



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No. 325/2018

In the matter between:

JOHN MHLONGO

Applicant

And

PREMIER SWAZI BAKERIES (PTY) LTD

Respondent

Neutral Citation: John Mhlongo vs. Premier Swazi Bakeries (Pty) Ltd
(325/2018) [2022] SZIC 68 (31 May 2022)

CORAM: **V.Z. DLAMINI – ACTING JUDGE**
(Sitting with Mr. A. Nkambule and Mr. M.T. E Mtetwa –
Nominated Members of the Court)

SUBMISSIONS FILED : 13th September 2021

JUDGMENT DELIVERED : 31st May 2022

Summary: Applicant filed an application for the determination of an unresolved dispute alleging that he was unfairly dismissed by the Respondent on charges of Gross Negligence. Respondent disputes unfairly terminating the Applicant's services.

Held: That Respondent bears the onus of proving that the Applicant's dismissal was for a reason permitted by Section 36 of the Employment Act of 1980 and that taking into account all the circumstances, dismissal was reasonable. Respondent accordingly discharged its onus by showing that the Applicant committed the misconduct, which resulted in the company suffering serious financial losses.

Held: Further, that the Respondent proved that Applicant's dismissal was reasonable in all the circumstances; Applicant was a trained manager of five years' experience who bound himself to exercise all reasonable skill, care and diligence in discharging his obligations and also to promote the interests of the Respondent while employed. The relationship of trust was irretrievably damaged. Further that Applicant's dismissal was substantively and procedurally fair.

JUDGMENT

APOLOGY:

Obviously the Court has inordinately delayed to deliver this judgment. The parties were directed to file the record of trial and could only do so at the close of the 3rd Session in December 2021. Notwithstanding that occurrence, the delay is regretted.

INTRODUCTION

- [1] The Applicant is an adult liSwati male of Lavumisa area in the Shiselweni region and the Respondent is a company incorporated and registered in

terms of the Company laws of Eswatini, having its principal place of business in Matsapha in the district of Manzini.

[2] The Respondent employed the Applicant on the 1st February 2012 as Confectionery Manager. The latter was in continuous employment until his dismissal on the 13th April 2017. After dismissal, the Applicant reported a dispute for unfair dismissal to the Conciliation, Mediation and Arbitration Commission (CMAC), but the dispute remained unresolved, which culminated in CMAC issuing a certificate of unresolved dispute.

[3] The Applicant then filed an application for the determination of an unresolved dispute on the 10th October 2018, contending that he was unfairly dismissed by the Respondent and claimed the following relief:

- | | | |
|-----|---|-------------|
| (a) | Notice pay | E17 600.00 |
| (b) | Additional notice pay | E10 830.72 |
| (c) | Severance allowance | E27 076.80 |
| (d) | Maximum compensation for unfair dismissal | E211 200.00 |
| (e) | Costs of suit | |
| (g) | Further and/or alternative relief. | |

PLEADINGS

APPLICANT

[4] In his Statement of Claim, the Applicant alleges that on the 13th February 2017, he was wrongly charged for gross negligence involving stock that

was under the custody of the Storeman. He also declared that the latter was not just responsible for the safekeeping of raw materials; together with the Value Chain Clerk, he was accountable for ordering and receiving the stock from Respondent's suppliers.

- [5] The Applicant also asserted that he was only mandated to account for raw materials that he ordered and received from the Storeman; as part of his functions, he had to compile daily variance reports, which were not questioned by the Respondent. He only prepared monthly variances in respect of recipes; otherwise monthly stock updates were done by another employee. He further contended that the standard operating procedures (SOPs) that Respondent used to hold him responsible for the stock losses did not apply to him, but were binding to the Production Manager.
- [6] It was also stated by the Applicant that he reported the missing stock to the Respondent's Bakery Manager and the Police. Furthermore, he claimed that the Storeman was not amongst the employees who were under his supervision; for instance, the latter never raised complaints to him nor was he granted leave by him. The Applicant asserted that his dismissal was substantively unfair for the above stated reasons and the fact that the Storeman admitted that he stole the stock in issue.
- [7] The Applicant claimed that his dismissal was procedurally unfair, firstly because he was never furnished with the minutes of the disciplinary and appeal hearings. Secondly, the chairpersons of the hearings were biased because they failed to apply their minds to the fact that the Storeman was liable for the loss of the stock in question. Thirdly, the Applicant impugned

the procedure adopted at his disciplinary hearing because the initiator was also a witness. Lastly, the Applicant decried the fact that his application for external representation was never decided by the chairperson; as such, this was tantamount to denial of representation because he was part of management.

RESPONDENT

- [8] On the other hand, the Respondent contended in its Replies that the Applicant had the sole responsibility of daily reconciling his stock-on-hand in terms of its SOP, in order to eliminate stock losses caused by theft and/or inefficiencies. Nonetheless, the Applicant did not perform his duties as expected, which resulted in the loss of stock. According to the Respondent, it was the Applicant's responsibility to receive stock from suppliers, but he delegated that function to the Storeman.
- [9] The Respondent also alleged that while it was a fact that the monthly stock variance report was compiled by the Value Chain Clerk, it was Applicant's duty to verify it; incidentally, the former wrote an email to the latter about recurring write-offs, but the latter did not report to senior management about the variances, which were very high. Moreover, the Respondent claimed that it was a certain Mr. Matsenjwa not the Applicant who reported the theft to the Police on the instruction of the Respondent's management.
- [10] The Respondent further asserted that while the Storeman did not directly report to the Applicant, he reported indirectly by virtue of the fact that their work was interdependent. In addition, the Respondent affirmed that the

Applicant's dismissal was fair and reasonable as it was proved that he had committed gross negligence. Lastly, the Respondent asserted that it followed a fair procedure to dismiss the Applicant; the latter was not entitled to legal representation.

APPLICANT'S VERSION

- [11] The Applicant testified in-chief that his duties as Confectionery Manager entailed supervising staff that worked under his control and being in charge of the production of buns. He was also responsible for the raw materials including the margarine that he requisitioned from the Storeman through his supervisors. He requisitioned the baking materials from the Storeman through a form (Exhibit "JM 2"). After the Storeman gave the Applicant's department the baking materials, the former locked the stores and kept the keys; consequently, the latter was only accountable for the stock that was delivered to his department.
- [12] It was the Applicant's evidence that the Storeman was also accountable for ordering stock for the other department that produced bread. After receiving the goods he had ordered from external suppliers, the Storeman would submit all the invoices to his supervisor, the Finance Manager. It was the Finance Manager through the Value Chain Clerk that was responsible for checking if the goods ordered by the confectionery department from suppliers were all accounted for. Consequently, the Applicant was surprised to be charged for loss of stock that was not under his care.

- [13] The Applicant referred the Court to monthly stock variance reports that were prepared by the Value Chain Clerk and given to him to explain any discrepancies between the raw materials he requisitioned from the Storeman and that used to bake. The variance reports were marked Exhibits “*JM 3*, *JM 3.2* and *JM 3.3*”. Moreover, the Applicant told the Court that he reported to the Bakery Manager to whom the variance reports containing his explanations were submitted; the latter never queried his explanations until the charges were preferred against him.
- [14] An organogram of the Confectionery department (Exhibit “*JM 4*”) was produced by the Applicant and using that chart, he affirmed that while it confirmed that he was Head of the department, the position of Storeman was not amongst the positions that reported to him. The Applicant added that he created the structure and submitted it to the former Bakery Manager, a certain Mr. Wayne Lavendale, who never disputed nor amended it. Additionally, the Applicant said he thought Mr. Lavendale’s successor Ms. Sthembile Khumalo was aware of the department’s organ chart.
- [15] Regarding the procedure adopted at the disciplinary hearing, the Applicant testified that, initially the hearing was chaired by a certain Mr. Gcina Fakudze who had made an *ex tempore* ruling that he may be represented by a legal practitioner because he was part of management. Nevertheless, when the hearing resumed on a subsequent day, the disciplinary hearing was now chaired by Attorney Mr. Sipho Mnisi and no explanation was proffered by the Respondent for Mr. Fakudze’s substitution.

- [16] Under cross-examination, the Applicant admitted that he was trained on the production SOP with a certain Mr. Fanukwente Mtsetfwa, the Production Manager (bread). He also acknowledged that there were two Production departments, one for confectionery and the other for bread. The Applicant denied that his signature appeared in the third column parallel to the SOP titled "*raw material*", which was in the first column. He contended that his signature appeared on the third column parallel to the SOP titled "*off-loads*" and "*production*", which was in the first column.
- [17] The Applicant asserted that he was trained on the "*off-loads*" and "*production*" SOP by one Ms. Gayle Corlia from the parent company in the Republic of South Africa. He acknowledged that in terms of his contract of employment, he undertook to exercise all reasonable skill, care and diligence in the discharge of his functions. Furthermore, the Applicant observed that the SOP required him to review raw materials and production consumables, reconcile daily and sign relevant documents. Moreover, he was required to investigate, clear and document any discrepancies.
- [18] The Applicant conceded that the SOP did not provide that as Confectionery Manager, he was expected to only review raw materials he received from the storeman. He further admitted that he filed the requisition to the Storeman for the purchase of raw materials from the suppliers and in turn the latter filled in a purchase order, which he signed and submitted it to be counter-signed by the Confectionery Manager and Bakery Manager. Another concession was made by the Applicant that the SOP did state that the Production Manager was responsible for raw materials and this included him as Confectionery Manager.

- [19] The Applicant accepted that as Head of the Confectionery department, he was in charge of the employees, machinery and raw materials under his department. He however denied that following a monthly stock take, he was expected to explain any discrepancy between stock-in-hand and that used by his department. In the same breath, the Applicant accepted that he was part of the value chain team that comprised of the Confectionery Manager, the Storeman as well as the Value Chain Clerk who all played different roles in the procurement of raw materials.
- [20] The Applicant acknowledged that his department was dependent on the Storeman and the latter received instructions from him on what raw materials to order from suppliers. However, the Applicant denied that the Storeman indirectly reported to him, which was also referred to as dotted line reporting. According to the Applicant, the Storeman reported to the Value Chain Clerk.
- [21] While the Applicant confirmed that in 2016, the Human Resources Manager Ms. Bridgette Magongo gave him specimen work profiles that were taken from the South African parent company; he could not recall if Ms. Magongo instructed him to modify the profiles to suit the Respondent's structure and operations.
- [22] Although the Applicant admitted amending the work profiles for the positions of Confectionery Manager, Supervisors, General Operators and Labourers, he nonetheless denied that he adapted the profiles of the Storeman and Quality Controller to reflect that these positions reported to him. The Applicant refuted the fact that by his denial, he was insinuating

that the Human Resources Manager surreptitiously added the disputed profiles. According to the Applicant, he modified the work profiles in line with his department's organogram.

[23] The Applicant asserted that even though the precedent of the Storeman's work profile reflected that he was responsible for appraising the latter's performance, the Storeman did not report to him. He affirmed that in the work environment the phrase "*reports to*" denoted an arrangement where a junior employee consulted him when facing a problem. It was put to the Applicant that the meaning of the phrase extended beyond problems; it also denoted a junior officer taking instructions from a superior. In response, the Applicant insisted that he was the one that told the Storeman what he wanted from the stores. He however accepted that he was above the Storeman in status.

[24] The Applicant admitted that on the 17th February 2016, the Value Chain Clerk Ms. Siphesihle Khumalo sent him an email in which she communicated her dissatisfaction with the explanation he gave, that the high level of stock variances as reflected in the reports was attributable to the recipes that were not updated. He further acknowledged that Ms. Khumalo had instructed him to monitor stock movement because the margarine that was written-off at the end of January 2016 was excessive.

[25] It was revealed by the Applicant that he complied with the Value Chain Clerk's instruction to investigate the cause of the high level of stock variances by checking the recipes and such exercise was contemplated by the SOP. The Applicant admitted that the SOP provided that the rationale

for investigating stock variances was to eliminate stock losses through theft and inefficiencies.

- [26] It was put to the Applicant that the spreadsheet of monthly stock variances in respect of super bake yellow and super bake white margarine for January to December 2016 revealed that the variance figures were too high and these numbers could not have been caused by outdated recipes. He asserted that he tried to explain the variances by showing the correlation between the raw materials used and the buns produced.
- [27] The Applicant admitted that the variance report was generated from the system, after the Value Chain Clerk uploads the stock-in-hand data and information on raw materials used, which is submitted by him to the Clerk. The Applicant further acknowledged that he signed the variance reports after giving reasons for the discrepancies. He asserted that even though he would requisition stock through the Storeman, when that stock was purchased and delivered, it was not his responsibility to verify whether the stock delivered was as per his requirements; it was the Value Chain Clerk's duty.
- [28] According to the Applicant, he would count stock at the end of each month with the other Heads of department. After receiving the email from the Value Chain Clerk to investigate the variances, he counted the stock daily with the Storeman to verify if the figures the latter gave were accurate. The Applicant added that the outcome of the stock count with the Storeman was that at first the stock balanced, but over time they realized that there was a shortage of stock.

[29] The Applicant told the Court that following the investigation, they discovered that stock was stolen; he then approached the Bakery Manager to report the theft; the latter instructed him to change the locks and report the larceny to the police. He admitted that when he discovered that stock was stolen, the variance had accumulated to E574, 904.31 and this figure was huge for any company in Eswatini. The Applicant further conceded that after the theft was discovered in December 2016, no variances occurred in January 2017. He denied that the Bakery Manager instructed him to report the theft of stock to the police because he was in charge of the same.

[30] The Applicant further refuted the fact that if he had counted the stock with the Storeman daily as he claimed, he would have discovered the theft earlier. He also stated that although he was not responsible for the stock under the Storeman's custody, he investigated the variances as part of the team, including the Storeman and Value Chain Clerk.

[31] The Applicant admitted that during his disciplinary hearing he filed an application to the Court challenging an interlocutory ruling of the first chairperson, Mr. Gcina Fakudze and at the conclusion of that matter; the Court ruled that he should be represented by a fellow Manager.

RESPONDENT'S VERSION

[32] The Respondent led the evidence of two witnesses, namely Ms. Sthembile Khumalo (RW1), its former Bakery Manager and Ms. Bridgette Magongo (RW2), the Human Resources Manager. RW1 testified that she was

employed by the Respondent in 2016 and was the Bakery Manager around that time. Her duties entailed overseeing the whole operation of the Bakery, which had various departments. These departments included Finance and Administration, Workshop-Motor Vehicle Fleet, Production-bread, Production-confectionery and Dispatch-Sales.

- [33] RW1 told the Court that the Applicant like other Heads of department was responsible for his department's operations and resources that included personnel and stock. Moreover, it was RW1's testimony that the Heads of department under the production side of the business had to ensure that raw materials were ordered, kept safe and accounted for. She added that upon employment, the Heads of department are trained on the operations especially the SOPs; therefore by virtue of their positions, they were deemed to know their general responsibilities.
- [34] RW1 declared that the production SOP was applicable to the Applicant as Head of the Production-Confectionery department; it also applied to the Production-Bread Manager. RW1 denied that the Applicant was only accountable for the raw materials he requisitioned from the Storeman, but was also responsible for all goods ordered by the Storeman from suppliers on behalf of the Confectionery department.
- [35] According to RW1, the Head of department was required to investigate, clear and document variances to ensure that the raw materials ordered and the product manufactured was aligned with the information in the system. Moreover, the Head of department's explanation enabled the Finance department to write-off the variances. It was also RW1's evidence that the

role of the Storeman was to order and keep goods safe as delegated by the Head of department.

- [36] RW1 further stated that the Storeman reported to both Production Managers, nevertheless in terms of the Respondent's structure, the Storeman's head count was under Production-Bread Manager; he still had a dotted line reporting to the Production-Confectionery Manager. RW1 denied that the Storeman reported to the Finance Manager.
- [37] RW1's evidence was that the Applicant was charged with gross negligence for failing to account for stock variances in respect of super baked white and yellow margarine that resulted in the Respondent suffering a loss of close to E600, 000 yet the stock was under his care. She disclosed that in 2015, the Applicant complied with the SOP by properly managing the movement of stock, which resulted in no variances. She further stated that after discovery of the theft of stock in December 2016, the huge variances that had occurred between January and December 2016 decreased drastically and that has been the position to date.
- [38] RW1 denied that she was aware of the huge stock variances from February to December 2016, but never raised any query with the Applicant. She stated that prior to December 2016; the SOP did not require her to authorize the write-offs. Nonetheless, after the theft in December 2016, she was required to authorize any write-offs as a control measure; it is for that reason that her signature only appears on the January 2017 monthly variance report.

[39] Under cross-examination, RW1 told the Court that she no longer held the position of Bakery Manager; she had been redeployed to the Milling Section. She however denied that she was removed from her previous position because of the theft of stock that occurred in December 2016; she asserted that she was moved in July 2018 following a restructuring process within the company. RW1 asserted that even though the Applicant reported to her on daily operational issues, an annual SOP audit was conducted by the Finance department in conjunction with the South African parent company to ensure that he complied with the SOPs.

[40] It was RW1's evidence that if the Applicant did not understand the cause of the stock variances, he should have approached her as his supervisor to advise her of the difficulties he had and not to ignore the problem as deteriorated. She further stated that due to the fact that all along she did not authorize write-offs and did not have access to the whole system, she could only initiate investigations in December 2016 after the missing stock was discovered; she then instructed the Finance department to compile an analysis report of the consumption of raw materials in 2016 and compare it with the 2015 analysis report.

[41] According to RW1, prior to December 2016 write-offs were done by the Finance Manager in consultation with the Value Chain Clerk after a satisfactory explanation for stock variances was given by the Head of department. She further stated that even though the document was not produced in Court, she made a follow up with the Applicant regarding exhibits "*R49*" and "*R50*", which were emails sent by the Value Chain

Clerk to the Applicant and copied to her as Bakery Manager instructing him to investigate the variances.

[42] RW1 declared that if she been negligent in supervising the Applicant, the Respondent would have taken disciplinary action against her; she asserted that on the contrary, she swiftly instituted investigations after the missing stock was discovered and following that process, the variances went down. RW1 revealed that during monthly stock takes managers never conducted inventory in their own departments, but for the daily stock takes, in the Applicant's case the Storeman counted stock and gave the data to the Finance department and the Applicant. She added that the monthly stock records were consolidated and submitted to Head office and to her, but these records only entailed the bigger picture of the business.

[43] RW1 denied that the Finance Manager and Value Chain Clerk were accountable for the stock at the Confectionery department by virtue of keeping stock records; she maintained that the Applicant was responsible. She further disputed that the Applicant was only accountable for the stock that was requisitioned from the storeman and delivered at Confectionary. According to RW1, the fact that the Applicant signed the purchase requisition form and that raw materials could not be ordered without his signature was a clear indication that he was accountable for all Confectionery stock.

[44] RW1 admitted that the Storeman kept the keys to the Bread and Confectionery production stores and further that the Storeman ensured that the stock kept was available whenever required by either department. She

further acknowledged the fact that the Storeman received Confectionery raw materials delivered by suppliers, but qualified that he did so on the Applicant's instructions. RW1 added that the Applicant was also accountable for the raw materials by virtue of the explanation he was required to give in the event daily stock counts showed variances.

[45] RW2 Ms. Bridgette Magongo, the Human Resources Manager corroborated RW1's evidence in a number of respects. She confirmed that the Storeman reported to the Production-Bread and Confectionery Managers save that in the case of the latter, it was a dotted line reporting. She further testified that in a bid to ensure that all employees knew their roles and responsibilities, she circulated job profiles she had downloaded from the Premier Bakery Group to Heads of department and instructed them to modify the profiles to suit the Eswatini operation.

[46] According to RW2, she sent profiles of jobs under the Confectionery department to the Applicant around July 2016. These profiles included those of the Manager, Supervisors, Operators, Storeman, Quality Controller and General Labourers. RW2 added that she selected and sent these profiles to the Applicant because in terms of the company blueprint, all the positions reported to him. She further revealed that the Applicant emailed the amended job profiles back to her on or about the 18th July 2016 and the Storeman's job profile was amongst them.

[47] RW2 admitted that the information in the Storeman's specimen job profile did not match the employment details of the Storeman in the Eswatini business; she asserted however that the Applicant's act of emailing the

profile without comments implied that he acknowledged that the Storeman was under his supervision.

[48] During cross-examination, RW2 admitted that she was not well versed with the operational aspects of the Confectionery department such as procurement and delivery of raw materials, how stock was secured and moved within the business; but she stated that there were SOPs that outlined these processes. RW2 also conceded that she never checked the job profiles re-sent by the Applicant to her after amendments were made.

[49] RW2 also stated that she was the scribe during the Applicant's disciplinary hearing and could not recall if the Applicant stated that the Storeman did not report to him; she asserted that the minutes she took would be helpful in that regard.

ANALYSIS

[50] **Section 42(2)** of the **Employment Act 1980** provides that an employer has the onus of proving that the reason for terminating an employee's services was one permitted by **Section 36** of the **Employment Act** and that taking into account all the circumstances, it was reasonable to terminate the services of the employee.

[51] The Applicant was dismissed by the Respondent after a disciplinary enquiry found him guilty of the following charge:

"Gross Negligence; in that from the months of January to December 2016, you disregarded the critical nature of your duties when you failed

to manage staff and raw materials in your department, thus exposing through your actions the company to risk of a loss of raw material (Supa Bake white and yellow margarine) amounting to E574, 904.31."

[52] This Court and the Industrial Court of Appeal have held that the workplace misconduct of gross negligence falls under **Section 36 (l)** of the **Employment Act**.

See: **Hezekiel Soko v Swazi Paper Mills** (Case no: 206/98 SZIC).

Jabulani Dlamini v Swazi Oxygen (Case no: 30/2001 SZICA).

[53] **Section 36(l)** of the **Employment Act** provides that it shall be fair for an employer to terminate the services of an employee for any reason, which entails for the employer or the undertaking similar detrimental consequences to those set out in **Section 36**.

[54] **Grogan: Dismissal 2nd Edition** at page 122 states that:

"The requirements for dismissal for negligence are:

- *That the employee failed to exercise the standard of care and skill that can be reasonably be expected of him or her;*
- *That the lack of care and skill manifested itself in an act or omission that did or could have caused loss to the employer;*
- *That the loss or potential loss to the employer resulted or could have resulted from the employee's negligent act or omission;*

- *The negligence must be gross.*”

[55] Then at page 123, **Grogan (supra)** continues to comment as follows:

“To warrant dismissal negligence by an employee must be ‘gross’. Gross negligence may be said to have occurred if the employee is persistently negligent, or if the act or omission under consideration is particularly serious in itself.”

[56] In terms of **Clause 4.1.6** of the Applicant’s contract of employment, he bound himself to *“exercise all reasonable skill, care and diligence in the discharge of his obligations in terms of his employment with the Company.”* Then in **Clauses 4.2**, he agreed that *“the employment relationship is based upon mutual relationship of trust and confidence. The employee undertakes not to conduct himself in such a way as to destroy the relationship of trust and confidence and acknowledges that a breach of the trust relationship constitutes a disciplinary offence.”*

[57] The Applicant’s main defence to the charge is that, the loss of stock occurred at the warehouse under the Storeman’s care and not under the Confectionery department where he was Head. For the reasons that follow below, we find the Applicant’s version improbable.

[58] The Applicant was trained on the Production and Raw Materials SOPs; this is confirmed by his signature that appears on the document. Under Raw Materials, the document reflects that the Applicant acknowledged that he was trained on the Head of Department’s (HOD) guidelines for ordering, receiving, issuing, storage and reconciliation and stock takes. Regarding the Production SOPs, the Applicant accepted by signing on the document that he was instructed on the HOD’s guidelines for premier buckets, dough

mixing, dough weights, production damages, production transfers and bill of materials.

- [59] The Applicant's denial that his signature appears on the "*raw material*" row dented his credibility. If his denial is taken to be true, then it means that he was trained on the "*Off-loads*" SOP. That SOP includes guidelines for receiving and warehouse damages. In essence, he contradicted himself because his denial is not consistent with his other version that he did not receive goods delivered by suppliers nor was he responsible for damages or losses that occurred at the warehouse. The document is very clear from the top to the bottom of the columns regarding which HOD is responsible for which SOP. We have no doubt that the Applicant signed adjacent to the "*Production*" and "*Raw Materials*" SOPs. The Court takes a dim view of the Applicant's denial of an obvious fact.
- [60] According to the SOP, the Production Manager's duty entailed reviewing raw materials and production consumables, reconciling daily and signing as evidence. If there were any discrepancies, he was supposed to investigate, clear and document them. Furthermore, he was supposed to approve all write-offs and send the signed supporting documentation to the Value Chain Clerk for processing on a daily basis.
- [61] The Applicant admitted under cross-examination that the SOP provided that the HOD was responsible for raw materials and production consumables and makes no distinction between raw materials found in the warehouse or delivered to the confectionary department in preparation for baking.

[62] The Applicant seems to have confused the disciplinary charge with the theft that occurred on the 9th December 2016 for which the Storeman was dismissed. The value of the stock that was stolen that day was **E79, 520**. He was not charged with theft of those goods, but for dereliction of duty resulting in the mismanagement of raw materials and production consumables in his department over a period of twelve (12) months culminating in a stock loss valued at **E574, 904.31**.

[63] So, whether those raw materials and production consumables in respect of which he was charged were in the warehouse or in the confectionary department is immaterial. The fact of the matter is that the variance reports, which were the basis for the year on year analysis, were produced using data taken from stock-in-hand, raw materials used and the end product. The Applicant signed the monthly variance reports compiled by the Value Chain Clerk and never questioned the stock-in-hand data, which clearly showed a huge discrepancy between that data and the raw materials used by his department to bake buns.

[64] The Applicant contended that the stock-in-hand in the monthly variance report referred to the stock delivered to his department and not stock that the company had in its books. It is common cause that the Value Chain Clerk prepared her monthly report using data sourced from the records of the entire value chain, not just from the Applicant. The Applicant himself was required to submit his own daily variances to the Clerk and so was the Storeman. In any event, according to the **Cambridge Dictionary: Cambridge University Press** – <https://dictionary.cambridge.org>, the term “*stock-in-hand*” also called “*stock-on-hand*” means “*the amount of*

goods, such as parts, materials, and finished products, that a company has available at a particular time."

[65] The Applicant would not have been required to offer an explanation for the monthly variances if he was not accountable for all the raw materials (*stock on hand*) used by his department. The explanation was due where the variances exceeded acceptable quantities as per the *bill of materials*.

[66] In as much as the Respondent did not produce the *bill of materials* or allege the acceptable quantities, the Applicant never denied that the discrepancies were excessive. In an email sent to the Applicant on the 17th February 2016, which was a follow-up email, the Value Chain Clerk wrote as follows:

"Noted John, however can you please also keep track of your daily stock movement. You can request the stock recon from Mathokoza on a daily basis to see if those quantities are what u use on a daily basis.

This emanates from the margarine we had to write off end of January. It was too much and the explanation I got is not convincing enough.

The target is to reduce month end stock variances to only those caused by BOM efficiencies.

If we are all committed to it, we can achieve it." [Our emphasis].

[67] The foregoing email is critical in several respects. The Value Chain Clerk rejected the Applicant's explanation that the excessive discrepancies were

caused by outdated recipes. The Applicant did not dispute the Value Chain Clerk's opinion by a response via email. Instead, during trial he said he complied with her advice by checking the Storeman's daily stock reconciliations. He admitted that after checking, he discovered that there was a stock shortage.

[68] After discovering the stock shortage pursuant to the Clerk's advice, the Applicant never escalated the matter to the Bakery Manager nor conduct investigations in his department until there was a theft of margarine in the warehouse on the 9th December 2016. While the Applicant contended that the variances were caused by outdated recipes, he never produced any evidence in Court to prove the correlation between the excessive variances and the outdated recipes.

[69] It was Applicant's evidence that his subordinates were responsible for collecting the stock in the warehouse for baking. It is not farfetched to infer that, in the absence of the controls suggested by the Value Chain Clerk, the supervisors were left to their devices and may have under declared the quantities taken at the stores to try and surreptitiously reduce variances so that they could take the unaccounted goods for themselves. They may also have correctly declared the quantities taken at the stores, but claimed that the discrepancies were caused by old recipes.

[70] The Applicant did not tell the Value Chain Clerk by email at that time that he would not adhere to her advice because the stock at the warehouse was the Storeman's responsibility. In the Court's view, the Applicant's defence that he was not accountable for the stock at the warehouse was an

afterthought. His responsibility for the stock at the stores arose out of his duty to order raw materials to specifications from the suppliers. It is improbable that he would not verify if the specified goods were delivered. The rationale for the "*raw materials*" SOP requiring the Applicant to check the deliveries was that if the goods were not delivered to specifications, he was required to adjust his records accordingly and/or report this to his superiors; failing which he would be liable for any discrepancies caused by his dereliction.

[71] Even though the Applicant argued that after the Value Chain Clerk raised the issue in February 2016, no other query was raised until December 2016 after the theft was discovered, he never challenged the accuracy of the year (2015) on year (2016) comparative analysis report that reflected the total variance of **E574, 904.31** nor did he dispute that the figure was too excessive. On another note, again during cross-examination, the Applicant admitted that after the discovery of the theft in December 2016, there were no variances in January 2017.

[72] Furthermore, the Applicant never denied that his department was the only one that used super baked white and yellow margarine, which was the stock that was mismanaged. The Court cannot therefore find any inconsistency in the Respondent's application of disciplinary action against him because the Production Manager-Bread did not use those raw materials.

[73] In our view, there is nothing wrong with an employer who raises a control query once for a manager to act, but does not make a follow up until after an offence occurs within that manager's department. It is probable that the

Respondent had full confidence in the Applicant to handle the issue, but the latter did not take action. The Respondent cannot therefore be blamed for commissioning an investigation to ascertain the extent of the impact of theft in its systems and/or operations. The Applicant did not allege and prove *mala fides* on the Respondent's part. Instead he acknowledged the accuracy of the figures in the report.

[74] If the Court were to hold that in this case, the Respondent ought to have taken action on the variances earlier, that would not only constitute an unwarranted interference in the Respondent's managerial prerogative, it would also be setting an unreasonable standard. Once the Respondent placed the evidence proving the misconduct to the Applicant, the latter had the obligation to rebut it, but he failed to do so. Even if the Court agrees with Mr. Magagula that some aspects of RW1's (Bakery Manager) evidence were not impressive, that does not assuage the weight of the proven facts against the Applicant.

[75] In the case of **Dumisa Zwane v Ezulwini Municipality and others** (30/2014) [2014] SZIC (14 August 2014), at paragraph 8, the Court said the following:

"...Under the doctrine of management prerogative every employer has the inherent right to regulate, according to their own discretion and judgment, all aspects of employment relating employees' work, including hiring, work assignment, working methods, time, place and manner of work, supervision, transfer of employment, lay off of employees, discipline and dismissal of employees. The only limitations to the exercise of prerogative by employers are those

imposed by labour laws and the principles of equity and substantial (natural) justice."

[76] According to the Applicant's job profile, which he modified, one of his key outputs was controlling costs by optimal utilization of human and financial resources by comparing previous years' performance. He was also expected to ensure that available stock met minimum stock requirements and the product met required specifications. Moreover, he was required to have an understanding of the confectionary production process.

[77] On the authority of **The Central Bank of Swaziland v Memory Matiwane (Case no. 110/1993 SZICA)**, this Court has a duty to enquire into the evidence adduced before it whether the Respondent has been able to discharge its onus as per **Section 42 (2)** of the **Employment Act**. Based on the narrative at paragraphs 4 to 49 above and the analysis that appears from paragraphs 57 to 76 above, we find that the Respondent has proved that the Applicant committed gross negligence by not properly managing employees and stock under his control resulting in a huge financial loss to the employer. Accordingly, we hold that the Applicant's dismissal was for a fair reason as per **Section 36 (1)** of the **Employment Act**. Moreover, the Respondent's Disciplinary Code prescribes dismissal as a sanction for a first offender found guilty of gross negligence, causing loss to the company.

[78] We also find that the Applicant's dismissal was reasonable in all the circumstances. The performance standards set by the Respondent for the Applicant were reasonable. The Applicant was contractually required to

reduce costs in his department. The loss suffered by the Respondent was very severe and had occurred over a period of twelve (12) months without the Applicant taking corrective measures himself or escalating the issue to higher levels of management, if it was beyond his control. His service of five (5) years as an experienced manager in baking operations aggravates his misconduct. Senior Managers are expected to have the knowledge and experience to judge for themselves whether they are meeting the standard set by the employer. See: **Somyo v Ross Poultry Breeders (Pty) Ltd** [1997] 7 BLLR 862 (LAC).

[79] In the case of **Joseph Myeni v JD Group Swaziland (Pty) Ltd t/a PRICE 'N PRIDE** (Case no.94/2000 SZIC at paragraph 19), the Court observed as follows:

"To justify dismissal, the misconduct must be work related and must be of such a nature as to render the employee unfit for employment in the employer's business or to render the continuation of the employment relationship intolerable. At Common law misconduct which has been held to justify summary dismissal includes dishonesty and gross negligence..."

[80] Furthermore, in the case of **Metro Cash and Carry Ltd v Tshehla** (1996) 17 ILJ 1126 (LAC) at paragraphs 9.4 to 9.5, the Court stated as follows:

"....In our view, an employer is entitled to introduce rules to protect its commercial integrity and to expect compliance therewith. It is further entitled to, in appropriate cases, to treat disregard or non-compliance with such rules with severity.....It is not unfair for the employer, as happened in this case, to introduce rules for the

protection of its commercial integrity, to expect strict compliance with such rules and to exact severe penalties such as dismissal for failure to comply therewith...A court should not interfere unless the application of the rule leads to injustice."

[81] On the procedure, the Applicant argued that he was denied legal representation after the previous chairperson had ruled that he was permitted to come with an external representative. According to the minutes of the disciplinary hearing held on the 23rd February 2017, the Applicant was first accompanied by Attorney Mr. Siyabonga Dlamini. Mr. Dlamini applied to be permitted to represent the Applicant; Ms. Sthembile Khumalo, the initiator objected and argued that the Recognition and Procedural Agreement did not allow legal representation in the hearing. To his credit, Mr. Fakudze asked if the Recognition Agreement applied to the Applicant since he was not a member of the Unions, but was part of management.

[82] The Applicant's attorney took up the point raised by the chairperson, but the initiator maintained her objection. Nevertheless, the chairperson made the following ruling:

"I am not going to force any party, but would like to clarify these points. It is true that John is not part of the Union as you submitted. It is a fact that the same agreement does not bind Mr. Mhlongo and do not apply to Mr. Mhlongo.

It could have been better if you not quoted the recognition agreement. That doesn't mean Dlamini must stay and represent Mr. Mhlongo in this hearing. As a chairperson, I cannot overrule

Management's decision and allow you to sit in; only the court can make that decision.

It is true that Mr. Mhlongo is a Manager, in most companies they do allow outside representation when a manager is charged. Ms. Khumalo is a layman in these proceedings, there won't be a balance, the company should hire a prosecutor to prosecute in order to get the balance, this is a recommendation and again I cannot overrule the company's decision."

[83] Secondly, the Applicant submitted that the initiator played the role of prosecutor and witness. The record of the disciplinary hearing confirms the Applicant's version on this ground. In the case of **Mathews Hlanze v Swaziland Dairy Board (IC Case No. 68/1997 at page 3)**, the Court laid the following principles of procedure that should apply in disciplinary enquiries:

"We will continue to state ad nauseum the six minimum standards which must be met in order for a hearing to satisfy the requirement of procedural fairness. They were stated in Christopher H. Dlamini v Inter Africa Suppliers (Swd) Limited, Industrial Court Case No. 55/97 at p7. Of course the list is not meant to be numerus clausus. There, we had this to say- 'While we do not expect an employer to handle disciplinary hearings according to the standards of a court of law (see Grogan, Riekert's Basic Employment Law 2nd ed, p102), we expect that certain basic procedures must be followed. Among these are: (i) The employer should advise the employee in advance of the precise charge or charges that he or she is to meet at the hearing. This requirement is tied up with the need for adequate preparation. (ii) The employee should be advised in advance about

his right to representation, and the representative must be a representative of his or her choice, not imposed by the employer or any other person. (iii) The chairperson or presiding official should be impartial. That is to say he or she must weigh up the evidence presented before him or her and make an informed and thought-out decision. There should be no grounds for suspecting that his or her decision was based on erroneous factors or considerations. (iv) The employee must be given ample opportunity to present his or her case in rebuttal of the charge or charges preferred against him or her and to challenge the assertions of his or her accusers. (v) The employee must be present at the hearing, and it is essential that everything possible is done to enable him or her to understand the proceedings. (vi) There should be a right of appeal, and this should be explained to the employee (see Grogan, *ibid*, pp103-107)."
[Emphasis added].

[84] In the case of **Vusi Ndzingane v Swaziland Building Society (259/2012)** [2018] SZIC 42 at paragraph 10, the Court stated that:

"....A disciplinary hearing may not necessarily follow the rigid rules of procedure that apply in Court. What is of paramount importance is that the accused –employee must be given a fair hearing both substantively and procedurally...."

[85] The Applicant did not allege nor prove in what way the dual roles of the Bakery Manager inhibited his rights to a fair hearing outlined in the above cases. We accordingly find the Applicant's grounds for challenging the procedure unsustainable.

CONCLUSION

[86] For the above stated reasons, we hold that the Applicant's dismissal by the Respondent was substantively and procedurally fair.

[87] In the result, the Court orders as follows:

- (a) **The Application be and is hereby dismissed.**
- (b) **Each party to pay its own costs.**

The Members agree.



V.Z. DLAMINI
ACTING JUDGE OF THE INDUSTRIAL COURT

<i>FOR APPLICANT</i>	: Mr. V. Magagula
<i>FOR RESPONDENT</i>	: Mr. N.D. Jele (Robinson Bertram)