# IN THE HIGH COURT OF ESWATINI

**HELD AT MBABANE** **CASE NO. 338/2020**

In the matter between

**LEWIS STORES (PTY) LIMITED t/a**
**BEST HOME ELECTRIC** **Applicant**

**And**

**BONGANI S. DLAMINI N.O** **1ST RESPONDENT**
**MAKHOSAZANA SYLVIA SHABANGU** **2ND RESPONDENT**
**CONCILIATION, MEDIATION AND**
**ARBITRATION COMMISSION (CMAC)** **3RD RESPONDENT**

***Citation:*** *Lewis Stores (Pty) Ltd t/a Best Electric v Bongani S. Dlamini N.O. and 2 Others (338/2020) [2023] SZHC 239 (27 November 2023)*

**CORAM:** **N.M. MASEKO J.**
**FOR APPLICANT:** **ATTORNEY K. SIMELANE**
**FOR 2ND RESPONDENT:** **ATTORNEY M.S. DLAMINI**

**DATE HEARD:** **05/08/2021**
**DATE DELIVERED:** **27/11/2023**

**Preamble:** Civil Law – Civil Procedure – Labour Law – Review of CMAC – Award – Whether grounds of

review established – Relevant case law and principles discussed.

**Held:** That the Commissioner appointed by CMAC did not misdirect himself in any manner whatsoever to warrant this Court to review, correct or set aside the Award he made. Consequently the application is dismissed with cost.

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**JUDGMENT**

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**MASEKO J**

[1] On the 24th February 2020, the applicant launched motion proceedings for an order in the following terms:

1. Insofar as same may be applicable, condoning the Applicant's late filing of this application for review;

   **In the event no issue is taken on condonation or prayer 1 is granted, the Applicant prays for orders that**;
2. Reviewing and or correcting and or setting side the Arbitration Award issued by the 1st Respondent dated 13th December 2019, under CMAC Reference NO. SWM 285/90
3. Ordering and directing the 1st Respondent to despatch and file the record of arbitration within the time determined by the above Honourable Court;
4. Ordering and directing that the execution of the Award be stayed pending finaliation of this application

5. Ordering that prayer 3 and 4 hereinabove, operate as an Interim Order with immediate effect
6. Costs of suit in the event of opposition.

[2] It is common cause that the affidavits of Patrick Mabuza are used in support of these review proceedings and the affidavit of Makhosazane Sylvia Shabangu is used in opposition to this application.

[3] During the submissions in this matter before this court, both Counsel for the parties consented to orders for condonation for the late filing of the Replying Affidavit, as well as condonation for the late filing of these review proceedings. Counsel further made brief submissions and urged this court to consider their comprehensive written submissions.

**THE APPLICANT'S CASE**

[4] According to Patrick Mabuza, the Human Resource Manager of the Applicant, the 2nd Respondent was employed by the Applicant on or about the year 2000 as a Debtor's Clerk. In the year 2004 she was promoted to the position of Stock Clerk and then in 2011 she was promoted to the position of Branch Manager.

[5] In the year 2015, the 2nd Respondent was dismissed from employment of the Applicant, however she was re-employed in the year 2016 as a Branch Manager and was stationed at the Mbabane Branch.

[6] Mabuza states that whilst the 2nd Respondent was employed as a Branch Manager she was charged with an offence of poor work performance, and the charge was framed as follows:

> ***"The matter was investigated and the investigation showed that you made yourself guilty of poor work performance. It is specifically alleged that you are guilty of poor work performance in that you did not reach the prescribed Sales Target of E440 000.00 for the months of August as***

***communicated to you, even after you received several verbal and or written evaluations and warnings for the same offence to improve your performance. You only achieved E294 221.00 [66.88%] for the month of August 2018. You did not achieve the said standard or targets for the month as stated and received following evaluation..."***

[7] Mabuza states further that the Applicant thereafter set in motion disciplinary proceedings before the 1st Respondent where the Applicant led her evidence and the 2nd Respondent also led her evidence in support of her case.

[8] The 1st Respondent found in favour of the 2nd Respondent and made an Award in the sum of E112 840. 00 on the 13th December 2019.

[9] This is the Award that has resulted to these review proceedings *in casu*.

**THE GROUNDS FOR REVIEW**

i. The 1st Respondent misdirected himself and or failed to apply his mind or failed to take all relevant evidence presented into consideration, in failing to arrive into the conclusion that the offence charged has been proved.

ii. The 1st Respondent misdirected himself in finding that the Applicant ought to have led evidence to justify that the target of E440 000.00 (Four Hundred and Forty Thousand Emalangeni) set by the Applicant was reasonable. The Applicant alleges further that the 2nd Respondent in her cause of action never challenged the reasonableness of the monthly target and therefore such a finding by the 1st Respondent was unreasonable and a misdirection on his part.

iii. The 1st Respondent further misdirected himself when he failed to consider the Applicant's evidence on the alleged increased interest payable in June 2016 and more particularly because the

2nd Respondent never challenged it during the performance evaluations.

iv. The 1st Respondent misdirected himself when he found that there was no explanation from the Applicant on why the target of August 2019 was reduced to E390 000.00 and that such reduction raised questions on reasonableness of the target.

The 1st Respondent misdirected himself in making such a finding, and or failed to apply his mind and or failed to take into consideration the evidence that the targets are set on a monthly basis based on the analysis of the performance of the branch in the previous financial year month-to-month on what they achieved and from these add a certain percentage for the new target of the current year financial month.

v. The 1st Respondent further misdirected himself in failing to consider that the amount set for the target of August 2019 was not in dispute and or was not challenged by the 2nd Respondent.

vi. The 1st Respondent misdirected himself and or failed to take into consideration relevant facts or evidence presented when he found that the 2nd Respondent cannot be found to be guilty for failing to meet her target for the month of August.

vii. Further that the 1st Respondent misdirected himself and failed to apply his mind when he found that the Applicant chose a wrong month to charge the 2nd Respondent because the said 2nd Respondent was on leave for a period of four (4) days in the month of August 2018.

viii. Further that the 1st Respondent made an irregular finding and misdirected himself in that, **despite holding that the Applicant failed to adduce sufficient evidence** regarding her claim for procedural unfairness, the 1st Respondent continued to find that the dismissal of the 2nd Respondent **was procedurally unfair as**

**it could be inferred from the fact that the Applicant did not make available to the 2nd Respondent the minutes of the disciplinary hearing.** It is therefore argued that such a finding constitutes an error of law as the Applicant is found to have failed to adduce evidence on a balance of probabilities to prove that the dismissal was procedurally fair.

ix. Further that the 1st Respondent misdirected himself and failed to apply his mind properly and respectfully made an unreasonable Award in that, **despite finding that the dismissal of the 2nd Respondent was only substantively unfair,** the 1st Respondent awarded the 2nd Respondent eight (8) months compensation.

[10] These are, in the main, the grounds for review of the Award made by the 1st Respondent in favour of the 2nd Respondent which the Applicant has tabled in this matter *in casu*.

**THE 2ND RESPONDENT'S CASE:**

[11] In her Answering Affidavit the 2nd Respondent states that she was not guilty of poor work performance levied against her as she was wrongfully charged for the month of August where she was lawfully on four (4) days leave and she had worked twenty-two (22) days and not the full twenty-six (26) days. She states further that she timeously applied for leave of four (4) days and it was approved by the Applicant. She states further that it then raises eyebrows as to why the Applicant charged her for poor performance in a month i.e. August 2018, where she did not work all the full days.

The 2nd Respondent states further that:

i. She was not properly evaluated by her supervisor Mr. Bheki Dlamini.

ii. She was not properly assisted and guided by the said Mr. Bheki Dlamini to warrant her dismissal based on a charge of poor work performance.

[12] The 2nd Respondent states further that in all her evaluations, and for the month of August to be precise, she was evaluated in absentia without any engagement and involvement thus she was not properly and accordingly assisted and guided, and therefore this was grossly defective to be used as a basis for grounds to prefer charges of poor work performance and that being charged under these circumstances was or is not fair and reasonable to the 2nd Respondent.

[13] She states further that some of the evaluation forms were faxed and came to her attention already filled-in for her signature and that this shows the lack of commitment on her supervisor in seeing the Applicant perform well.

[14] She states further that she was not given a **final warning** considering her circumstances. Further that, after her re-instatement following her earlier dismissal in 2015, she was transferred to Mbabane from Manzini, yet it was known to the Applicant that the Mbabane branch had a history of not being able to achieve the stipulated targets and that her supervisor failed to assist her to reach her targets despite being fully aware of the history of the Mbabane branch.

**APPLICANT IN REPLY:**

[15] In the Replying Affidavit, the Divisional Human Resources Manager of the Applicant Teboho Mabuza re-iterated all the averments made in the Founding Affidavit.

[16] Mabuza reiterates further that the 2nd Respondent was properly charged for failure to meet her target for the month of August 2018 and

did not even achieve the prorated target. Mabuza further re-iterates that the 2nd Respondent was given sufficient assistance, evaluations, and trainings, had meetings with the Regional Controller and was experienced in the job. Mabuza further re-iterates that the dismissal of the 2nd Respondent was not premeditated as alleged Applicant.

[17] Mabuza further states that the 2nd Respondent was properly evaluated and obtained a **red evaluation** which led to her final warning. Mabuza explains that there are three results obtained during an evaluation for work performance. The evaluation may result to;

1. Green result;
2. Orange result, and
3. Red result

[18] Mabuza states that the 1st Respondent misdirected himself in comparing a 2019 evaluation yet the charge in question relates to a target for August 2018. He adds that the 1st Respondent failed to consider that the valuations are based on targets that are set on a monthly basis.

[19] Mabuza in his Replying Affidavit states further at paras 30-31 and 33 pages 109-110 of the Book of Pleadings (the Book) in the following manner:

> "[30] ***I further humbly reiterate that there was no need for the Applicant to call witnesses to prove the reasonableness of the targets and or the criteria or factors taken into account in setting such targets as same were known to the 2nd Respondent. The 2nd Respondent had at all material times, whilst under the employments of the Applicant, been working under such targets.***
>
> [31] ***I further humbly aver that the issue of the reasonableness or criteria or the facts taken into account in setting such targets, were never disputed and or challenged by the 2nd Respondent.***

***Therefore, there was no need for the Applicant to lead evidence in proof of such. This was clearly an irrelevant consideration taken into account by the 1st Respondent. Evidence of the target being reachable was presented to the 1st Respondent.***

***[33] The contents of this paragraph are again denied and the 2nd Respondent is put to strict proof thereof. I reiterate the contents of paragraph 35 of the Founding Affidavit herein and further emphasize the fact that the matter and or the change in question related to the 2nd Respondent failing to achieve her monthly target. I further reiterate that the 2nd Respondent never challenged the reasonableness of such targets and her allegation that the Mbabane branch was known for not performing well, or reaching its targets is denied and vitiated by the evidence of her successor who easily reached her targets. This allegation is also vitiated by the 2nd Respondent's claim that she could have reached the target in the last four (4) days."***

**THE ISSUE FOR DETERMINATION:**

[20] It appears to me that the issue for determination in these review proceedings is predicated upon the charge preferred against the 2nd Respondent for poor work performance for the month of August 2018, and whether the 1st Respondent misdirected himself in the manner herein alleged by the Applicant.

[21] It appears to me that the circumstances surrounding the evaluation of the 2nd Respondent's poor performance for the month of August 2018 attracted the attention of the 1st Respondent, and in my view rightfully so because, the 2nd Respondent was indeed dismissed for her alleged poor performance during this month. It was alleged by the Applicant that she (2nd Respondent) did not meet her monthly target, and also failed to meet the prorated target. The issue is therefore whether the 1st Respondent went overboard and considered issues which he was not legally obligated to consider and thus misdirected himself in his

findings in favour of the 2nd Respondent, for example, the issue of the reasonableness of such targets.

[22] The paragraphs referred to above herein, to wit, 30-31 & 33 at pages 109-110 of the Book sets the tone for the manner in which the 1st Respondent approached the matter, and I shall revert to same later in this judgment.

**ANALYSIS OF THE PROCEEDINGS BEFORE THE 1ST RESPONDENT AND THE LAW APPLICABLE**

[23] It is common cause that after her dismissal, the 2nd Respondent reported a labour dispute to CMAC, and because the parties could not reach an agreement or settlement, CMAC issued a Certificate of Unresolved Dispute. The parties thereafter entered into an agreement on the 23/09/2019 that the matter be referred to arbitration, hence the 1st Respondent was appointed as an Arbitrator on the 02/10/2019. He commenced his arbitration on the 15/10/2019, further continued on the 20/11/2019 and 21/11/2019, and written submissions were filed on the 29/11/2019. Patrick Mabuza represented Respondent whilst Mhlonishwa Shongwe represented the Applicant during the arbitration proceedings. The 1st Respondent eventually made his **"Arbitration Award"** on the 13/12/2019 in favour of the Applicant. The review proceedings *in casu* are meant to review, correct and/or set aside the arbitration award made by the 1st Respondent on the grounds as listed herein above.

[24] During the proceedings before the 1st Respondent, the 2nd Respondent, who was the applicant then, led her evidence only, whilst the Applicant, who was the respondent then, led the evidence of two witnesses, namely Bheki Dlamini the Regional Controller and Kholiwe Sylvia Mabuza, the Branch Manager Mbabane who succeeded the 2nd Respondent.

[25] In her testimony, she stated that she has lodged a claim for unfair dismissal in that on the 04/10/2018 she received or was given a Charge Sheet by the Regional Controller Bheki Dlamini wherein she was notified that there was a Notice of Performance Hearing Scheduled for 10/10/2018 at Matsapha Warehouse, Branch 604. She testified that she had started her leave days on the 09/10/2018. The chairperson was Ncobile Matsebula and the Initiator was Bheki Dlamini, her Regional Controller. She testified that the Charge stated that:-

> ***"the matter was investigated and the investigation showed that you are guilty of poor work performance.***
> ***It specifically alleged that you are guilty of poor work performance in that you did not reach the prescribed sales target of E440 000--- for the month of August as communicated to you even after you received several verbal or written communications (?) for the same offence to improve your performance..."***

[26] The 1st Respondent testified that she felt she was unfairly treated because in August 2018 she was away on leave for four (4) days, and only worked for twenty- two (22) days as opposed to the twenty- six (26) days which they normally work. She argued that it was unfair of her employers to choose August 2018 to evaluate her performance yet she was on leave for four (4) days. She argued further that the manner in which the charge was framed indicated that her employer the Applicant had premeditated her dismissal without affording her an opportunity to present her defence.

[27] In fact even the 1st Respondent was worried by the manner in which the charge itself was drafted.

[28] The 2nd Respondent also testified that the manner in which the target of E440 000.00 was set is unfair more so because her management was

aware of the poor performance history of the Mbabane Branch compared to the Manzini Branch. Further she testified that she was not properly evaluated by her Regional Controller based on the evaluation procedure usually characterized by the green, orange and red evaluation ratings. She testified that the valuations are more of a formality because the Regional Controller fills the evaluation forms on his own without her input and then give same to her for her signature after a brief discussion.

[29] During the arbitration the 1st Respondent took into account all the evidence presented by the parties, in order for him to properly determine whether the 2nd Respondent's dismissal was procedurally and substantively fair or not.

[30] The 1st Respondent, properly in my view and fairly so, outlined the history of the 2nd Respondent with the Applicant i.e. that the 2nd Respondent was originally employed by the Applicant as Debtor's Clerk on the 20th October 2000, and was promoted to the position of Stores Clerk in 2005. She was eventually promoted to the position of Branch Manager Manzini in 2011. She worked in that capacity until she was dismissed in 2015, and was again re-employed as Branch Manager in 2016 but was posted to Branch No. 669 Mbabane District of Hhohho.

[31] The process of arbitration of disputes is sanctioned by The Industrial Relations Act No. 001/2000 as Amended. Section 80 (3) of the Act provides as follows:-

> 80 (3) Where a dispute remains unresolved after conciliation, the Commission shall arbitrate the dispute, if
>
> (a) this Act requires arbitration

(b) this Act permits arbitration and the parties to the dispute have requested that the dispute be resolved through arbitration or;

(c) the parties to the dispute in respect of which the Industrial Court has jurisdiction consent to arbitration under the auspices of the Commission.

(d) The President of the Court directs that the dispute be determined by arbitration under Section 8 (8),

[32] I have referred to this Section above herein because the 1st Respondent duly pronounced his status as Chairperson and the nature of these proceedings when he commenced the proceedings herein under review.

[33] At all material times the 1st Respondent was conscious of the charge which was faced by the 2nd Respondent before the Applicant's disciplinary processes including the appeal hearing before the Applicant's appellate structure. In my view, the 1st Respondent did not commit the errors collectively which he is alleged to have committed which in the submission of the Applicant warrant this Court to review, correct and/or set aside the award which he made on the 13th December 2019.

[34] The evidence led by the Applicant before the 1st Respondent was that the 2nd Respondent failed to reach the target E440 000-00 for the month of August 2018, and this resulted in the 2nd Respondent being charged for poor work performance.

[35] The 2nd Respondent testified before the 1st Respondent that during the month of August 2018 she was on leave for four (4) days and as a result she did not work the normal twenty-six days (26) per month. She testified further that it was not fair to evaluate her on the twenty-two

(22) days she worked more particularly because her leave was official and had been authorized by the management of Applicant way in advance. She argued that the evaluation was a sham designed to fulfil the Applicant's premeditated plan and intention to dismiss her from Applicant's employment. Her view is that she should have been evaluated on performance for a whole month and not August because she did not work for a full month i.e. the 26 days. She testified that even the Charge Sheet was given to her whilst she was on leave and she was saved by her union to have the matter postponed to a date when she would have returned to work after her leave. She testified further that she was treated differently from her two junior officer who were given warning letters as opposed to outright dismissal for a similar offence of poor work performance.

[36] The 2nd Respondent also complained about the evaluations themselves in that, they are supposed to be conducted in person where the Regional Controller would discus with her the performance strategies and a way forward on how to meet the targets. However, she testified that such meetings never took place instead the Regional Controller would fax the evaluation form for her to append her signature and then re-send the signed form back to the Regional Controller.

[37] The 1st Respondent correctly considered Sections 36 and 42 of the Employment Act 1980 wherein the dismissal of an employee by the employer must be fair and reasonable taking into account all the circumstances of the matter. The aforesaid Sections are worded as follows:-

Section 36 (a) of the Employment Act 1980 provides as follows:

***"36. It shall be fair for an employer to terminate the services of an employee for any of the following reasons-***

***(a) because the conduct or work performance of the employee has after written warning, been such that the***

***employer cannot reasonably be expected to continue to employ him."***

[38] It is common cause that Section 36 must be read together with Section 42 which provides as follows:-

> ***"42. (1) In the presentation of any complaint under this Part the employee shall be required to prove that at the time his services were terminated that he was an employee to whom Section 35 applied.***
>
> ***(2) The services of an employee shall not be considered as having been fairly terminated unless the employer proves –***
>
> ***(a) that, the reason for the termination was one permitted by Section 36, and***
>
> ***(b) that, taking into account all the circumstances of the case, it was reasonable to terminate the service of the employee."***

[39] The 1st Respondent correctly considered that the failure to achieve the target amount of E440 000-00 for the month of August 2018 was the offence which resulted to the 2nd Respondent's dismissal. The 1st Respondent's assessment of the E440 000-00 target was whether it was reasonable or not reasonable in the circumstances. The 1st Respondent came to the conclusion that the target of E440 000-00 for the month of August 2018 was not reasonable because:-

i. the 2nd Respondent had only worked for 22 days instead of the normal 26 days, and therefore the evaluation based on 22 days was not fair.

ii. the evaluations themselves were not adequate and proper because the supervisor conducted these over the phone, and there was no proper training and action plans formulated to assist the 2nd Respondent to achieve the set targets.

[40] This is in my view a proper and fair approach to the matter which was adopted by the 1st Respondent. The 1st Respondent also considered as a material factor to prove that the target sales of E440 000-00 in August 2018 was unreasonable because evidence had been led by the Applicant that in August 2019, a year later, the target sales was set at E390 000-00 not the E440 000-00 set for August 2018, and there was no reason or explanation given as to why the figures had been reduced and therefore raised questions on the reasonableness of the target.

[41] I have seen in the record of proceedings before the 1st Respondent the target figures as revealed by RW1 Bheki Dlamini, and none of these target figures amounted to E440 000-00 after the dismissal of the 2nd Respondent. RW1 revealed these figures when he was praising RW2 Kholiwe Silvia Mabuza who succeeded the 1st Respondent as Manager for the Mbabane Branch.

August 2018 target is E440 000-00 for 2nd Respondent
July 2019 target is E390 000-00 for RW2
August 2019 target is E390 000-00 for RW2

[42] The 1st Respondent was concerned that the change of the figures from E440 000-00 as target for the 2nd Respondent in August 2018 had been reduced to E390 000-00 for RW2 the new manager in 2019, a year later, and his view is that the manner in which the target of E440 000-00 was set for the 2nd Respondent is in the circumstances not reasonable and constituted unfair dismissal of the 2nd Respondent.

[43] I cannot see any error of law or facts on the part of the 1st Respondent which constitutes a ground for the review of the award he made *in casu*. I say this for the following reasons:-

(i) The Applicant did not issue the 2nd Respondent with a written warning letter as dictated to by Section 36 (a) of the

Employment Act, because this Section prescribe that **"because the conduct or work performance of the employee has after written warning been such that the employer cannot reasonably be expected to continue to employ him."**

(ii) In her very first portion of her testimony the 2nd Respondent testified that she was being discriminated upon because she was dismissed without being first issued with a warning letter (see pages 52-53). She testified that she was only given a Charge Sheet which was not explained to her but just read to her.

(iii) During the appeal hearing, there was only the Chairperson, 2nd Respondent and Union Representative. There was no Initiator, further; (see pages 50-51 Record).

(iv) During the appeal hearing there was no Minutes of Disciplinary Proceedings, and it is not clear how the Chairperson managed to continue with the appeal hearing in the absence of the Disciplinary Record/Minutes and in the absence of the Initiator. It means therefore that the Chairperson was prosecutor and judge at the same time, something very irregular and unfair in the circumstances.

[44] The absence of the Record/Minutes of Proceedings and the Initiator during the appeal hearing bolsters the 2nd Respondent's argument that this was a premeditated strategy by the Applicant to dismiss her from employment, of course coupled with the unreasonable target of E440 000-00 for the month of August 2018, as well as the failure by the Regional Controller to effectively evaluate, assist and support the 2nd Respondent to reach her target. The 1st Respondent was of the view that the target set in August 2019 was E390 000-00 and that the E440 000-00 target for August 2018 clearly introduces the element of unreasonableness in the target allocation which resulted to the

dismissal of the 2nd Respondent because she failed to achieve that target.

[45] I have checked the Record of Proceedings before the 1st Respondent and have found that the target of E440 000-00 was only for August 2018, and that figure (E440 000-00) was never set as a target for RW2 Kholiwe Mabuza who took over from the 2nd Respondent. Further the 2nd Respondent was evaluated on the basis of 22 working days as opposed to 26 working days. RW2 Kholiwe Mabuza conceded under cross-examination that a target can be achieved in 26 days, and further that she (RW2) had achieved and even surpassed the target with only three (3) days remaining, (see page 140 of the Record of Proceedings). However, I must point out that she was not referring to a target of E440 000-00, as I mentioned above herein, the E440 000-00 was a target for August 2018 only in these proceedings and it was never set for RW2 Kholiwe Mabuza, but was only set for the 2nd Respondent in August 2018. By August 2019 RW2 Kholiwe Mabuza's target was only E390 000-00 having been significantly reduced from E440 000-00.

[46] The appeal hearing before the Chairperson constituted a second hearing of the disciplinary hearing in the sense that the 2nd Respondent testified at pages 50-53 that the Chairperson told them to start from the beginning so he could hear what they were complaining about and he wrote the record of appeal (page 51 Record). This is procedural unfairness and the 2nd Respondent should have never been subjected to this defective and irregular appeal hearing where there was no record/minutes of the disciplinary hearing and further where there was no initiator. The Chairperson was under a legal duty to postpone the appeal to enable the Applicant to constitute a process with a Chairperson, an Initiator, record/minutes of proceedings of the disciplinary hearing and of course with the 2nd Respondent and her union representative. However, this did not happen and the

Chairperson ultimately subjected the 2nd Respondent to an obvious procedural unfairness. This is despite the fact that the 1st Respondent made a finding that there was insufficient evidence presented by the 2nd Respondent on why she alleges her dismissal was procedurally unfair. The 1st Respondent went on to state that it can however be inferred from the facts of the matter and evidence presented that the failure by the Applicant to make available to the 2nd Respondent the minutes of the disciplinary hearing or at least get submissions from the initiator at the appeal hearing amounted to a procedural defect on the part of the Applicant. (see pages 22-23 paras 5.1.14-5.1.15 of the Book)

[47] It is my view as a review Court that the 1st Respondent ought to have found without doubt whatsoever that the failure by the Applicant to produce the record/minutes of the disciplinary proceedings together with the absence of the initiator compromised the integrity and credibility of the appeal hearing and thereby rendering the whole hearing procedurally unfair on the part of the 2nd Respondent who was the appellant.

[48] As regards the substantive unfairness aspect, the 1st Respondent found correctly in my view that the evidence presented at the hearing was that for the month of August 2019, the target was a lower figure of E390 000-00 as opposed to the figure of E440 000-00 for the month of August 2018. There was no explanation as to why the figures had been reduced and which raises questions on the reasonableness of the target.

[49] The 1st Respondent also found that the failure of Applicant to lead evidence of witnesses to shed light on how the monthly target figures are formulated and why the Applicant allege that any manager in the shoes of the 2nd Respondent in the month of August 2018 could have achieved the set target of E440 000-00 was fatal to its case.

[50] The 1st Respondent also found that it was substantively unfair to evaluate the 2nd Respondent during the month of August 2018 when she was on leave for four (4) days and did not work for the 26 days, when RW2 Kholiwe Mabuza testified that a set target could be achieved in four days, as she had achieved her set target at some point in time. However it must be borne in mind that RW2 was never set the target of E440 000-00 when she took over as manager for the Mbabane Branch. The evidence on record indicate lesser figures.

[51] The Respondent took into consideration all the evidence presented by both parties and was convinced by the merits and circumstances of this case that the 2nd Respondent's dismissal was substantively unfair. There is no misdirection or error of law or fact in the 1st Respondent's finding warranting or resulting to his award to be reviewable. The evidence led by Applicant during the disciplinary proceedings is unknown, and the evidence led by the Applicant before the arbitration proceedings fails to sustain the dismissal of the 2nd Respondent, instead her own evidence clearly prove that her dismissal was premeditated by the Applicant because:-

(i) she was never served with a warning letter and this violates Section 36 (a) of the Employment Act;

(ii) she was never properly and adequately evaluated with a view to increase her sales and meet the target set for her for that particular month. Her testimony is that she would meet the Regional Controller for only ten (10) minutes where she would be made to sign an already filed evaluation form, and also in some instances the evaluation form, would be faxed to her for her signature. She was evaluated despite the fact that she was on leave for four (4) days, and did not work for the full 26 days;

(iii) the target of E440 000-00 for the month of August 2018 is unreasonable in the circumstances and very high such that in August 2019 the 2nd Respondent's successor RW2 Kholiwe Mabuza's target was only E390 000-00 and no explanation was forthcoming from RW1 Bheki Dlamini the Regional Controller why the target set for August 2019 was substantially reduced;

(iv) the 2nd Respondent was subjected to an irregular appeal hearing wherein there was no record/minutes of proceedings of the disciplinary hearing, and further there was no initiator. The Chairperson served as both initiator and Chairperson, and he confirmed the dismissal without considering any record/minutes and thereby rendering the 2nd Respondent's dismissal procedurally unfair.

[52] In the case **Swaziland Airlink v Nonhlanhla Shongwe N.O. and Two Others (1249/2015) [2019] SZHC 195 (17 October 2019)** at paragraph 56. I referred to the judgment of PR Dunseith JP in the case of **Rudolf Graham v Mananga College and Another (94/2007) [2007] SZHC 17 (30 April 200)** where the President stated the following:-

> ***"the importance of fair procedure in disciplinary enquiries was emphasized in Thwala v ABC Shoe Store (1998) 8 ILJ 714 (IC) where the Industrial Court of South Africa held that natural justice is a process of value in itself. It is an end in its own right ----- it is so fundamental in the context of industrial relations, said the Court, that it should be enforced by the Court as a matter of policy, irrespective of the merits of the particular case."***

[53] **John Grogan** in his book *WORKPLACE LAW 9TH EDITION 2008 JUTA* states as follows at page 122 when dealing with fair procedure:-

> ***"----- All that needs to be stressed at this point is that procedural fairness and substantive fairness are independent criteria: a***

***dismissal is unfair if the employer failed to follow a fair procedure no matter how compelling the reason for the dismissal may have been. It does not follow, however, that a minor procedural lapse by an employer will render a dismissal procedurally unfair."***

[54] At page 188 **John Grogan** *(supra)* states as follows:-

***"The requirements of procedural fairness were developed by the labour courts from the rules of natural justice of the common law, adapted to suit the employment arena. Basically the rules of natural justice require employers to act in a semi-judicial way before imposing a disciplinary penalty on their employees. A fair procedure is meant to discourage arbitrary and spur-of-the moment action against employees. But as will be seen below a fair hearing does not necessarily entail conducting disciplinary proceedings according to the rigorous standards of a Court of law. Nor does it mean that employees can be forced to attend disciplinary hearings. The rules of natural justice require no more than that domestic tribunals must be conducted in accordance with common-sense precepts of fairness."***

[55] *In casu* the 2nd Respondent testified that the Charge was never explained to her. Evidence led by the 2nd Respondent, and which has not been denied by the Applicant, is that the Charge was contained in a document titled Notice of Performance Meeting which was read by RW1 Bheki Dlamini. It turned out that the Performance Meeting was, the disciplinary hearing since there was the initiator Mr. Bheki Dlamini RW1 the Regional Controller and Ncobile Matsebula was the Chairperson. The 2nd Respondent testified that she was called to attend the aforesaid Performance Meeting when she was on leave and was saved by her union which wrote a letter requesting for a postponement to the 07/11/2018 which was granted.

[56] 2nd Respondent testified at pages 14-15 of the Record as follows:-

| | |
|---|---|
| *"AW1:* | *The Notice of Performance Meeting was read to me by Bheki Dlamini* |
| *COMMISSIONER:* | *Yes* |
| *AW1:* | *can I continue?* |
| *COMMISSIONER:* | *Yes proceed.* |
| *AW1:* | *and when it was my turn to ask I asked him to clarify* |
| *COMMISSIONER:* | *You asked who?* |
| *AW1:* | *I asked Bheki Dlamini the Initiator* |
| *COMMISSIONER:* | *Yes* |
| *AW1:* | *yes because when he read the Charge ---* |
| *COMMISSIONER:* | *Yes* |
| *AW1:* | *----it says "The matter was investigated and the investigation showed that you made yourself guilty of poor work performance."* |
| *COMMISSIONER:* | *Yes* |
| *AW1:* | *Yes "It is specifically alleged that you are guilty of poor work performance in that you did not reach the prescribed sales target of E440 000-00 for the month of August as communicated to you even after you received several verbal or written communications for the same offence to improve your performance". What I wanted to find out is, is there any law in the Company ---* |
| *COMMISSIONER:* | *Yes* |
| *AW1:* | *--- that says I must be treated differently from the junior employees?* |
| *COMMISSIONER:* | *Yes* |
| *AW1:* | *Yes, because the month of August which says I am guilty of that poor performance ----* |
| *COMMISSIONER:* | *Yes?* |
| *AW1:* | *----I had four (4) days ---* |

***COMMISSIONER:*** ***Yes***

***AW1:*** ***Which I put for leave***

***COMMISSIONER:*** ***Yes***

***AW1:*** ***Yes, which means that I didn't have a full month's work. I worked for only 22 (twenty two) days instead of 26 (twenty six) days."***

[57] It is clear from the caption above that the 2nd Respondent was not aware of the Charge which was read to her by RW1 because she had to ask him to clarify it. As I observed earlier, the Performance Meeting turned out to be a disciplinary hearing. The 2nd Respondent was on leave and was saved by her union in having the matter postponed to the 7th November 2028.

[58] The Charge itself was badly framed because it talked of an investigation which had showed that the 2nd Respondent had made herself guilty of poor work performance. The Charge itself was not sure or certain whether the 2nd Respondent received verbal or written communications and from who. It is for that reason why she asked for clarity from the Initiator PW1 Bheki Dlamini. This was not the stage for asking for clarifications because at that stage on the 7th November 2018, the 2nd Respondent was supposed to be fully conversant with the Charge and also to have been fully prepared for her hearing. She seemed confused more so because she was on leave and had also been on leave for four (4) days during the month of August, and now she was being subjected to a disciplinary hearing disguised as a Performance Meeting.

[59] The Charge also referred to the 2nd Respondent having received several verbal or written communications for the same offence to improve her performance. There are no such several verbal or written communications that were proved by the Applicant through (RW1) Bheki Dlamini other than the poor and inadequate evaluations which were of no assistance to the 2nd Respondent to improve her

performance. I must reiterate that there was no written warning afforded the 2nd Respondent before her dismissal as dictated to by Section 36 (a) of the Employment Act.

[60] When dealing with the right of the employee to be informed of the Charge, **John Grogan** *(supra)* states as follows at page 194, and I quote:-

> ***"Employers should advice accused employees of the precise charge or charges they are required to answer in advance of the hearing. This requirement flows from the need for adequate preparation. Accused employees cannot prepare a defence if they are ignorant of the charges they are required to answer. The Charge should be formulated in precise and simple terms, and should clearly spell out the consequence of a finding of guilty could be dismissal. Allthough it is permissible to formulate the charges in wide form and non-technical style, they must be specific enough to enable the employee to answer them."***

[61] Procedural fairness is the cornerstone of disciplinary proceedings. It is trite law that the lack of proper and fair pre-dismissal procedures may result to unfair dismissal resulting to compensation or even re-instatement of the employee or employees affected. Pre-dismissal procedures must never give the impression to the employee that his/her matter has already been decided and that the disciplinary processes are just a mere formality.

[62] This is the feeling which the 2nd Respondent has in casu, and the circumstances surrounding her evaluations, the disciplinary hearing itself disguised as a Performance Meeting whilst she was on leave, the fact that a high target was set at E440 000-00 for August 2018 when she was on leave for four (4) days, the appeal hearing presided by a Chairperson who had no minutes of the disciplinary hearing and when

there was no Initiator clearly justify the feelings of the 2nd Respondent that the Applicant's premeditated goal was simply to dismiss her. Further the Charge itself was badly crafted and not precise to fully appraise the 2nd Respondent of her poor work performance. The charge mentions an investigation which she was unaware of.

[63] In a situation of poor work performance like the position *in casu*, **John Grogan** *(supra)* states as follows at pages 213-214 when dealing with poor work performance cases:-

> ***"Poor work performance for which the employee is not to blame may arise from a variety of causes, including illness, technological change, or incompatibility. In all these cases, the basic principle is that employees should be timeously informed of their deficiencies, be told how to rectify them and be given a reasonable opportunity to improve before any action is taken against them. This process is known as counselling.***
>
> ***The code requires a proper investigation before action is taken against an employee for alleged poor work performance. An investigation is essential because it may well be that an employee's poor work performance is attributable to extraneous factors, like inadequate equipment or organizational problems. The investigation must therefore be aimed at properly assessing the employee. During the investigation, the employee's problems should be discussed with him or her, and ways and means of overcoming the problem should be attempted, including re-training, transfer or even demotion.***
>
> ***An inquiry into alleged poor performance should be conducted fairly – i.e., the requirements of natural justice should be followed. This means that employees must be made aware of the respects in which their performance is alleged to be defective, and***

***they must be given an opportunity to explain the alleged deficiencies***

[64] In the case of **Sabelo Gule v Inyoni Yami Irrigation Scheme IC Case No. 31/04** PR Dunseith JP. stated as follows at para 28:-

> ***'the Code of Good Practice: Termination of Employment is sanctioned by Section 109 of the Industrial Relations Act of 2000 as Amended, and provides as follows where cases of dismissal for work performance are concerned:-***
>
> > ***"Any person who determines whether poor work performance justifies dismissal must consider:-***
> >
> > ***(a) Whether the employee failed to meet a performance standard;***
> >
> > ***(b) Whether the employee was aware, or could reasonably be expected to have been aware of the required performance standard;***
> >
> > ***(c) Whether the performance standard is reasonable***
> >
> > ***(d) The reasons why the employee failed to meet the performance standard;***
> >
> > ***(e) Whether the employee was afforded a fair opportunity to meet the performance standard***
> >
> > ***(f) Whether dismissal is the appropriate sanction for not meeting the performance standard."'***

[65] It is common cause that these practice guidelines are not legally binding but they assist to a great extent in providing guidance to those responsible for adjudicating in such cases of dismissal for poor work performance.

[66] It is my view that when dealing with the matter in casu, the 1st Respondent took into consideration whether the 2nd Respondent failed to meet the required performance standard, and whether the performance standard itself was/is reasonable. *In casu* the performance standard is the sales target set at E440 000-00 for the

month of August 2018, and the 1st Respondent found that the target of E440 000-00 was unreasonable in the circumstances, since the 2nd Respondent was on leave for four (4) days and did not work the full twenty-six (26) days, further that the unreasonableness of the E440 000-00 is proven by the fact in the following year i.e. August 2019 the target was reduced to E390 000-00 when Kholiwe Mabuza RW2 was the Branch Manager.

[67] The 1st Respondent further considered and accepted the 2nd Respondent's reasons that she could not achieve the said target of E440 000-00 because she did not receive full support and guidance in terms of evaluation from the Regional Controller Bheki Dlamini RW1. Bheki Dlamini himself did not shed light on how the monthly target figures are formulated and why the Applicant allege that any manager in the shoes of the 2nd Respondent could have achieved the target of E440 000-00. There were no witnesses from South Africa led to support the Applicant's case on how the targets are set since the targets are set in South Africa. The 1st Respondent found that this was and or is fatal to the Applicant's case. The 1st Respondent also considered the circumstances of the E440 000-00 target, and found that the 2nd Respondent was not afforded a fair opportunity to meet the performance target of E440 000-00 because she was evaluated during August 2018 when she did not work for twenty-six (26) days, and further that the 2nd Respondent was not properly evaluated and supported, and further that there was no proper training and action plans formulated to assist the 2nd Respondent achieve the set targets.

[68] It is my view that the 1st Respondent fairly and properly considered all the relevant evidence presented before him during the arbitration resulting to the award which he made. There is no misdirection on his part when he analyzed the evidence of parties. At page 21 of the Book, the Applicant accuses the 1st Respondent of ***"making speculative***

***findings in finding that the evidence of Kholiwe to the effect that she was once able to achieve her target on the last four days, means there was a possibility for the 2nd Respondent to achieve hers in the four days of her leave."***

[69] The 1st Respondent did not make any speculative finding as regards Kholiwe. At page 140 of the Record of Proceedings before the 1st Respondent, this is what she states under cross-examination from the 2nd Respondent's Counsel:-

> ***"AC: So you can reach your target in a space of a week if you want?***
>
> ***RW2: It is impossible but if you can, like at another time there was a week left, you can achieve the target because last time there were 3 (three) days left and I reached it and I proceeded."***

[70] I must point out again that Kholiwe was never tasked to achieve the target of E440 000-00 per month since she took over from the 2nd Respondent until the arbitration proceedings commenced. All the figures of her targets are far below E440 000-00 going into August 2019 where her target was E390 000-00. This is the unreasonableness of the E440 000-00 target which worried the 1st Respondent, and he eventually found that the target of E440 000-00 was unreasonable in the circumstances. I cannot find any fault with this finding in the circumstances of this case.

[71] In the case of **James Ncongwane v Swaziland Water Services Corporation (52/2012) [2012] SZSC at pgs 16-17** Ota J stated as follows on principles applicable when a Court deals with review proceedings sanctioned by Section 19 (5) of the Industrial Relations Act of 2000 as Amended, and I quote:-

> ***"It is overwhelmingly evident from the foregoing, that the Common Law grounds of review as permitted by Section 19 (5) of***

***the Act, falls within the purview of decisions arrived at in the following circumstances:-***

***(1) Arbitrarily or capriciously, or***

***(2) Mala fide or***

***(3) As a result of unwarranted adherence to a fixed principle or***

***(4) The Court misconceived its functions or***

***(5) The Court took into account irrelevant considerations or ignored relevant ones, or***

***(6) The decision was so grossly unreasonable as to warrant the inference that the Court had failed to apply its mind to the matter or***

***(7) An error of law may give rise to a good ground of review. The list is not exhaustive. Each case must be dealt with accordingly to its own peculiarities."***

[72] *In casu* I am of the view that none of the above guiding principles or factors exist in this matter. The 1st Respondent dealt with the arbitration proceedings in a just, fair and transparent manner. He was forthright on the poor manner in which the 2nd Respondent was evaluated without the proper training and no action plan formulated to assist the 2nd Respondent to meet the target.

[73] The 1st Respondent was also critical of the failure by the Chairperson of the appeal to produce the minutes of the disciplinary hearing during the hearing of the appeal as well as the non-presence of the Initiator to prosecute the appeal. The 1st Respondent was therefore greatly disturbed by the prosecution of the appeal without the Minutes/Record of the Disciplinary Hearing and without the Initiator.

[74] This is not the kind of a matter which permits an appeal to be prosecuted or dealt with in this manner where the result would be dismissal. The Applicant was under a duty to set a fair **"appeal hearing process"** with the Minutes/Record of the Disciplinary Proceedings and

an Initiator. The manner in which it was handled resulted to a failure of justice, and I cannot fault the 1st Respondent for being so apprehensive about this issue. There is no instance where the 1st Respondent misdirected himself on a fundamental matter of law so as to warrant an inference of gross irregularity where the Applicant did not have its case fairly adjudicated upon as discussed herein above. Instead the Applicant's case was fairly adjudicated upon by the 1st Respondent.

[75] In the case of **Harpet Van Seggelen v Swazi Spa Holdings Limited IC Case No. 390/2004**, PR Dunseith JP. stated as follows at paragraph 87.2 when dealing with deficiencies or poor work performance, and I quote:-

> ***'[87.2]As was said in Buthelezi v Amalgamated Beverage Industries (1999) 20 ILJ 2316 (LC):-***
>
> ***"When an employer appoints someone to a position whom it acknowledges may not meet all the requirements for that position, it is under an even greater obligation to adhere to its remedial plans for that employee. While employers should not be unduly predudiced for taking a chance on an employee who may have key attributes for a position but not all the key competencies, there is a greater obligation on that employer to devise a remedial plan and stick to it before taking action against that employee because he or she has not succeeded."'***

[76] At paragraphs 97. 98, 100, 101, 102 and 103 of the Seggelen case *(supra)* P.R. Dunseith JP continued to state as follows:-

> ***"[97] The Applicant submits that his dismissal was substantively unfair because he did not receive any prior written warning as required by Section 36 (a) of the Employment Act.***

*[98] The law expressly provides that the dismissal of an employee for poor work performance shall not be regarded as fair unless he has been given prior written warning – see Section 42 read with Section 36 (a) of the Employment Act. This provision means that a dismissal for poor work performance without prior warning is substantively unfair.*

*[100] A warning in the case of poor work performance should inform the employee in unequivocal terms that he/she may be dismissed if his/her performance does not improve within a given period. (See: Fikile Nkambule v Transworld Radio @ 9)*

*[101] This type of warning is in the nature of an ultimatum, and it is required in addition to appropriate counseling, guidance and training before and employee may be dismissed for poor work performance.*

*[102] If an employer wishes to issue an ultimatum, in our view the appropriate time to do so is after a remedial action plan has been established through counselling and consultation. The employee is thereby given the opportunity to improve his performance, and at the same time warned of the consequences should he fail to improve. This kind of warning does not have to be preceded by a formal inquiry, as is the case where written warnings are given by way of sanction or admonishment for misconduct.*

*[103] Section 36 (a) of the Act requires the warning to be in writing. In our view this is not only to enable the employer to prove that the warning was given, but more importantly to impress upon the employee by the delivery of a formal written instrument that he is being given a serious ultimatum and his future employment is at risk."*

[77] In the Supplementary Heads filed by the Applicant, there is an effort to prove that the 2nd Respondent was given three written warnings before she was dismissed. These written warnings are said to be in the **"evaluation forms"** which are said to be Green, Yellow and Red. At page 43 of the Applicant's Bundle of Documents there is a copy of the Applicant's Disciplinary Code and Guide – Disciplinary Offences and Suggested Actions:-

There is a schedule of the nature of offences and poor work performance is item number 7 on the aforesaid Schedule which is drawn as follows:-

[78]

| | CATEGORY A NATURE OF OFFENCE | FIRST WRITTEN WARNING | SECOND WRITTEN WARNING | FINAL WRITTEN WARNING | DISMISSAL |
|---|---|---|---|---|---|
| 7 | Poor work performance (Refusal/Reluctance/negligence to comply with work standards) | Counselling in writing (Green) | Counselling in writing (Orange) | Counselling in writing (Red) | 4 |

[80] The Applicant's argument is that these evaluation forms Green, Orange and Red are in fact written warnings preceding a dismissal, and that the 2nd Respondent was given these as written warnings in compliance with Section 36 (a) of the Employment Act. This cannot be true for the following reasons:-

(i) The 2nd Respondent in her testimony before the 1st Respondent is clear that she was never given any written warning, and that she never received any **"evaluation form"** for **August 2018**.

(ii) The **"evaluation forms"** relied upon by the Applicant at pages 17-24 (Applicant's Bundle) are as follows:-

| | | | |
|---|---|---|---|
| Pages 17-18 | Green Evaluation Form for February 2018 dated 23rd March 2018 | Target E340 000 | Achieved E213 901 |

| | | | |
|---|---|---|---|
| Pages 19-20 | Orange Evaluation Form for March 2018 dated 12th April 2018 | E340 000 | E257 980 |
| Pages 21-22 | Red Evaluation Form, for April 2018 dated 12th May 2018 | E440 000 | E278 282 |
| Pages 23-24 | Red Evaluation Form for July 2018 dated 8th August 2018 | E440 000 | E284 316 |

[81] These are evaluation forms as presented by the Applicant in its Bundle of Documents filed before Court on the 23rd July 2021. These forms relate to evaluations of the months of:-

| | |
|---|---|
| February | 2018 |
| March | 2018 |
| April | 2018 |
| July | 2018 |

[82] There is no evaluation form for **August 2018**, and if it was there, it would have been dated sometime in early September 2018, but that is not the case. In the months of April and July 2018, the set target for the 2nd Respondent was E440 000-00 and she did not meet the set targets, and it appears from the Charge Sheet that she was not charged for those months. Further if you look at page 43 in the Offences Schedule referred to above, in each of the columns for the Green, Orange and Red evaluation, there are words **"counselling in writing"**, however, on the evaluation forms themselves from pages 17-24 there is no provision for counselling and nothing in writing has been produced in evidence by the Applicant as fulfilling or proving the aforesaid **"counselling in writing"** mentioned therein. **Grogan** *(supra)* is very emphatic that in poor work performance cases which may result to dismissal, employees should be timeously informed of their deficiencies,

be told how to rectify them and be given a reasonable opportunity to improve their performance before any action is taken against them.

[83] *In casu* there was no counselling in writing as prescribed by the evaluation from. The 2nd Respondent was set an unreasonable target of E440 000-00 for the months April and July 2018, however, in August 2019 when Kholiwe RW2 was the Branch Manager, the target was reduced to E390 000-00. There is no evidence in writing that the 2nd Respondent was counselled, trained or re-trained including action plans formulated to assist her to achieve the unreasonable target of E440 000-00 which was persistently set for her despite it being known that the Mbabane Branch did not have potential to achieve that E440 000-00 target.

[84] As regards the **"Red evaluation form"** for August 2018, it is the Applicant's evidence at page 29 of the Record of Proceedings where she states as follows:-

| | |
|---|---|
| ***"AW1:*** | ***Yes, in August as I have said there were days which I was not at work, 4 (four) days.*** |
| ***COMMISSIONER:*** | ***Sorry, before you proceed please refer us to the page of August or Form for August where we will find the form so that we can all ----*** |
| *AW1:* | *There is no form for August.* ***On the Notice of Performance Meeting there is no Form for August, there is only this one for July which is dated 8th August 2018, it was a ready evaluation.*** |

***AC:*** ***So you were never evaluated for August?***

***AW1:*** ***I wasn't given anything for August, it only appeared here on the Notice of Performance Meeting."***

[85] The evidence of the 2nd Respondent is actually corroborated by the evidence of the Applicant as contained in the Bundle of Documents (pages 17-24) herein referred to above, that the 2nd Respondent was never given a written warning in terms of Section 36 (a) of the Employment Act. In fact as an observation, the manner in which the evaluations forms are designed, they do not qualify to be written warnings in terms of Section 36 (a) of the Act *supra*.

[86] Even in the other Applicant's Bundle of Documents dated 27th July 2021 the evaluations' forms are found from pages 2-13, and there is no evaluation form for August 2018. Even the Charge as contained in the Notice of Performance Meeting dated 29/10/2018 also bearing the cancelled date 10/19/2018 refers to August 2018 but is supported by evaluations for March, April and July 2018. Even this Bundle does not have evaluation form for the month of August 2018. The Charge itself is not supported by any evaluation form for the month of August 2018, but strangely it seems to be supported by evaluation forms of March, April, and July 2018, when these months do not form part of the Charge which was faced by the 2nd Respondent. It is for that reason why I observed that the Charge is badly drafted. It refers to an investigation which prove that the 2nd Respondent is guilty in a very confusing manner because no such investigation report has been provided in evidence and the 2nd Respondent herself was confused by the Charge itself.

[87] The Record of Appeal is contained in pages 26-28 of the Applicant's Second Bundle of Documents bearing the Registrar's stamp 27th July 2021, it clearly shows that there were no Minutes of the Disciplinary Hearing and also that there was no Initiator. The Appeal was heard on the 24th April 2019 at Branch 727 Lewis Mbabane at 11:30hrs and the Chairperson was Neo Mthembu. The 2nd Respondent and her representative were present, but there were no Minutes of the Disciplinary Hearing and there was no Initiator such that in the designated spaces for signatures of the Initiator at pages 26 and 27 there are no signatures. This was indeed a failure of justice resulting to procedural unfairness.

[88] In conclusion it is my considered view that the dismissal was both substantively and procedurally unfair. There is no misdirection on the part of the 1st Respondent in any manner whatsoever as alleged by the Applicant in the grounds of review and consequently I hand down the following order:-

1. The application is dismissed.
2. The Award made by the 1st Respondent on the 13th December 2019 is hereby confirmed.
3. The Applicant is to pay costs on the ordinary scale.

N.M. MASEKO
JUDGE