



CONCILIATION, MEDIATION & ARBITRATION COMMISSION (CMAC)

HELD AT MBABANE

SWMB 333/16

In the matter between:-

SCAWU obo Jabulile Dlamini

Applicant

AND

Lewis Stores (PTY) LTD

Respondent

CORAM:

Arbitrator : Mr M.C Simelane

For Applicant : Mr Michah Yende

For Respondent : Mr Patric Mabuza

Arbitration Dates : 22/11/16, 08/12/16

ARBITRATION AWARD

{09 -02-2017}

1. Background and the parties.

1.1 The Applicant is Jabulile Lasbhomba Dlamini. It is alleged that she was employed by the Respondent on the 11th of June 2015 and that Section of 35 Employment applies.

1.2 The Respondent Lewis Stores (PTY) LTD is a company registered with limited liability in terms of the law of Swaziland having shops throughout the towns and duties of the country.

1.3 The Respondent is in the business of selling household furniture and related goods. The Applicant was employed in the business of the Respondent at its shop located at Piggs Peak Town.

2 Factual Background of the Case.

2.1 The Applicant was employed under a written contract of employment as Sale Advisor commencing on the 11th of June 2015. She was paid a basic salary and a commission calculated in terms of the contract.

- 2.2 Sales person are paid a commission of 12.5% on xxx profit once a commission barrier which is five times the xxx basic salary xxx.
- 2.3 The Applicant employed on a probating xxx of six months after which she was permanent and pensionable
- 2.4 The Respondent employed the Applicant not as a trained xxx but took through training called an xxx Training that trains the new employee behavior disciplincy code of the company and grievance procedure. This training occurred on the 7th of August 2015. The Applicant was also taken through what is named and ABC of selling which entails the job description a Sale Advisor custom service the know – how of sale using different techniques and methods, closing on deals and convincing customer. This training was undertaken by the Applicant on the 18th of November 2015.
- 2.5 The Applicant was required to meet certain monthly targetting in sale however she failed. The Respondent issued to her for her signature Form A of its disciplincy code titled record of a first performance meeting (xxx) on the 12th of February 2016, subsequently there xxx when she continued to fail to meet the set target another Form A title record of second performance

Management Meeting (charge) my issued the 14th of March 2016. Her performance did not xxx a he continued to fail to meet there set target. On the 8th of April 2016, a third Form A was issued titled "record of third performance Management Meeting (RD) The Applicants performance was still below set target therefore she was served with a notice to attend a hearing on the following change.

"Poor Work Performance in that she did not reach prescribed minimum standard of E75,000.00 per month despite several verbal and written warnings"

2.6 Applicant attended the disciplincy hearing as it was held however she xxx guilty and was dismissed from the employ of the respondent through a notice of dismissal dated 29th of July 2016.

2.7 The Applicant has filed a dispute for arbitration having filed a certificate of unresolved dispute she challenges her dismissal procedural as well as substain time justice xxx. She now claims the following:-

Reinstatement alternatively	
Maximum Compensation	E36,000.00
Unlawful Deduction	E934.00

2.8 The Respondent disputes that the Applicant was dismissed unlawful and sought to demonstrate that procedure and substantive rights of the Applicant were observed therefore disputed that she was entitled to reinstatement or maximum compensation for unfair dismissal. Respondent further deny any unlawful deductions on the Applicant salary an xxx by the Applicant.

3 Summary of evidence of the Applicant.

3.1 The Applicant herself was called in to testify and she was the only witness called to support the Applicant's case.

3.2 She testified that she was employed by the Respondent on the 11th of June 2015, on a Sale Advisor. She stated that she signed a contract of employment. Her testimony is that she had

initially been employed to promote sales but that due to the shortage of staff she was required to do all kinds of duties including sewing customers inside the shop displaying the shop load vehicles display the merchandise and other task.

3.3 Applicant states that her job was mainly to sell merchandise and by so doing she was expected to reach a sales target set by the Manager on monthly basic. She testified that in order to earn the basic day you had to meet a target of 5 times your set basic salary and that xxx was $5 * E3,000.00 = E15,000.00$.

3.3 Applicant testified that any amount exceeding the E15,000.00 would entitled her to 12.5% of it.

3.4 The Applicant testified that the manager would set sales target at E80,000.00 to E88,000.00 which she failed to reach. She testified that it was only in December 2015 that she reached the target of E88,000.00 and actually exceeded the target.

3.5 The Applicant testified that on the 12th of February 2016, she was called in the Manager's office to appear before her Branch Manager Mr Mahlangu. She testified that Mr Mahlangu advised her that

she had failed to meet her sales target and that she must sign the form that he place before him already filled. She testified that she signed the form and left the office. Her testimony is that at the end of February 2016, she had failed to meet the set targets whereas Mr Mahlanga again called her to inform her that she had failed to reach the target provided a written document already filled by handwriting and demanded her to sign. Applicant testified that she signed the document and left the offices. Applicant testifies that the second signing of the document occurred on the 14th March 2016. Applicant testified that she failed to meet the targets again in March 2016 and that on the 8th of April 2016, the Branch Manager made her sign another document which was similar the last too.

- 3.6 The Applicant testified that the meeting between herself and the Branch Manger were very brief and that the Manager only informal her of her failure to meet sale target and then expressed xxx that may be month end it would be better and then required her to sign the document the last end of the document.
- 3.7 The Applicant's testimony is that she failed to reach the targets still until she was served with a

notice of a disciplinary notice calling her to a disciplinary hearing on the 25th of July 2016. She testified that she was able to xxx her case and that she was afforded an opportunity to cross – examine the xxx xxx. Applicant testified that she was found guilty and dismissed.

3.8 Applicant testified that on the hearing the charges were then amended to xxx to perform task according to company standards and that she objected to the amendment as she was not ready to answer to the charge however, the Disciplinary Chairperson xxx her objection

3.9 On cross – examination Applicant conceded that the target that she reach in December 2015 was not as a result of any special attribution on or her part but that it was as result of the busy season where customers spend then bounces on cash items. The writers conceded this fact with ease.

3.8 The witness categorically denied being given opportunity to raise any issues that were challenging her resulting in her failure to meet target even when squeezed on cross – examination by the Respondent’s representative.

4 Summary of Respondent's Evidence.

4.1 The Respondent paraded two witness the Branch Manger Rocky Vusimuzi Mahlangu and Nqobile Matsebula who was he chairperson of the disciplincy hearing of the 25th of July 2016. She is the same person that dismissed the Applicant through a notice of dismissal dated 29th July 2016.

4.2 The evidence of Rocky Vusimuzi Mahlangu Respondent's witness 1 (RWI) confirms that the Applicant was indeed employed as a Sale Advisor. He testified that Sales Advisor were required to reach a minimum target of E75,000.00. He assist that Applicant was well aware of the set target.

4.3 RWI referred the Commission to a guide titled "Disciplincy offences and suggested xxx" An Appendix to guide 1.7. This guide list offences and then correlate sanctions in particular the degree at which such an offence escalate from first warning to a dismissal

Notably is Incapacity to perform tasks according to company standard is distinct offence to poor

work performance (xxx/reluctance negligence to comply with work standard). There is an obvious similarity of the penalties that may give for these different offences. It is glaring from the document and for both offences that at the just instance the offender is XXX in writing and then given a just written warning categorized as Green. At the second instance the offender is xxx xxx again in within and them issued a second written warning categorized orange Art the third instance, the offender is xxx xxx in writing and them given a final written warning categorized a Bed. At the forth instance the offender should he dismissed.

- 4.4 The witness interpretation of the disciplincy offences and suggested xxx guide and the way he applied it, and he testifies is that if an employee fails to reach the target he prepares Form A titled record of a First Performance Management Meeting (Green) fills the form and then calls the employee to sign the form. He considers this form the first written warning. The witness gave evidence that if the offence is repeated he issued another Form A title Record of second Performance Management Meeting Orange. He considers the final the second written warning.

The witness further testified that on the third occurrence of the offence he would fill and call the offender employee to sign Form A titled record of Third Performance Management Meeting (Red) that he considers a final written warning. At the fourth instance the witness states that he would then call the offender employee to a disciplinary hearing.

- 4.5 The evidence of RWI is that the Applicant failed repeatedly to reach the minimum of E75,000.00. He testifies that he would write the evaluation by filling its blank spaces call the Applicant read it to her and require her to sign it at the end of the document. He states that he would then tell the Applicant objectives of the evaluation that is to make her improve. RWI testified that she would then give the Applicant and opportunity to say anything but then she said nothing. The witness referred the commission to the documents that he filled and were signed by the Applicant
- Notable is that Form A is a record of a First Performance Management Meet form The Branch Manager to the employee. Paragraph 1 is titled Review of Present Performance.

Paragraph1 is titled Review of Present Performance.
The Paragraph of under this title starts with the words

“During the month _____ (insert date)
we xxx your performance which is not meeting the
required standards set by the company. For the
sake of clarity I would confirm that you were given
the following goals/target objectives to achieve
this xxx (hand written)

Sales Target of 80,000.00

Further aspect of your work that all unsatisfactory
(handwritten)

Plus Plan and Reserve calls

I confirm that you raised the following issues
(including requests for training guidance or
counseling_____

As a result of the above we agreed on the
following action _____

Your actual result/achievement were

Further aspects of your work that are unsatisfactory (hand written)

Paragraph 2 is titled Issues Raised by the Employee and start xxx the xxx

"I confirm that your raised the following issues (including requests for training guidance of counseling)_____

As a result of the above we agreed on the following

Sales and xxx the cash dosil

Paragraph 3 is titled Objectives Set and xxx with the paragraph

"The following are set goals /target /objective for the next month (hand written) 05/03/2016 which you xxx as reasonable _____ (hand written)88,000.00"

Paragraph 4 is titled Further Review beginning with the paragraph.

“We will meet again on a about (hand written) 07/03/2016 to review your performance against the above objectives. Please note that your xxx poor performance could ultimately lead to you dismissal. I trust however, that such consequence can be avoided and xxx your to make a xxx effort to improve your performance”

The employee signs at the end as well as the Manger

4.6 The witness referred me further to another document written Record of Second Performance Management Meeting (Orange) which he states was issued at the second instance. This one sets the target at E98,000.00 and that the Applicant `s actual result were E29,692.99. Further aspects of the Applicant’s work that is unsatisfactory were plus plan delivery change Hod and maintain contract. There is nothing on issues raised by the employee or on agreed xxx and actual achievement. The set target to be met was set to E88,000.00 and a further review was set for the 7th of March 2016. The form is signed by the Applicant and the Manager.

4.7 The witness further referred xxx to another document titled

“Record of a Third Performance Management Meeting (Red). In terms of the document the meeting was held on the 8th of April 2016. The target was set at E79,000.00 and the employee reached E33,333.34. further aspect of unsatisfactory work are delivery change plus plan and xxx is said to be very poor. There is nothing that is written o issues raised by the employee and on agreed xxx. The form was signed by the Applicant and her supervisor.

4.8 The witness testified that Applicant like all other new xxx was taken in training on the following date. On the 7th of August 2015, she went xxx some training called xxx for New Employees. On the 18th November 2015, she was taken through ABC of selling.

On the 21st of July 2015 the Applicant was taken through TDP xxx sales and on the 4th of March 2016 she was taken through TDP xxx credit. The witness testified that every Tuesday all Sales Advisor would receive training on another service and how to overcome a xxx customer.

4.9 On cross – examination the witness explained that the training that was afforded the Applicant was for all her employees and was not xxx to the Applicant. The witness explained that even the Tuesday meetings were for all the Sales Advisor.

4.10 The witness was questioned on the xxx xxx that Applicant served. The witness answered to say 3 months later said to xxx but, later changed to 3 months and xxx very dicey xxx this question. When referred to the contract which fixed the xxx to 6 months he still resorted to 3 months and tried to explain through xxx that the other 3 months is not actually xxx because it is for training.

4.11 The witness admitted to charging the Applicant for per working performance in terms of the notice to attend disciplincy hearing and deined that she was made to answer on a different change at the hearing of the matter being incapacity to perform in terms company standards.

4.12 The witness testified that there was no problem with Applicant and that as for he observed she was failing to reach targets because she did not extra mile.

- 4.13 The witness agreed that he filled the xxx called the Applicant and then she would sign the form after having discussed with her briefly.
- 4.14 The second witness called to testified in favor of the Respondent's case was Nqobile Matsebula herein I will call RW2 she testified that she is employed by Respondent as xxx Controller. She stated that she was the Chairperson that sat at the disciplincy hearing of the Applicant and decided on the matter as well as the sanction.
- 4.15 Her testimony is that she found Applicant guilt and eventually sanctured her with a dismissal because there was compelling evidence against her. She testifies that the evidence was compelling that the Applicant was correctly charged with incapacity to perform according to company standards.
- 4.16 RW2 testified that when she heard the evidence of the Manager Rocky Mahlangu during the hearing of the matter she was convinced that the Respondent did all it could to assist the Applicant but then she could xxx reach targets. The witness testified that the written warning xxx corded are sufficient xxx that the company complied with its owns disciplincy xxxx.

4.17 On cross – examination it was suggested to the witness that she was biased towards the Respondent hence her attendance to testify against the Applicant a suggested that the witness refuted.

4.18 The witness was at pain to justify why she answer at the decision in form of the Respondent. She xxx also put a pain of justifying why another employee named Sibusiso who was xxx a similiary offence only xxx a written warning get the Applicant was dismissed. This is what the witness said

“The xxx Sibusiso is different. As much as he was facing a similar offence and had xxx warnings issued I did not into intend to dismiss him therefore I issued him with a final written warning so that he realizes that the xxx was xxx.”

The witness however admitted that the written warning issued to the other employee occurred often what she terms a final warning had been issued. This document titled Record of Third Performance Management Meeting (Red). She however admits that the treating of these ceses differently is irregular.

4.19 In so xxx as RWZ was concenced the Applicant had been given enough training and the Manager had done sufficiently for xxx the Applicant enough time and Counseling in order to perform.

4.20 The witness regarded a change for incapacity to perform according to company standards the same as a charge for poor working performance (xxx /reluctance negligence to comply with work standards) an the same. As far as the chairperson was concenced it was xxx to listen to evidence on a particular change and then issue a xxx for another charge and that there was nothing wrong with that.

4.21 The witness understands written warnings to be xxx and that a final written warning is issued by Respondent before a disciplinacy hearing is held.

5. **Analysis of Evidence and Submissions.**

5.1 The Applicant's representative Mr Yende submitted at the close of the Applicant's case that Applicant's job description was to promote sales and that her position as a Sales Advisor was different to the job she practically xxx on as Sales Agent.

The contract of employment appoints Applicant to a position Sales Advisor xxx in Piggs Peak. The contracts seems to be a ready – made contract for sale staff Driver or their xxx xxx staff and others such as collectors. The Applicant falls under the category of a Sales Staff xxx whose job particulars are said to be available at the branch even when the contract is signed. It may be concluded that at the time the parties enter into the contract of employment, the employee did not have full details of her employment and this is however not in dispute and has been admitted by applicant that her job was to sell furniture and then do other duties on spelled out in the contract of employment.

5.2 The evidence of RWI that applicant knew of her job description is where.....with that of the applicant that she displayed unambiguously that she understand her job details, core and minor. It follows, therefore that as a Sales Advisor whose core duties are to sell furniture, applicant would be bound by set targets.

5.3 The applicant was crystal clear that she failed to meet the set targets. She testified that she did all she could but could not meet the targets. She **spined** that it took time to build a chentele that would ensure that one

meets the set targets. The evidence of RWI, the Manager tallies with applicant assessment of herself when he testifies that there was nothing wrong with applicant save her failure to sell to meet the set targets.

5.4 The issue of probation seems is clearly articulated in the contract of employment and I accept the applicant, evidence that she served six months on probation. The evidence of RWI Mr. Mahlangu is rejected as he displayed dishonesty and unreliability when refused to acknowledge what is written on a contract. The serving of six month probation period does not assist the applicant in the relief that she seeks in this matter unless of course she aimed at displaying the nature of the employment relationship between the parties. For clarity, for non-technical and non-management staff, the Industrial Relations Act of 2000 as amended limits a probationing period to three months without any right to extend by agreement. Any engagement beyond three months is assumed to be on permanent and pensionable basis by operation of law.

5.5 The respondent has submitted that procedure was followed to the later in dealing with the applicant's case before arriving at the decision of dismissal. It was

future contended that applicant, failure to meet set targets as a sales person entitled the respondent to dismiss her and that enough training had been given to her. It is contended by respondent that sufficient evidence has been addvxxxxx by RWI Mr Mahlangu that applicant was afforded coaching counselling guidance and motivation in xxxxxx to improve her performance.

- 5.6 the analysis of the evidence of RW2 Nqobile Matsebula, the chairperson of the discipling hearing when she testified that she found the applicant guilty of incapacity to perform according to company standards even though she was charged with poor working performance brings the fairness of the procedure adopted by the respondent.

Similarly these fairness of the procedure is tested through the evidence of the same witness RW2 when she admits that applicant faced a similar charge with a co-employee however she, the witness did not intend to dismiss the other therefore she issued him with a final written warning than to call him to a disciplinary hearing. By necessary implication it can be implied that she intended to dismiss the applicant and that is why she called her for a disciplinary hearing. Such an

intention **formed** by a chairperson of a disciplinary hearing would amount to miscarriage of justice in that biasness is apparent. The legal **jargon** justice must not only be done but must be seen to be done cuts across all institutions that dispense justice to people including disciplining bodies in the work place. It is not expected of a chairperson who is supposed to be neutral to formulate an opinion or intention about a matter he/she is still going to decide based on evidence yet to be adduced and produced. Regardless of the informal nature of disciplining hearings there is a standard or of barometer of justice that such process should meet.

5.7 applicants representative reframed to a document titled Performance Management Guide – Performance Management Procedure of Under Performing Employees”. This document was availed to both witness for the respondents and they confirmed that it is the guiding rule in dealing with underperforming employees.

5.8 the analysis of the evidence will therefore be weighed against the regulatory procedure in the performance Management Procedure for Under – performing employees. The respondent must display that in

dealing with the applicant they complied with their own rules therefore complied with their own Disciplining Code. The outcome of this assessment would still have to be tested if it passes the test of our Employment Act and Common Law **as** to fairness.

5.9 RW1, the Manager testified that he filled in the Record of Performance Management Meeting all **three** first, second and final. He testified that he would then call the applicant talk to her and then require her to sign. He testify that when talking to her he would motivate her and train her. The applicant testified that Mr Mahlangu at all instances having filled in the form would inform her that she **was being assessed** her poor performance and then require her to sign the documents. All three records of the meetings have nothing on issues raised by the employee.

The respondent, Performance Management Procedure for Under Performing Employees states on **following**.

Article 1.2 of the Codes states,

“The work performance standards required by the employer must be communicated to all new employees on commencement of employment. A letter (Annexure 1) must be given to all new employees during the first

month of employment. These are job descriptions and branch instructions to further clarify the job requirement. The employee must be aware of what he/she is expected to achieve. Article 1.6 states that the code of practice applies to work performance only and excludes all other offences and refers for such offences to the Company Disciplinary Policy and Procedure.

It follows therefore that in dealing with an under performing employee like the applicant who was charged for poor working performance we would be guided by this code.

Article 2.1 of the Code requires of management of if at any stage, the performance of an employee becomes unsatisfactory, to firstly conduct an investigation to establish the reasons for the unsatisfactory performance (my emphasis).

Article 2.2 of the Code states

“Corrective action should be taken such as giving detailed job explanation, training, guidance and direction to ensure the employee knows what to do. This action is often taken through informal on – the – job discussion with the intention of assisting the employee to remedy his/her unsatisfactory

performance. The employee may – also be given formal off- the-job training.

Article 2.3 requires the employer to give the employee reasonable period of time to improve his/her performance in line with the required standard.

Article 2.4 states that should the poor performance continue the manager holds a performance management meeting with the employee where the parties discuss standards required, problems or difficulties which are preventing achievement of these standards and future ~~gxxxxx~~, 1 targets (my emphasis).

Article 2.5 states that the meetings must be documented on colour coded Performance forms with each meeting the manager must ensure that each Section of the document is completed. (my emphasis).

Article 3.3 and 4 deals with percentages of the performance reflecting on different scenarios and guiding how each scenario must be treated. In terms of these guides the evaluation process is based on the performance in percentages weighed against the set target.

5.10 The code creates a system that escalates on the poor performance persist on the part of the employee. The obligation that is placed on the Manager cannot be overlooked. Before there is a meeting that is recorded the code creates responsibilities for the Manager to investigate and establish the reasons for the unsatisfactory performance. To further put in place corrective active such as training, guidance and direction.

5.11 The evidence of RW1, Mr Mahlangu that nothing was wrong with the Applicant save that she lacked commitment is inconsistent with what he wrote as "further aspect of unsatisfactory work" where he listed a plethora of issues like Plus Plain, delivery change maintenance, and working at the cash desk. It seems to me that Mr. Mahlangu adopted the view that "nothing was wrong with the Applicant" when dealing with her and her performance while he contained his xxx assessment to himself for the record. The view that Mr. Mahlangu adopted when dealing with the Applicant led him to ignore the responsibilities that he has towards the Applicant in terms of the Performance Management Guide to investigate the reasons of poor performance and offer solutions to the Applicant. The testimony of Mahlangu does not reflect poor

performance of the Applicant in Plus Plain, delivery change sales **xxx** or cash desk.

5.12 The Respondent cannot therefore he said to have complied with its own code for dealing with under performing Applicant or there is no evidence sufficient to hold compliance that is acceptable to discharge the responsibilities put on the supervisor / manager towards the employee.

5.13 I am unable to comprehend the **xxx** of a record of a meeting and a sanction in a form or warning. It is acceptable that in such cases of poor working performance the employer would meet the employee in order to discuss the causes difficulties so that solutions are **xxx** and agreed upon. The employer would then set short term goals and then give the employee reasonable time to achieve these goals and then give the employee reasonable time to achieve these goals. The record is tantamount to minutes of a meeting of course with expectations of the employer. It is unfathomable how this record charge change to be a sanction in a form of a written warning. That the records of performance meeting are written warning is rejected.

Taking into account all the evidences before this process, I come to the conclusions that the dismissal of the Applicant was unfair.

6. The Applicant is 24 years and still employable, she is however presently unemployed and has dependents. She has not been able to find alternative employment.
7. There is enough evidence that the tax deducted from the salary of Applicant **annuity** to E934.98 **contravenes** limit fixed by the Swaziland Revenue Authority on the taxable amount on salary. Persons earning E3 576 - E3 577 should be taxed E31.97 according to the Tax table.

8. AWARD

- 8.1 The Respondent is to pay the Applicant an amount equivalent to four months salary in the sum of $E3000.00 \times 4 = E12\ 000.00$ as compensation for the unfair dismissal.
- 8.2 That respondent pay the unlawful tax with held to be calculated according to the Tax laws of Swaziland.
- 8.2 These amounts to be payable at CMAC offices by the 30th January 2017.

Arbitrator
(M C SIMELANE)