INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.161/2004

In the matter between:

ENOCK MNDZEBELE Applicant

And

JOMAR INVESTMENTS (PTY) LTD Respondent

Neutral citation: Enock Mndzebele vs Jomar Investments (Pty) Ltd (161/2004) [2018] SZIC 05

Coram: MAZIBUKO J,
(Sitting with A.Nkambule & M.Mtetwa
Nominated Members of the Court)

Last Heard: 12th February 2018

Delivered 21st February 2018

Summary: Labour Law. Unfair dismissal of employee from work. Employer fails to prove misconduct on the part of employee.

Company Law. Financial director concludes agreement with employee which varied initial employment contract. Variation agreement promotes employee from supervisor to manager and improves employee's salary package.

Employee works as manager for 5 (five) years, thereafter terminated. Managing director challenges co-director's authority to promote Applicant and also to improve Applicant's salary package.

Held: *Company bound by agreement – Financial director exercised actual - alternatively ostensible-authority when he conducted variation agreement with employee.*

JUDGEMENT

---

1. The Respondent is Jomar Investments (Pty) Ltd a private limited liability company registered and incorporated in Swaziland, trading as Shamrock Butchery in Manzini town. The application before Court is accompanied by a 'Certificate of Unresolved Dispute' which was filed by the Applicant.

2. The Applicant is Mr Enock Mndzebele who is a former employee of the Respondent. The Applicant was employed in December 1992 as a block man and sales assistant at the Respondent's butchery. When concluding the contract of employment, the Respondent was represented by the then Managing Director Mr George or Jorge Potgieter. The Applicant was promoted to supervisor in 1996.

3. In March 1998 the Applicant was promoted and transferred to work at Nhlangano town as manager. The Respondent had a shop in that town. The Applicant continued to work as manager at the Nhlangano shop until December 2002.

4. It was a standing procedure at the Nhlangano shop for the Applicant to conduct a stock –take every month end. There was however no stock-

take that was done end of November 2002. The Applicant had received a prior instruction from Mr Leon Potgieter that the regular stock-take should not be done at the end of November 2002. Mr Potgieter had directed that the November stock-take would be done in his presence. The Applicant complied. Mr Potgieter was the General Manager and also director of the Respondent at that time. For the sake of brevity, the Court shall refer to Mr Leon Potgieter simply as Mr Potgieter.

5. About the 3rd December 2002 Mr Potgieter arrived at the shop as he had planned and the stock-count began. The Applicant worked on the weighing scales while Mr Potgieter recorded the readings. The Applicant stated that Mr Potgieter left the readings to himself and did not reveal them to the Applicant. Thereafter Mr Potgieter took the readings and left the shop. The following day Mr Potgieter informed the Applicant that there was a stock shortage to the value of E17, 150. 38 (Seventeen Thousand One Hundred and Fifty Emalangeni Thirty Eight Cents). Applicant has denied the alleged shortage. The Applicant added that he was denied a chance to verify the shortage as

alleged by Mr Potgieter. According to the Applicant, he demanded a re-count of stock, but same was denied by Mr Potgieter.

6. On the 4th December 2002 Mr Potgieter arrived early at Nhlangano before the shop opened for business. Mr Potgieter ordered that the Applicant should not open the shop that day. He further ordered that the junior officers should not commence their daily duties. Instead, Mr Potgieter ordered the Applicant to open the safe and take out all the money therein and bring it to him in the office. According to the Applicant, in the process of carrying out that instruction he was further ordered, by Mr Potgieter, to collect all his (Applicant's) personal belongings that were in the shop. The Applicant left the money in Mr Potgieter's possession and control as he went out of the office to collect his personal belongs. As soon as he had finished collecting his personal belongings the Applicant reported to Mr Potgieter for further instruction. At that time Mr Potgieter had gone ahead to count the money (that the Applicant had presented) and had finished doing so. Mr Potgieter informed the Applicant that he had discovered a cash-shortage of E173.00 (One Hundred and Seventy

Three Emalangeni) from the till money. Mr Potgieter mentioned also that he had further discovered a shortage of E225.00 (Two Hundred and Twenty Five Emalangeni) from the cash- float. According to Mr Potgieter the shop was supposed to have a cash float of E500.00 (Five Hundred Emalangeni). Mr Potgieter concluded that the Applicant was responsible for the cash shortage both as manager and the person who kept the keys to the safe.

7. The Applicant refuted Mr Potgieter's allegation regarding the alleged cash – shortage. The Applicant demanded a re-count of the cash but Mr Potgieter refused that proposal and stated that he had already counted the money. The Applicant denied Mr Potgieter's assertion and stated that he had counted the same till-cash the previous day together with the cashier (named Jabu Nkambule) and there was a shortage of E3-00 (Three Emalangeni) only. The Applicant offered to make the till recordings from the previous day's sales available to Mr Potgieter for verification. Mr Potgieter declined that offer and informed the Applicant not to worry himself about that detail.

8. Thereafter Mr Potgieter produced a letter dated 3rd December 2002 in terms of which he suspended the Applicant from work. The letter is marked exhibit R1 and it reads thus:

"3rd December 2002

To: Enock Mndzebele

Re: Stock Taking September, October & November: 2002.

With reference to the above, I wish to confirm my telephonic conversation with you during stock balancing of September and October 2002. The short fall during September E4 757.22 and October E5 434.33 were not acceptable for the company. And now in November 2002 you repeat a shortage of E17 150.38. The former mentioned situation leave us with no alternative as to suspend you from your duties. After the necessary investigation we will notify you of the date of your hearing or any further steps.

Thanking you for your co-operation.

L. Potgieter	*Enock Mndzebele*
Director	*Employee*

9. In terms of exhibit R1 the Applicant was suspended pending finalisation of investigation. The Applicant did not hear from the Respondent for a lengthy period of time. Consequently the Applicant sought legal assistance. Through his attorneys (Mahlalela and Associates) the Applicant wrote the Respondent a letter dated 9th January 2003. In that letter the Applicant challenged the basis and duration of the suspension. The Applicant's letter is marked exhibit R2. The Respondent replied exhibit R2 by writing R3. Exhibit R3 is dated 17th January 2003 and is written by the Respondent's attorneys (PR Dunseith). In exhibit R3 the Respondent conceded that the Applicant was suspended without pay on the 14th December 2002. The Applicant was then invited to a disciplinary hearing which was scheduled for the 28th January 2003.

10. The Applicant also received exhibit R4 dated 17th January 2003. Exhibit R4 contained disciplinary charges. The Applicant was charged with the following offences.

> *"1. That you are guilty of dishonesty and/or negligence and/or poor management and work performance regarding stock shortages as follows:*
>
> *E4, 757.22 in September 2002*
>
> *E5, 434.33 in October 2002*
>
> *E17, 150. 38 in November 2002*
>
> *2. That you are guilty of dishonesty in respect of a shortage of till cash of E173.15 and a shortage of change cash of E225.00 discovered on 4th December 2002.*
>
> *3. That you are guilty of dishonesty and/or abuse of trust in that you sublet your company accommodation to subtenants for your own profit.*
>
> - *You are entitled to be represented at the disciplinary hearing by another employee only.*

- *You must bring any witness who you may wish to call in your defence to the hearing. If such witness is an employee of the company, you must make a timeous arrangement with me for his/her production.*
- *The hearing shall be chaired by the Financial Director, Mr Boshoff.*
- *If you do not attend the hearing, it will continue in your absence.*
- *The charges against you are serious and may result in your dismissal. You should accordingly treat this matter with the seriousness it deserves.*

Yours faithfully

<u>L.POTGIETER</u>
DIRECTOR"

11. The disciplinary hearing proceeded as scheduled. The chairman was Mr Boschoff. The initiator was Mr Potgieter. Also in attendance was Mr Pierre Potgieter. All 3 (three) gentlemen were directors of the Respondent. When the Applicant arrived at the hearing he found all

3(three) directors in attendance in the room where the disciplinary hearing was scheduled to proceed.

12. The Applicant pleaded 'Not Guilty' to all 3 (three) charges. Nevertheless the Applicant was found guilty in all the 3 (three) charges and was summarily dismissed. The minutes of the disciplinary hearing were handed in as exhibit R5. Exhibit R5 reads as follows:

"Disciplinary Hearing

Enock Mndzebele 28th January 2003

1. *Mr. Boshoff chairman of the J. Potgieter Family Trust and Financial Director greet and welcome all who attended the meeting.*

Mr Boshoff

Mr L. Potgieter

Mr P. Potgieter

Enock Mndzebele

Mr Boshoff explain to the meeting what it is all about and read the charges against Mr Mndzebele. He then ask Mr

Mndzebele to plead on charge No.1 and ask him what he has to say. Mr Mndzebele said that he is not sure what to say about the shortages in September, October and November. Mr Mndzebele said he had a problem with deliveries in 2001. Mr Boshoff said 2001 is not one of the charges against him. He confirm that the truck was sealed and not opened when they offload the meat. He said on 29-11-2002 the delivery was short he then phoned. Mr Potgieter showed the meeting the credit note of 29-11-2002. Also on 17-10-2002 wrong price charge Mr Potgieter showed credit note.

2. *Mr Mndzebele said that Mr L. Potgieter and Mr P Potgieter took the money that is why it was short on both cash takings and change float.*

3. *Mr Mndzebele confess that he gave the two people permission to stay in the house although he knew that he hasn't got the power to do so. Mr Boshoff said that the person confirmed that he pay rent but refuses to mentioned amounts. After Mr Boshoff read the minutes of the meeting,*

he asked Mr Mndzebele if he agrees to the contents, he confirm.

Mr Boshoff ask Mr Mndzebele to leave the meeting for a few moments. Mr Boshoff called him back and told Mr Mndzebele that his explanation is not acceptable and he is dismissed.

[Signature]

Chairman"

13. The Applicant explained that he had been told by Mr Potgieter in December 2002 that there had been stock-losses incurred at the Nhlangano shop in September and October 2002. The Applicant had been shown a worksheet with calculations and arithmetical figures that had been compiled by Mr Potgieter (annexures R14) which the latter had presented to the Applicant to support an allegation of stock-loss. Based on the calculations in the said worksheet the Applicant accepted that there could be stock-loss incurred in September 2002 as alleged by Mr Potgieter. The Applicant added that he accepted the figures as

presented by Mr Potgieter in his worksheet and confirmed that the figures showed a stock- shortage.

14. The Applicant has challenged the reason as well as the procedure that led to his dismissal. According to the Applicant he was surprised to learn that he had been charged with stock loss for September and October 2002 since he had discussed with Mr Potgieter reasons for a possible stock loss for the said period.

15. Firstly, the Applicant stated that he had been informed by Mr Potgieter that the Applicant had a surplus stock in August 2002. When Mr Potgieter reported to the Applicant that there was a stock-shortage in September 2002, Mr Potgieter mentioned also that the surplus that occurred in August 2002 would offset the loss that was incurred in September 2002. The Applicant's evidence reads as follows under cross - examination:

> *"A In August Mr Potgieter phoned me and told me that my stock was over, then in September there was the shortage that's why when I gave my evidence in chief here in court I*

told the court that we discussed that with Mr Potgieter for September. But he said because I was over in August then maybe we could balance the shortage with the surplus for August."

RC *So at the hearing you admitted that there were indeed shortages for September, October and November 2002.*

A: *<u>According to the figures, yes there were shortages</u>.*

RC: *<u>At the hearing you also admitted that you were responsible for these shortages</u>.*

A: *<u>No your lordship</u>"*

(Underlining added)

(Record page 107)

16. According to Mr Potgieter there were instances where stock-surplus was noted at the Nhlangano shop. Mr Potgieter stated as follows under cross examination:

"I can't remember which smaller shortages he was signing for my lord. They would get these smaller shortages when they were taking stock on their own and you can get a small

shortage if the stock is not taken in a proper way. So what happens then is that the next month I go there personally because I can't be there every month <u>and when the stock is over then it covers that little shortage"</u>

(Underlining added)

(Record page 308)

17. Mr Potgieter did not deny that there was surplus stock in August 2002. Mr Potgieter was asked that question and his answer was that he could not remember. The evidence reads thus.

"AC My instructions are that in August 2002 at Nhlangano branch where the Applicant was manager the operation on that month [sic] <u>when the stock was taken there was a surplus in August 2002.</u>

A <u>I can't recall that my Lord</u>."

(Underlining added)

(Record page 337)

18. Since Mr Potgieter could not recall whether or not there was surplus stock in August 2002, he was given a chance to consult his records.

Exhibit R14 could not assist Mr Potgieter in answering this pertinent question. Exhibit R14 is a summary prepared by Mr Potgieter to assist him to prove his case in Court. Exhibit R14 did not contain the stock summary that would have shown how the surplus or shortage occurred. Mr Potgieter testified that the source documents were either destroyed or misplaced.

18.1 Mr Potgieter testified as follows:

"AC Where is the [stock] summary for 2002.

A I had a look my lord and I couldn't find it.

AC The summary

A: Yes

AC Can you explain to the Court why you would be in a position to keep September 2002 summary and not the one for August?

A: It was in the safe my lord. The one for August has got nothing to do with the case. I could have just well kept two, three years back, which I don't think is necessary my lord."

(Underlining added)

(Record pages 336 – 337)

18.2 Mr Potgieter did not keep stock summary (or record) for August 2002 because it never occurred to him that it would be required in Court as evidence. Mr Potgieter did not think that the August stock record was a necessary document for this case.

18.3 The Applicant mentioned in his evidence that after each monthly stock-take was done the figures were recorded on paper, then sent to Mr Potgieter for reconciliation of the accounts. The Applicant testified as follows:

"A My Lord Mr Leon [Potgieter] was the one who used to make telephone calls to me telling me whether my stock was up to date or it was missing after I had sent him the papers.

AC <u>What are these papers</u>, you must be specific Mr Mndzebele since you were the manager.

A: <u>There were paper [sic] that we were using my lord when counting stock</u>. Those are the papers that I

used to send to Mr Leon Potgieter, even though I was the one who used to count the stock but he would also confirm and tell me that my stock was in order."

(Underlining added)

Record page 30)

18.4 Mr Potgieter failed to produce stock summaries (or records) for September, October and November 2002. According to Mr Potgieter the records could not be located. Mr Potgieter was given a chance to look for the missing records but failed to locate them. The Applicant should not be prejudiced by the Respondent's failure to produce material evidence before Court which was in the Respondent's possession and control. In the absence of the stock record for August 2002 the Respondent cannot prove the value of the balance of stock carried forward each month from August to September 2002.

19. According to exhibits R14, R15 and R16 Mr Potgieter stated the opening stock balances as follows:

September 62, 628-98

October 57, 768-00

November 70, 065- 21

In the absence of the stock summaries (or records), that which Mr Potgieter has misplaced, the Court as well as the Applicant, is not in a position to verify the opening and closing balances that were presented by Mr Potgieter as his exhibits. The alleged stock balances are not supported by evidence. In short Mr Potgieter is saying the Court must accept the figures that are stated in his exhibits as if they are correct because he (Mr Potgieter) says so.

20. The Applicant challenged the allegation of stock shortage for October and November 2002. Under cross examination the Applicant stated as follows:

"RC In fact you agree with me that those shortages did occur.

A Your Lordship like I said in my evidence in chief that I didn't agree with the stock shortages but that's what

he[Mr Potgieter] told me and he gave me in figures that my stock was short with so much.

…

RC Mr Leon Potgieter did not lie that there were the shortages in September.

A In September, yes.

RC He also did not lie that there were those shortages in October 2002.

A I don't agree in October."

(Underlining added)

(Record pages 91-92)

21. The Respondent has not denied the Applicant's assertion that there was surplus stock in August 2002. The Respondent failed to take into account the value of the surplus -stock that occurred in August 2002 when it determined that there had been a stock – shortage in September 2002. The Court accepts the evidence of the Applicant as compared to that of Mr Potgieter as being more probable that the August 2002 stock – surplus should offset the September 2002 stock-shortage. In the absence of the monetary value of stock - surplus in

August 2002 the Court is not in a position to determine whether there was a positive or negative balance after the set off. Consequently the Court rejects the Respondent's assertion that the Applicant is guilty of misconduct regarding stock shortage in September 2002.

22. The Applicant also testified that the Nhlangano shop had been burgled 3 (three) times between September and November 2002. The Applicant's evidence in chief reads thus on this point.

Judge *Now that you have been asked the question, just give us the information again. You say that three burglaries took place in three months and then the lawyer asked when exactly did those burglaries took [take] place, give us that information Sir:*

A *My lord it was September and they entered at night, October they entered during the night and in November it was during the day.*

AC *Can you recall the dates in each month in September, October and November.*

A *No my lord its been a long time.*

AC *But in each of these burglaries, did you report [the] incidents to the Royal Swaziland Police and your supervisor Mr Leon.*

A *I reported my lord.*

…

CM *When the Police were investigating were you there to help the Police to ascertain how much stock was taken.*

A *My lord even though I helped them I do not recall as to how much was stolen."*

(Underlining added)

(Record pages 32-33)

23. At an early stage in his evidence the Applicant mentioned that the shop he was managing suffered loss of stock as a result of the 3 (three) separate burglaries that took place there. The Applicant added that he did not know the quantity and therefore the value of the stock that was lost as a result of the burglaries. The Respondent therefore had sufficient time to investigate this item of defence (against the disciplinary charges) and to instruct its attorney accordingly.

23.1 Mr Potgieter's worksheets (exhibits R14, R15 and R16) do not take into consideration the loss of stock that was incurred as a result of the burglaries aforementioned. Mr Potgieter's exhibits are therefore inaccurate as they contain incomplete information regarding the value of stock which the Nhlangano shop carried each month between September and November 2002. The Court cannot rely on incomplete and therefore inaccurate documents which have been tendered to prove the truth of their contents.

23.2 The loss of stock that was incurred by the Respondent as a result of the burglaries is a fact that cannot be ignored. The Applicant cannot be held liable for stock shortage in September, October and November 2002 unless the economic effect of loss of stock as a result of the burglaries is determined. The Respondent has accordingly failed to prove the allegation that the Applicant is liable for stock – shortage for September, October and November 2002. The stock –shortage itself has not been proved, let alone the identity of the person who should be held liable.

24. In his evidence Mr Potgieter mentioned a robbery that took place in March 2002, but did not talk about the burglaries which Applicant had mentioned. Mr Potgieter denied that there was any robbery at the Nhlangano shop in September, October and November 2002 but did not deny the alleged burglaries.

24.1 The evidence of Mr Potgieter reads thus when he was examined by his counsel:

"RC In September, October and November 2002 were any <u>robberies reported to your shop</u>.

A No my Lord

RC My lord that would be all from this witness"

(Underlining added)

(Record page 246)

24.2 Mr Potgieter may be correct in stating that there was no robbery that was reported to him, from the Nhlangano shop, in September, October and November 2002. That statement does not mean that there was no burglary that occurred at that shop and which was reported to him at the material time.

24.3 It is possible for a lay person –in-law to fail to distinguish these 2 (two) terms; a '*burglary*' and a '*robbery*'. It is fair to conclude that Mr Potgieter, despite being a successful businessman, he was a lay person – in law. However in this case Mr Potgieter as well as the Respondent was assisted by an attorney. An attorney is expected to tell the difference between these 2 (two) terms. The competence and skill of each of the attorneys who appeared before Court in this matter is not in doubt. The Respondent's attorney was satisfied with the answer that Mr Potgieter gave on the – robbery and did not prove further on the – burglary. If Mr Potgieter wanted to deny the alleged burglaries, he would have done so.

25. Neither party could tell how much stock was lost in each one of the 3 (three) incidents of burglary aforementioned. The Applicant testified that he was not aware of how much was stolen in the 3 (three) incidents of burglary aforementioned. When Mr Potgieter calculated the amount of stock that was supposed to be held at the

shop in each of the 3(three) months in question, he did not take into consideration the loss of stock as a result of the burglaries.

26. The Applicant has also been found guilty of subletting a company house to a tenant or tenants for his own profit. The Applicant has denied that he sublet the company house. According to the Applicant he shared that house with a work-colleague called Mr Sipho Gamedze. Mr Gamedze was in need of accommodation. The Applicant allowed Mr Gamedze to stay in the house as a colleague and not as a tenant.

27. The Respondent failed to bring a witness to support the charge of subletting the company house. During cross examination Mr Potgieter claimed that the Respondent had witnesses who are still employed in Nhlangano whom he could call to support the charge, but none was called. Mr Potgieter testified as follows:

> *"AC My lord he [Applicant] did sublet to people that are still working in Nhlangano <u>which we can call as witnesses</u>"*
>
> (Underlining added)

(Record page 345)

For reasons unknown to the Court the Respondent failed to call the alleged witnesses. The Respondent has failed to prove this charge as well.

28. The Applicant has challenged the minutes of the hearing (exhibit R5) as being incomplete and factually incorrect.

28.1 Inter alia, exhibit R5 stated that the Applicant admitted (at the hearing) that he did sub-let the company house to a tenant. The minutes also state that a certain (unidentified) person had admitted to Mr Boshoff that he had paid rent to the Applicant but refused to state the exact amount that he alleged to have paid. The Applicant denied that he made that admission during the hearing or at all.

28.2 According to the Applicant, no witness was called at the disciplinary hearing. Therefore the Respondent relied on information that the Respondent's directors had either received from an undisclosed source, and in the absence of the Applicant, or such information was merely fabricated

by one or more of the directors in order to implicate the Applicant. The conduct of the Respondent's directors was irregular, and that irregularity resulted in a miscarriage of justice at the disciplinary hearing.

28.3 The statement that was made by Mr Boshoff clearly indicates that as chairman at the disciplinary hearing - he failed to be neutral. Mr Boshoff gave hearsay evidence in a matter where he was supposed to be neutral. That irregularity also rendered the disciplinary hearing together with the verdict – irregular and unfair.

28.4 The Applicant further complained that there was no one at the hearing who recorded the minutes, and that exhibit R5 is a mere fabrication by Mr Boschoff. Mr Boshoff did not testify in defence of his work both as chairman of the disciplinary hearing and as the person who recorded the minutes. There is no indication as to when were the minutes drafted.

28.5 There is no admission or confession that is recorded in the minutes. The minutes reflect a statement made by Mr

Boschoff that the Applicant confessed to sub-letting the company house. Since Mr Boschoff did not testify at the trial, the Court does not know how he arrived at the conclusion that the Applicant confessed to the misconduct aforesaid.

28.6 Mr Potgieter testified that at the disciplinary hearing the Applicant confessed to sub-letting the company house. The Applicant has denied the alleged confession. The onus is on the Respondent to prove the charges on a balance of probabilities. The Respondent has failed to discharge that onus.

The Court is not persuaded that the Applicant admitted or confessed (at the hearing), that he did sub-let the company house. The Respondent has failed to prove that charge. There is no evidence therefore that supports the – '*Guilty*' verdict and the dismissal of the Applicant.

28.7 The Applicant also mentioned that he was ordered to leave the room where the hearing was held. Mr Boschoff, Mr Potgieter and Mr Pierre Potgieter remained in the room to

discuss the Applicant's fate. Thereafter the Applicant was invited back in the room and was told that he had been found guilty and was there and then summarily dismissed. Mr Potgieter did not see anything wrong with that procedure. According to the Applicant Mr Boschoff was not neutral when he made his decision on the verdict. Since Mr Boschoff was the chairman at the hearing, it was wrong of him to discuss the Applicant's guilt or otherwise with the initiator. The verdict was therefore not Mr Boschoff's decision but a decision that had been influenced by another director. This irregularity resulted in a further miscarriage of justice.

28.8 The circumstances under which Mr Boschoff conducted the disciplinary hearing shows that he compromised himself and consequently denied the Applicant - justice. The '*Guilty*' verdict in each of 3 (three) charges was unjustified and so was the dismissal.

28.9 The Applicant complained further that he was denied a chance to mitigate on the sanction. The Respondent did

not deny this allegation. The Court accepts this issue as a proven fact. The denial of mitigation confirms that the Applicant was denied a fair hearing.

28.10 It is one of the inalienable rights of an employee who has been found guilty of misconduct at a disciplinary hearing – that he should be given a hearing on mitigation of sanction. Failure to do so will render the dismissal procedurally irregular. This Court is in agreement with the *ratio decidendi* expressed by the Industrial Court in the matter of: SABELO GULE VS INYONI YAMI IRRIGATION SCHEME SZIC case no. 31/04 (unreported), where the following was said:

"44. The appropriate sanction for an employee who has been found guilty of misconduct or poor work performance must be distinctly addressed at a disciplinary enquiry and <u>the employee must be given an opportunity to advance evidence and arguments in mitigation. Failure to do so renders a dismissal procedurally unfair.</u>"

(Underlining added)

(At page 19)

28.11 The failure by the Respondent to give the Applicant an opportunity to make submission on mitigation is another reason the Court finds the dismissal of the Applicant to be procedurally unfair.

29. The Court is satisfied that Mr Boshoff acted irregularly in the manner he introduced hearsay evidence – at the hearing. The general rule regarding introduction of evidence in Court or at an enquiry is that: hearsay evidence is inadmissible.

29.1 It was also irregular for Mr Boshoff to be both chairman and witness in the same hearing. The manner the hearing was conducted as well as the verdict was unfair.

29.2 The Court is not satisfied that the minutes as recorded by Mr Boschoff correctly reflect what was discussed at the hearing. The minutes had been written by Mr Boschoff who had compromised his neutrality in the matter in a manner that was

prejudicial to the Applicant. The Court cannot therefore rely on the minutes and the verdict that is contained therein.

29.3 The Respondent has failed to produce evidence in Court to prove the charge – that the Applicant had sub-let the company house.

30. There was a dispute of fact between the Applicant and Mr Potgieter regarding the events of the 4th December 2002. Mr Potgieter denied that he counted the money (that the Applicant had presented) in the Applicant's absence. According to Mr Potgieter he counted and also recorded the money in the presence of both the Applicant and Mr Pierre Potgieter. Mr Pierre Potgieter was Mr Potgieter's co-director in the Respondent. The evidence of the Applicant as well as that of Mr Potgieter is mutually destructive.

31. Mr Pierre Potgieter did not testify in this trial. The Court is not certain as to which of the 2 (two) versions is correct. The onus to prove that the Applicant is guilty of the offence he is charged with – is on the Respondent – as employer. It is the employer that is accusing the employee of misconduct.

"Proof is that which leads to a conclusion as to the truth or falsity of alleged facts which are the subject of inquiry"

CLASSEN CJ: DICTIONARY OF LEGAL WORDS AND PHRASES, Vol 3, Butterworths, 1976 SBN 409 01892 9 at page 212.

32. The Respondent has failed to prove that the money was counted in the presence of the Applicant. Furthermore, the Respondent has failed to prove that there was a shortage in the money that was presented to Mr Potgieter. The Respondent has failed to discharge the onus that rested on her. The evidence does not support the charge that the Applicant is guilty of dishonesty in respect of the shortage of cash. The Respondent's decision to dismiss the Applicant on this charge was also irregular.

33. The Respondent has failed to prove that the Applicant is guilty of any of the offences with which he was charged. Section 42 of the Employment Act no 5/1980 (as amended) provides that:

(1) In the presentation of any complaint under this Part the employee shall be required to prove that at the time his service 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."

34. The Applicant was employed by oral contract for an indefinite period. This particular aspect of the Applicant's contract of employment is not in dispute. The Applicant was therefore an employee to whom Section 35 applied. The Applicant's employment contract was terminated contrary to Section 42 (2)(a) and (b) of the Employment Act. The Respondent failed to prove misconduct on the part of the

Applicant. The dismissal was accordingly unreasonable and unfair both procedurally and substantively.

35. According to the Applicant, he had initially been employed as a block man in 1992. In 1998 the contract of employment was varied and improved by oral agreement with Mr Boschoff – the Financial Director. The Applicant testified that he was enticed by the benefits that Mr Boschoff had offered if he (Applicant) would agree to go and work at the Nhlangano shop. The Applicant accepted the offer and relocated to Nhlangano town. The Applicant occupied the company house from the time he relocated to Nhlangano until the time of dismissal.

35.1 Inter alia, the Applicant was offered the company house to occupy together with his family - at Nhlangano. The Applicant accepted the house but refused to relocate his family to Nhlangano town. The Applicant occupied the house alone for some time. Later the Applicant was joined by his work colleague- Mr Sipho Gumedze as aforementioned. Mr Sipho Gumedze lived in the company house at the benevolence of the

Applicant. There was no evidence adduced that Mr Gumedze ever paid the Applicant rent.

35.2 The house was leased by the Respondent from Mr Elliot Mavimbela. As at November 2002 the monthly rent was E2, 365-00 (Two Thousand Three Hundred and Sixty Five Emalangeni) per month.

36. Mr Potgieter initially denied that the company house was allocated to the Applicant and his family only. He further denied the agreement between Mr Boshoff and the Applicant which improved the Applicant's benefits. According to Mr Potgieter, the company house was allocated to all the Respondent's employees who worked at the Nhlangano shop, both male and female. At that time the Applicant was in charge of 3 (three) female employees plus 1(one) male.

37. Mr Potgieter testified further that in March 1998 he addressed the employees at the Nhlangano shop and informed them that they will have to share the company house. He stated that both Mr Boschoff

and the Applicant were present at that meeting. The Court has difficulty with that statement.

37.1 This statement was made for the first time when Mr Potgieter was under cross examination; the Applicant was therefore denied an opportunity to comment on it. The Court does not know how the Applicant would have responded - had that statement been put to him while he was still in the witness box. It would be unfair to the Applicant if the Respondent would be permitted to raise items of defence only after the Applicant had left the witness box. If the Respondent's conduct were to be permitted - it would result in a miscarriage of justice.

37.2 Mr Potgieter was asked whether he had made this particular allegation known to his attorney. He answered that he had not informed his attorney about it. Mr Potgieter's evidence reads thus:

"AC *Did you tell your attorney that there was a meeting where the staff was told [at] the time Mr Mndzebele [Applicant]*

assumes the managerial position they are going to share the house with him. Did you tell your attorney that?

A *No my lord."*

(Record page 255)

37.3 The allegation made by Mr Potgieter is an afterthought which the Court cannot allow. It would result in a miscarriage of justice – if allowed.

37.4 Mr Boschoff's statement does not affect the validity of the variation agreement. The variation was a product of an agreement between the Applicant and the Respondent, the latter was duly represented by Mr Boschoff. The relocation of the Applicant to Nhlangano town was part of the implementation of the variation. The Applicant and the Respondent continued to implement the agreement until the date of suspension of the Applicant.

38. The Applicant stated that he was further enticed (to accept Mr Boschoff's offer) by the right to enjoy unrestricted use of the company motor vehicle. The Applicant testified that he was allowed by Mr

Boschoff, the use of the company motor vehicle during and after working hours. During weekends and sometimes during mid –week, the Applicant drove home in Manzini town in the said motor vehicle and was not reprimanded for so doing. In several instances the Applicant gave a lift to his work – colleagues who also wanted to visit to their homes in Manzini town. Mr Potgieter did not deny that allegation but stated that the Applicant was not entitled to use the company motor vehicle other than in the course of work.

39. As aforementioned, Mr Boshoff did not testify at the trial. Mr Potgieter was not present in the meeting wherein the variation agreement was concluded. Mr Potgieter cannot deny the terms of the variation agreement since it was concluded orally and in his absence. The Applicant's evidence on the terms of the variation agreement remains uncontroverted.

40. As an alternative, Mr Potgieter argued that Mr Boschoff had no authority to negotiate and conclude a variation of the Applicant's contract of employment. Consequently, Mr Potgieter and the

Respondent do not recognize the Applicant's claim to housing and motor vehicle benefits since these benefits are a product of an agreement which they deem irregular – in that Mr Boschoff's exercise of authority was in conflict with the Respondent's internal policies. Mr Potgieter's testimony reads as follows:

> *"AC My instructions and this is in the evidence are that you were not in the meeting when Mr Mndzebele [Applicant] negotiated the terms, it was himself and Mr Boshoff.*
>
> *A It's not true my lord, he didn't have the position to have a meeting on his own concerning the butcheries.*
>
> …
>
> *AC Who did not have the authority to meet the Applicant alone.*
>
> *A Mr Boschoff."*
>
> (Underlining added)
>
> (Record page 257)

41. Mr Potgieter has failed to disclose before Court the extent of Mr Boschoff's authority to bind the Respondent, especially when dealing with the Applicant's contract of employment. In the absence of such

evidence it cannot be said that the variation of the Applicant's employment contract was beyond Mr Boschoff's authority as Financial Director.

42. Even if the Respondent had provided proof that the variation of the contract of employment was beyond Mr Boschoff's authority, (which is not the case), the Respondent would still be bound by that variation on the basis of company law principles including the *Turquand* rule. Authorities provide as follows:

42.1 *"A transaction which was beyond the director's or other officer's actual authority is nevertheless binding on the company if it fell within his ostensible authority and the third party acted in good faith or if it was covered by the rule in Royal British Bank v Turquand. Under that rule, also known as the 'indoor management rule', persons dealing with the director or manager of a company who openly exercises an authority which he could have under the constitution of the company provided that some act of*

internal management was performed, are entitled to assume that that act was performed."

HAHLO HR: SOUTH AFRICAN COMPANY LAW THROUGH THE CASES, 4th ed, Juta, 1984 ISBN 0 7021 14324 page 445.

42.2 *"The directorate is the obvious functionary within the company which is entrusted with the management of the company's affairs. The outsider is therefore entitled to assume that the directorate can exercise all powers which can be delegated to it in terms of the articles and there is no duty on the outsider to investigate whether the formalities required for a particular act have been complied with."*

CILLIERS HS AND BENADE ML: COMPANY LAW, 4th ed, Butterworths, 1982 ISBN 0 409 01935 6 page 124.

43. The Applicant is not a director in the Respondent but an employee. The Applicant had no means of knowing the extent of the mandate of each of the directors in the Respondent. As a reasonable man the Applicant was entitled to conclude that, Mr Boschoff as Financial

Director, had the authority to represent the Respondent in the variation agreement. The benefits that Mr Boschoff offered the Applicant- are of a financial nature as they improved the salary structure of the Applicant and are consistent with Mr Boschoff's position as Financial Director. The Applicant was an innocent third party in the variation agreement. Mr Boschoff exercised his actual, alternatively - ostensible authority when he concluded the variation agreement. The variation agreement is binding on the Respondent by virtue of Mr Boschoff's exercise of authority either actual or ostensible. The variation agreement is also binding on the Respondent based on the provision of the *Turquand* rule.

44. The consequences of the variation agreement were obvious to the other directors of the Respondent as early as March 2002. The Applicant relocated to Nhlangano town and took up a managerial position there. Mr Potgieter became aware in March 2002 that the Applicant's contract of employment had been varied. Mr Potgieter did not question or challenge the terms of the variation agreement nor the authority of Mr Boschoff to conclude that agreement. Mr

Potgieter's conduct meant that he was content with both Mr Boschoff's exercise of authority to conclude the variation agreement and the terms thereof. Therefore the Respondent as well as Mr Potgieter cannot at this late hour deny the authority of Mr Boschoff to conclude the variation agreement or the terms thereof.

45. The promotion of the Applicant from supervisor to manager and the inclusion of the housing and motor vehicle benefits into the Applicant's salary structure are terms in the variation agreement. Mr Potgieter recognized the Applicant as manager at the Nhlangano shop – duly appointed as such by Mr Boschoff. It is not open to Mr Potgieter to pick and choose which term in the variation agreement should he recognise and which - should he reject. It is either the variation agreement was lawful as a complete unit or it was not. Having accepted the Applicant as lawfully appointed manager it is fair and logical for the Respondent to accept the other term in the agreement. The Respondent is estopped from denying the authority of its director (Mr Boschoff) in concluding the variation agreement. The

Respondent is further estopped from challenging the terms of the said agreement.

46. In the course of cross examination Mr Potgieter admitted that it was possible that Mr Boschoff and the Applicant may have concluded the variation agreement but he (Mr Potgieter) had no knowledge of that fact. In that case. Mr Potgieter could not deny that fact. The evidence reads thus:

"A *Mr Boschoff had no authority on his own to give that vehicle to him to use for his private use.[sic]*

AC *Would the Applicant have been aware that Mr Boschoff didn't have the authority to give him accommodation and to give him a company motor vehicle.*

A: *I am sure my lord in his work he was communicating with me.*

AC *And you are saying you were the only one who could communicate with the Applicant in management and no one else was supposed to communicate with the Applicant.*

A *<u>Unless it happened but I don't know about it my lord."</u>*

(Underlining added)

(Record page 265)

47. The Court is satisfied that the company house was part of the Applicant's benefits as an employee of the Respondent. At the time of dismissal the housing benefit was calculated at E2, 365-00 (Two Thousand Three Hundred and Sixty Five Emalangeni) per month – which was equivalent to the monthly rent payable for the house.

48. The issue of the company motor vehicle stands on a different footing. The Applicant was allowed partial access to the motor vehicle for his personal use. The main purpose of acquiring the motor vehicle was to run the Respondent's errands at the Nhlangano shop. The Applicant had access to the motor vehicle for personal use only after the Respondent's business had been attended to. With the evidence that has been presented, the Court is unable to calculate in economic terms the extent of the Applicant's right to private use of the motor vehicle. *A fortiori,* the Court has not been told the economic value of the use of

the motor vehicle for any given time period – whether for private or business use.

48.1 The Respondent's primary purpose of acquiring the motor vehicle was to benefit its business. The Applicant's right to use the motor vehicle was subordinate to that of the Respondent.

48.2 The money that the Respondent provided for fuel was to benefit the Respondent's business. The Applicant had no right to claim that money as part of his remuneration. The Applicant was no longer entitled to fuel allowance after the motor vehicle had been removed from his possession. The monthly fuel allowance will not be taken into consideration when the Court computes the Applicant's monthly remuneration.

49. The Applicant has further claimed payment in lieu of leave outstanding for the years 2000 and 2001. Mr Potgieter denied that the Applicant was owed leave for the period aforementioned. Mr Potgieter stated that the Applicant was paid in the lieu of leave in the

sum of E3, 260-00 (Three Thousand Two Hundred and Sixty Emalangeni). Mr Potgieter produced a cheque payable in the said amount which he presented as proof of payment for the 42 (Forty Two) leave days claimed by the Applicant. The cheque is dated 12th July 2001 and is marked exhibit R8. The cheque is drawn by the Respondent in favour of the Applicant. It appears (from the date stamp) that the cheque was presented for payment at Standard Bank on the 14th July 2001.

50. The Applicant has not denied receipt of payment in the said cheque. The Applicant has not denied Mr Potgieter's evidence that the payment was in lieu of leave for the years 2000 and 2001. The economic value of the 42 (Forty Two) leave days which were then outstanding has not been challenged either. The Court is satisfied that the Applicant was paid in lieu of leave for the years 2000 and 2001 in terms of the cheque (exhibit R8).

51. Mr Potgieter conceded that the Applicant was owed leave for the year 2002 – which was equivalent to 21 (Twenty one) days pay. Mr Potgieter stated as follows in his examination in chief.

51.1 *"RC Mr Potgieter you say Jomar Investments [Respondent] does concede that they owe Applicant leave pay for 2002 which is equivalent to 21 years [days].*

A *Yes my lord."*

(Underlining added)

(Record page 243)

51.2 *"RC Mr Potgieter when we adjourned yesterday we were on the issue of leave pay of the Applicant, to your knowledge you conceded that he was owed leave for 2002, do you recall.*

A: *that is correct my lord."*

(Underlining added)

(Record page 244)

52. The evidence supports Mr Potgieter's contention that the Applicant is owed leave pay for the year 2002 only. The Applicant has indicated in his Amended Particulars of Claim that he worked 26 (twenty six) days per month on average. This allegation was not denied.

52.1 The Applicant's net pay as at the time of dismissal was E2, 400-00 (Two Thousand Four Hundred Emalangeni) per month.

52.2 The Applicant's housing benefit was valued at E2, 365-00 (Two Thousand Three Hundred and Sixty five Emalangeni) per month and same was equivalent to the monthly rent payable to the landlord. The Respondent provided the Applicant a company house together with certain utilities such as water, electricity and gardening services.

52.3 Therefore the Applicant's total pay package as per the evidence (amounted to E4, 765-00 (Four Thousand Seven Hundred and Sixty Five Emalangeni) per month.

52.4 The Applicant's average daily pay amounted to E158.83 (One Hundred and Fifty Eight Emalangeni Eighty Three cents) based on an average, of 30 (Thirty days) per month.

52.5 The Applicant is entitled to payment of a sum of E3, 335.43 (Three Thousand Three Hundred and Thirty five

Emalangeni Forty Three Cents) in lieu of 21 (Twenty One) leave days outstanding.

53. The Applicant was dismissed without notice. In terms of Section 33(2) of the Employment Act the Applicant is entitled of payment of 1 (one) month's salary in *lieu* of notice in the sum of E4, 765-00 (Four Thousand Seven Hundred and Sixty Five Emalangeni).

53.1 In terms of Section 33(1) of the Employment Act, the Applicant is entitled to payment for Additional Notice. The additional notice is for 36 (Thirty six) working days in the sum of E5, 717. 88 (Five Thousand Seven Hundred and Seventeen Emalangeni Eighty Eight Cents).

53.2 In terms of Section 34(1) of The Employment Act, the Applicant is entitled to payment for severance allowance. The allowance is 90 (Ninety) working days in the sum of E14, 294-70 (Fourteen Thousand Two Hundred and Ninety Four Emalangeni Seventy Cents).

53.3 The Applicant found employment about 4 (four) years after dismissal. In the exercise of its discretion the Court

awards the Applicant compensation for unfair dismissal equivalent to 8 (Eight) month's pay in the sum of E38, 120-00 (Thirty Eight Thousand One Hundred and Twenty Emalangeni).

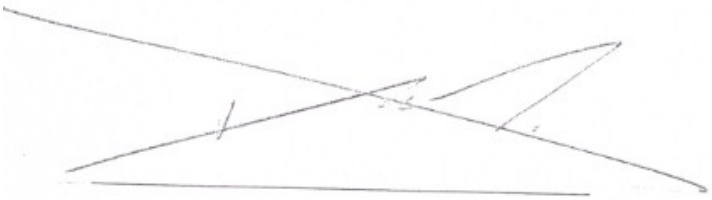
53.4 In the exercise of its discretion, the Court has determined that each part should pay its costs.

54. Wherefore the Court grants judgment in favour of the Applicant with payment as follows:

54.1	Compensation for unfair dismissal	E38, 120-00
54.2	Notice pay	E4, 765-00
54.3	Additional Notice	E5, 717-88
54.4	Severance allowance	E14, 294-70
54.5	Leave pay	E3, 335-43
54.6	Total	E66, 233-01

Members agreed

Members agreed



D.MAZIBUKO

INDUSTRIAL COURT – JUDGE

Applicant's Attorney	Mr.V Z. Dlamini Of V.Z. Dlamini Attorneys
Respondent's Attorney	Mr A. Lukhele Of P.R. Dunseith Attorneys