She claims 60 days in lieu of leave, but the court finds that she is entitled to 26 days payment in lieu of leave.

The 2nd Applicant worked as a cashier and earned E2058 per month at the time of dismissal. She is married and has one child. She is still unemployed inspite efforts to get alternative employment. She is a hawker now and earns

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about E400 per month, Her furniture was repossessed and her credit facilities withdrawn for non payment. She seeks reinstatement to her job and in the alternative terminal benefits and compensation.

Though she claimed 60 days payment in lieu of leave, the court finds that she was owed 26 days leave as contained in her particulars of claim. She had not gone for leave in 1996 and 1997 and was entitled to 24 days per year.

Accordingly, the 1st applicant will receive eight (8) months pay as compensation for unfair dismissal in the sum of:

(8 x 2500)	=	E20,000
Notice Pay	=	E 2,500
Additional Notice	=	E 3,846
Severance Allowance	=	E 9,615
Payment in lieu of leave =		E 2,499
TOTAL		E38.460

The 2nd Applicant will receive (12) months pay as compensation for unfair dismissal in the sum of;

12 x 2058	=	E 24,696
Notice Pay	=	E 2,058
Additional Notice	=	E 949
Severance Allowance	=	E 2,374
Payment in lieu of leave =		E 2,057
TOTAL		E32.134

There will be no order as to costs.

The Members Agree.

NDERI NDUMA

