



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

HELD AT MANZINI

SWMZ 210/13

In the matter between:-

SPHELELE NDLOVU

APPLICANT

And

PARMALAT SWAZILAND (PTY) LTD

RESPONDENT

CORAM:

Arbitrator : Mrs. Nonsikelelo Dlamini

For Applicant : Mr. Ephraim B. Dlamini

For Respondent: Mr. Zwelakhe Hlophe

Nature of Dispute: Unfair Dismissal

Dates of Hearing: 20th February, 2017; & 21st February, 2017; 14th March, 2017; and 12th May, 2017.

ARBITRATION AWARD

1. DETAILS OF THE PARTIES AND REPRESENTATION

- 1.1 The Applicant is **Sphelele Ndlovu**, an adult female who was represented by a labour law consultant, Mr. Ephraim B. Dlamini situated in Mbabane during the course of these proceedings.
- 1.2 The Respondent is **Parmalat Swaziland(Pty) Ltd**, a company duly registered according to the company laws of Swaziland, represented during these proceedings by Mr. Zwelakhe Hlophe, an attorney from Magagula Hophe Attorneys in Mbabane.
- 1.3 The arbitration hearing was held at CMAC- Manzini office and had four (4) sittings as follows: 20th & 21st February 2017; 1st and 14th March, 2017; 5th and 12th May, 2017.

2. ISSUE TO BE DECIDED

- 2.1 The issue for determination is whether or not the Applicant was unfairly dismissed from the Respondent's employment, in terms of **Section 35** of the **Employment Act, No. 5 of 1980**.

3. BACKGROUND TO THE ISSUE

- 3.1 The Applicant is an ex-employee of the Respondent, having been employed as a Packer in August, 2008 and allegedly unfairly dismissed on the 13th February, 2013. At the time of termination of employment she was earning a basic wage of **E1 627.00** per month. Applicant was dismissed for two offences namely; the use of derogatory language in the workplace and secondly, threatening violence/ victimization. The dismissal was through a letter dated 8th February 2013. She then appealed the decision of the disciplinary

hearing through her letter dated 20th February 2017, and on appeal the decision to dismiss her was upheld.

3.2 The Respondent admits the former employment relationship between the parties, as verbal and casual in August 2008 until January 2010 wherein a written employment contract was signed by the parties. It is further agreed by the Respondent that the Applicant was employed as a Packer and earned the monthly wage submitted in her evidence. The Respondent denies that the Applicant's dismissal was unfair, it alleges that the Applicant's dismissal was fair in terms of **Sections 36 and 42 of the Employment Act 1980**. She was dismissed after a disciplinary hearing presided by an independent Chairperson where she was then found guilty and dismissed. Respondent further denies that the Applicants' termination was procedurally and substantively unfair, stating that an appeal hearing was conducted for the Applicant and the decision to dismiss her was upheld. Respondent's application, therefore, was that the Applicant's application be dismissed in its entirety.

4. SUMMARY OF THE EVIDENCE AND ARGUMENTS

The Applicant's Version;

4.1 The most important and relevant aspects of the Applicant's evidence who testified as the sole witness to the proceedings are that Applicant was engaged verbally in 2008 as a Packer, and that she was employed as a casual employee. She further submits that she was then given a written contract to sign in 2010, and that during the two periods there was no broken service hence her employment was continuous.

- 4.2 The Applicant testified under oath that she was suspended, charged and latter on dismissed on the 13th February, 2013, following a disciplinary hearing that had been held on the 6th February, 2013, at the Respondent's business premises situated at Matsapha. The misconduct for which she was dismissed was the use of derogatory language in the workplace and threatening violence / victimization of a co-worker one Mr. Mzwandile Nhleko, offences she had allegedly committed on the 21st and 31st January 2013, at the work place during working hours.
- 4.3 The charge sheet tabulating the misconduct had been delivered to the Applicant on the 31st January, 2013. During the disciplinary hearing, which was chaired by an independent person, the Applicant testified that she pleaded not guilty to the alleged misconduct. She was found guilty after the disciplinary process where witnesses were called to testify, a verdict of dismissal was meted through a written letter dated the 8th February, 2013.
- 4.4 She further testified that she filed an application to be heard in an appeal hearing on the 20th February, 2013. Her appeal was duly prosecuted and the dismissal verdict was upheld.
- 4.5 The Applicant confirmed even during her evidence in this arbitration that she did not use derogatory language nor did she threaten to instill violence on Mr. Mzwandile Nhleko, a co- worker. She further denied that Mr. Nhleko was her supervisor neither did she admit that there was any disagreement between herself and Mr. Nhleko which would lead her to commit the wrongful conduct alleged. She confirmed that her supervisor was Patience Gule. The Applicant rebutted all allegations during cross examination relating to the

alleged misconduct; she maintained that she never used the word **"uyanginyela"** meaning you are messing up with me during working hours directing them to Mr. Nhleko. The Applicant further denied the allegations that she had abandoned her responsibility at work as a Packer as she was busy with her mobile cell phone, and that as a result Mr. Mzwandile Nhleko instructed her to attend to the machine as it had stopped working. She stated that her mobile cell phone was in the locker as they (employees) had been warned against the use of cell phones during working hours. The Applicant therefore challenges the substantive fairness of the dismissal in those aspects.

4.6 The Applicant testified that she did not have a good working relationship with Mr. Nhleko, and that they had not been in talking terms for a period of a year. When the Applicant was asked in cross examination to state the reasons that made their relationship sour, her explanation was that Mr. Nhleko did not accept excuses by the Applicant for refusing to work overtime. When she was also questioned whether she did report to Patience Gule the incidence of the 21st January 2013, her response was that she did not as she was not sure where Patience was on that day.

4.7 The Applicant further challenges the procedurally fairness of the dismissal, alleging that Mr. Mzwandile Nhleko did not prefer charges against her as would be expected of him as her supervisor. It was further argued by the Applicant that during the disciplinary hearing the chairperson led the witness as opposed to the complainant. Her argument was further that no evidence was submitted to prove her guilty of all the offences alleged.

The Respondent's Version;

- 4.8 The Respondent, through the testimony of Mr. Lindizwe Dlamini its Returns Clerk (RW1), gave evidence that it is true that the Applicant was dismissed but it was for the correct reason, being the acts of using derogatory language and threats of violence against Mr.Mzwandile Nhleko (a co-worker), pursuant to that, a fair disciplinary procedure in a form of disciplinary hearing and an appeal hearing were afforded to the Applicant.
- 4.9 It was Lindizwe Dlamini's testimony that following the unacceptable conduct by the Applicant against Nhleko on the 21st and the 30th January, 2013 the Applicant was suspended and advised to collect a charge sheet on the 31st January, 2013 something which she did.
- 4.10 It was the testimony of the witness (RW1) even during cross examination that he was present at work at the Production Department and at that time normal production came to a stop as the employees waited for the Applicant to load the machine with the required material in order for production to resume. It is alleged that Applicant uttered the words ***"uyanginyela"*** to Mr. Nhleko who was enquiring as to why the Applicant was sitting and paging her phone instead of attending to the machine as it had stopped working. He further testified that he was at a distance of approximately three (3) meters away from the incidence scene, and heard very well the words uttered since he did not have a hearing or an eyesight problem.
- 4.11 Dlamini also testified that on the 30th January, 2013 the Applicant went out of the production area and on her return grabbed Mr.

Nhleko by his clothes in an attempt of a fight. When cross-examined as to whether by any chance he would have a grudge against the Applicant, Lindizwe responded to the negative.

4.12 The next employee to testify in support of the Respondent's case was Mzwandile Nhleko (RW2), who swore under oath that he was employed at the Respondent's company as a Line Operator. He confirmed that the Applicant was employed as a Packer. He further explained that his job was to oversee the movement of the packing line just like a captain and gives instructions and orders should the need arise, and that he had an authority to command other employees to maintain working order.

4.13 He testified on the events of the 21st January 2013, when he discovered that the production line where the Applicant was working had stopped moving, this was due to the fact that the Applicant was playing with her mobile phone instead of loading cartons to the machine. He then gave her an instruction to fetch cartons and load them so that the production lines resumes movement, but the Applicant's response was "**uyanginyela**" meaning you're messing up with me and that only Musawenkhosi has the authority to give her an instruction. According to RW2 the Applicant decided to follow that instruction after a lapse of ten minutes.

4.14 It was Nhleko's evidence that on the 22nd January, 2013 before resuming his morning duties he reported the previous day's incidence to the Production Manager, Patience Gule who instructed him to write a report which he wrote and submitted. He further testified that on the 30th January, 2013 during working hours at the Production Department, the Applicant came carrying an envelope and held Mr.

Nhleko by his clothes and asked in provocation from Mr. Nhleko ***“yini lamanyala lowabhalile”*** meaning what garbage have you written? Nhleko testified that he did not give the Applicant a response.

4.15 He further testified that the relationship between the Applicant and himself was not good as sometimes he would give instructions to the Applicant which she did not adhere to nor followed. During cross-examination the witness testified that he had reported this to his former Manager Mr. Jerome Dlamini especially that his working relationship with the Applicant was not a good one.

4.16 The third witness to testify in support of the Respondent’s case was Musawenkhosi W. Dlamini (RW3). He testified that he knew the Applicant as a factory worker for the Respondent company and that he was the oversee in the disciplinary hearing held against the Applicant, ensuring that the disciplinary process was conducted professionally and that the Applicant was informed of all her legal rights including her right to call witnesses and to secure representation.

4.17 It was the testimony of RW3 that prior to the disciplinary hearing he had received a report that there was a need to have counseling sessions for the Applicant and Patience Gule as their working relationship was not good. He further testified that after the disciplinary hearing the Applicant was afforded an opportunity to appeal and the appeal hearing was held where the dismissal was upheld.

4.18 During cross examination the witness (RW3) testified that he performed his role in checking whether the charges laid against the

Applicant and the disciplinary hearing was conducted in line with the disciplinary code and procedure of the Respondent Company. It was also his testimony that Lindizwe Dlamini was called in the disciplinary hearing to testify as a witness and the Applicant was given an opportunity to cross examine the witness.

4.19 Therefore, Respondent's submission was that the burden of proving the fairness of the Applicant's dismissal in terms of Section 36 (b) of the Employment Act, 1980 has been successfully discharged warranting a dismissal of the application.

5. ANALYSIS OF THE EVIDENCE AND ARGUMENTS

5.1 The Applicant's claim against the Respondent is for compensation pursuant to an alleged unfair dismissal. **Section 42(1) of the Employment Act of 1980 (the Act)**, provides that an employee who sues an employer for the termination of her services must first prove that she was an employee to whom **Section 35 of the Act** applied. Put differently, the employee must prove the following: that she had completed probation; that she was required to work more than twenty-one hours per week; that she was not a member of the immediate family of the employer; and lastly, that she was not engaged for a fixed-term whose term of engagement had expired. The Applicant alleges that he was in continuous employment since August 2008 until the date of her dismissal on the 8th February 2013. No evidence was led by the Respondent to dispute these allegations except for submitting that the Applicant was engaged verbally as a casual employee in 2008 until she was made to sign a written contract on the 4th January, 2010.

5.2 Therefore, the Applicant has submitted sufficient evidence that she was a permanent employee and was not negatively affected by the other standards prescribed by **Section 35 of the Act**; consequently she has discharged her onus. **Section 42 (2) of the Act** provides that an employer has the onus of proving that the reason for terminating the services of an employee was one permitted by **Section 36 of the Act**; and that taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee.

5.3 It is the Respondent's evidence that the Applicant was dismissed for acts of violence against a co-worker, named Mzwandile Nhleko on the 21st January, 2013 whom she verbally assaulted/insulted through the use of derogatory language and also physically assaulting same on the 30th January, 2013 at the Respondent's business premises situated at Matsapha.

5.4 According to **JONH GROGAN** in his book titled: **DISMISSAL DISCRMINATION AND UNFAIR LABOIR PRACTISES, SECOND IMPRESSION 2007, pages 239- 241**, there are limits to the language which employees are permitted to use to express their views. Swearing and invective are generally considered misconduct which may in certain cases justify dismissal. He further writes in page 241 that; 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 according to Grogan is generally accepted as a valid reason to dismiss in any given circumstances of employment.

5.5 On the question of substantive unfairness of the dismissal, the Applicant led evidence that she never uttered any derogatory language neither did she ever threaten Mr. Nhleko with any form of violence. The Applicant further submitted that it was a norm that she and other employees would tell or crack jokes amongst each other and that she was not aware that Mr. Nhleko was being offended by such jokes.

5.6 From the foregoing arguments the Respondent's evidence through RW1, was that on the 21st January 2013, production stopped and the Applicant was questioned by Mr. Nhleko as to why she was sitting and busy with her phone instead of loading the machine with cartons to enable production to resume. The Response from the Applicant according to the witness to quote verbatim she said "**uyanginyela**" and you do not have authority to question me that, I only take instructions from Musawenkhosi. The witness further testified that on the 30th January 2013, the Applicant left the production area and on her return she grabbed Mr. Nhleko's clothes provoking him into a fight.

5.7 This argument was maintained by RW2 and RW3 respectively notwithstanding the disputed evidence by the Applicant. This then deters the rejection of the Applicant's arguments, first when the Applicant was asked during cross-examination whether she had insulted Mr. Nhleko her response was to the negative, and further submitted that as employees they would joke amongst each other. Then again she emphasizes that she has not been in talking terms with Mr. Nhleko for over a year because they did not have a good relationship and lastly during re-examination the Applicant testified that she does not recall what transpired on the 21st January, 2013

during working hours. Therefore, so goes the argument as RW2 also testified that he did not have a good relationship with the Applicant. In my view the Applicant's evidence is insincere as it is two faced.

5.8 It is further common cause that consequent to this act of misconduct, disciplinary charges were preferred against the Applicant and disciplinary proceedings were conducted which culminated to her dismissal. In line with the provision of **section 42** of the **Employment Act 1980 (as amended)**, the dismissal of the Applicant shall not be considered fair unless the Respondent proves that (a) the reason for such termination was one that was permitted by section 36; and (b) that taking into consideration all circumstances of the case, it was reasonable to terminate the services of the Applicant. Therefore, the onus then lies on the Respondent to prove that the dismissal of the Applicant was fair procedurally and substantively. The evidence submitted before me clearly proves that the Applicant was dismissed for reasons permitted by **Section 36(b) of the Employment Act, 1980**.

5.9 **Le Roux and Van Niekerk : The South African Law of Unfair Dismissal, paragraph 8.4, at page 20 as cited in the case of Zephania Ngwenya v Royal Swaziland Sugar Corporation IC Case 262/2001**, state that; " *assault is another of those forms of misconduct which has an impact both at the 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 first offender*".

5.10 I have adopted the decision of the Industrial Court of South Africa in **MAWU v Feralloys Limited (1987) 8 ILJ 124 (IC) at 137C**, where it is stated that: **"assault can vary from a mere touch to the infliction of serious harm."** It shall not be overlooked that the Applicant's violent action was not a result of provocation; it was a total disobedience and a refusal to perform a task. I shall not deal with those issues as they were not raised as evidence in this arbitration nor did they form part of the Respondent's charges against the Applicant.

5.11 I have considered the fact that at the time the Applicant was dismissed she had worked for less than five years. Having said that I hold the view that in the case of **Zephania Ngwenya v Royal Swaziland Sugar Corporation, 262/201 IC** on page 16 the **Honorable President of the Industrial Court Peter Dunseith**, made reference to the case of **Jabhane James Mbuli v Mhlume Sugar Company (IC case No7/1990)** where the Court per **Hassanali AJP** stated that: **"...where an employee has had a long record of good service in the past....this is a factor which may be taken into account by the court in judging the reasonableness of management's decision to dismiss."** In the present case the Applicant did not have a long service of employment to be considered, and neither did she submit any evidence concerning the type of record she maintained while in the Respondent's undertaking.

5.12 It is without any doubt proven that the Applicant's conduct resulted in work stoppage as production came to a halt for some time until the cartons were loaded in the machine, and with the evidence submitted before me it has been proven that the Applicant did use

offensive verbal language against a co-employee and also threaten violence. As pointed out above, the requirement of our law is that the employer must prove that the employee committed an act of misconduct so severe as to warrant dismissal.

5.13 The Applicant's action was not acceptable in that she failed to fulfill or satisfy her obligations as an employee. When production came to a stop and a spillage occurred she could not correct that, and the aggravating factor was that she acted violently instead of correcting a work related occurrence. In fact her violent action were not spontaneous but premeditated as she failed to show penitence for her action even after being called by Patience Gule, the Production Manager on the 30th January, 2013, concerning the occurrence of the 21st January, 2013.

5.14 In *casu* therefore, I find that the Respondent, Parmalat Swaziland (Pty) Ltd has proved on a balance of probabilities that the Applicant, Sphelele Ndlovu, committed serious acts of misconduct in the form of the use of derogatory/insultive language and acting with violence towards her co-employee and these acts of misconduct warranted her dismissal. In other words, my finding is that the dismissal of Applicant was substantively fair. Indeed violence, threats of violence and ill-treatment of fellow employees is strictly prohibited by our **Employment Act**, and such acts can never be approved in any employment relationship. **The Employment Act** provides under **section 36(b)** that; **"it shall be fair for an employer to terminate the services of an employee if that employee is guilty of violence, threats or ill-treatment towards the employer or other employee of the undertaking."**

5.15 The Applicant did not at anytime submit evidence that her actions were a result of provocation despite submitting in her evidence that she had not been in talking terms with Mr. Nhleko for a period over a year. See, ***Zephania Ngwenya vs Royal Swaziland Sugar Corporation, 262/2001 IC. On pages 13-14*** where the learned judge stated that, *“provocation alone cannot render assault lawful, unless it can be shown that provocation amounted to self defense or caused the Applicant to lose cognitive control over his actions”*.

5.16 I shall now look at the procedural aspect of the dismissal. The Applicant did not make any submission in her evidence in chief that the disciplinary hearing was procedurally unfair. In fact during cross examination she conceded that the disciplinary hearing was fair. She also said that even though the Chairperson of the disciplinary hearing was known to her as an employee of the Respondent, but she did not have a problem with him chairing it. The only procedural defect the Applicant complained about pertains to the charges, but she failed to submit sufficient evidence to support these allegations.

5.17 It is worth mentioning that in her closing submissions, the Applicant for the first time raised two points namely, that the chairperson played a role of prosecutor and presiding officer during the disciplinary hearing, and that he took the lead and led witnesses. This evidence cannot be taken into consideration since it is new evidence and the other party(Respondent) did not have an opportunity to test its veracity through cross-examination. I have also considered the fact that the Applicant was given an opportunity to be heard in an appeal hearing wherein the decision to dismiss her was upheld.

5.18 In light of the foregoing, it is my finding that the Applicant's dismissal was procedurally fair.

6. AWARD

6.1 I find that the Applicant's dismissal was both substantively and procedurally fair.

6.2 The Applicant's claims are accordingly dismissed.

6.3 There is no order for costs.

DATED AT MANZINI, ON THISJULY, 2017.

NONSIKELELO DLAMINI
CMAC ARBITRATOR