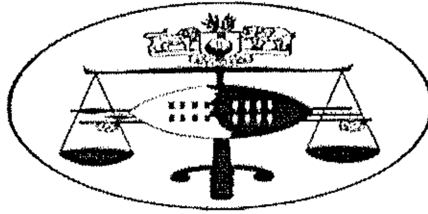

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No.343/2019

In the matter between:-

BHEKISISA SYDNEY MTSHALI Applicant

And

SWAZILAND BEVERAGES LIMITED Respondent

Neutral Citation : Bhekisisa S Mtshali vs Swaziland Beverages Limited, Case No. 343/2019 SZIC 39 [2023] (27 April 2023)

Coram : THWALA - JUDGE.
(Sitting with Mr. M. Mtetwa and Mr. A.M. Nkambule - Nominated Members of the Court)

Closing Submissions : 14 February 2023

Judgement Delivered : 27 April 2023

JUDGMENT

INTRODUCTION

[1] The relationship of employer and employee between Respondent and the Applicant started on the 1 July 2010, and subsisted upto 20 December 2018,

when it was terminated by the Respondent. It is the circumstances surrounding the said termination that are now the subject of these proceedings.

THE APPLICANT'S CASE

[2] In his pleadings as filed before this Court, Applicant contended that his dismissal was unfair and unreasonable both substantively as well as procedurally. As to substantive unfairness, Applicant made the following averments, to wit:

2.1 That, on the 13 October 2018, at around 1830hrs, he was involved in a road traffic accident at Nkoyoyo whilst driving his own private motor vehicle.

2.2 That, he properly reported the said road traffic accident to the Mbabane Police Station 'as soon as it was practically possible'.

2.3 That, he went further to lodge an insurance claim for the repairs of his vehicle.

2.4 That, after careful and thorough investigations regarding the authenticity of the claim, the insurer approved and proceeded to pay for the repair costs of Applicant's motor vehicle.

[3] Applicant went on to cry foul about the six (6) charges that Respondent subsequently preferred against him. On the face of it, Applicant appeared to contend that there was no legal basis, on the facts at hand, to warrant his dismissal. Specifically, it was Applicant's contention that Respondent had failed to be fair and reasonable in its assessment of the magnitude of Applicant's breach of the code viz-a-vis, the sanction that was eventually meted out against him.

[4] Regarding the question of procedural unfairness, Applicant put to question the impartiality of the chairperson of the disciplinary hearing, whom he accused of committing numerous irregularities, e.g. failing to act impartially; ignoring relevant facts and taking into account irrelevant considerations. Applicant further accused Respondent of failing to lead evidence of Applicant's wrongdoing either from the insurance company and /or from the broker. Instead, the chairperson allowed Respondent's representative to act as a witness and the initiator all at the same time. As to the appeal, Applicant's attack on same was on the basis that the appeal chairperson appeared to have 'rubberstamped' the decision from the disciplinary hearing.

RESPONDENT'S REPLIES

[5] In its replies to the Applicant's statement of claim, Respondent insisted that Applicant was correctly charged and subsequently dismissed for a series of counts which related to Applicant's dishonesty and failure to comply with company procedures. Regarding Applicant's claims for procedural unfairness, Respondent insisted that there was nothing untowards that occurred during the course of the hearing, either at the initial stage nor during the hearing of the appeal.

APPLICANT'S EVIDENCE

[6] As to substantive unfairness, Applicant told the Court:

6.1 That, it was a Saturday on the 13 October 2018, when he got involved in a motor accident whilst driving up the MR3 Highway near Nkoyoyo. The time was around 1830hrs, and that he was coming from attending a staff party where he had had some alcoholic beverages.

6.2 That, the accident occurred when he drove onto the side of a truck which he was trying to overtake.

6.3 That, having caused the collision, he however did not bother to stop nor report to the police, but instead he proceeded to his home.

6.4 That, on the next day, which was a Sunday, Applicant still did not bother to go and report the accident to the police. This he only did on Monday 15 October 2018, where he discovered that the driver of the truck had, infact already reported the accident.

[7] Regarding the filing of the insurance claim, Applicant told the Court that having recorded his statement on the occurrence of the accident with the Police, he then proceeded to his workplace in Matsapha, where he found that Respondent had already completed and e-mailed the insurance claim form to AON in Mbabane. Notwithstanding the aforegoing development, Applicant took the trouble to call one Sylvia Olivier, who, apparently was the agent that was handling Respondent's claims at AON. Apparently, the said Sylivia then advised Applicant about the other documents that were supposed to accompany the claim form. Applicant further told the Court that he was the holder of the Insurance Policy ('the insured'), with Respondent being only responsible for the payment of the monthly instalments on his behalf. Applicant told the Court that Respondent's responsibility to pay for the insurance cover formed part of the contractual entitlements that were due, from the Respondent, to a certain cadre of Respondent's employees to which Applicant also belonged.

[8] Applicant testified that one of the documents that had to accompany the claim form was the panel beater's quotation, which quotation, Applicant secured on the very Monday when he went to report the road accident with the police. This quotation, according to Applicant was then handed over to one Winile Maphosa at Respondent's finance department in order to await the receipt of a road traffic accident report from the police.

[9] Then in a sudden turn of events, Applicant then told the Court:

9.1 That he completed and signed the insurance claim form also on 15 October 2018;

9.2 That, Applicant having signed the insurance claim form, it then got lodged with the Eswatini Royal Insurance Corporation. Applicant told the Court that he was not aware as to who sent the claim form to Sylvia, but that it was not him.

9.3 That, part of the charges that were levelled against him by the Respondent included that of sending the claim form to Respondent's brokers without following the internal procedures (charge#1). Perhaps it is apposite to point out that Applicant pleaded guilty to Charge #1 during the disciplinary hearing, yet in these proceedings Applicant argued that the said plea was tendered because he was not familiar with disciplinary processes. The essence of Applicant's aforegoing assertion was to deny his commission of Charge #1.

9.4 That, at the disciplinary hearing he also pleaded guilty to Charge # 3, i.e that of 'Omitting to disclose all the information required by both the company and the insurer to make an informed decision on the processing of the claim. Yet, in his evidence in-

chief, Applicant turned around and asserted that he was not sure of the content and nature of these charges he, however was very quick to concede that the information / documents required were very critical in the assessment of the claim.

9.5 That, Applicant also pleaded guilty to Charge # 6, being that of 'Breach of trust'. When quizzed by Mr. S Simelane as to how this plea came about, Applicant attributed it to lack of proper advice, it being his latest assertion that this charge was, infact linked to the others above.

[10] As to the charges to which Applicant had tendered a plea of 'not guilty' Applicant insisted that not only were they equivalent to an unfair splitting of charges, but also that no evidence was led to substantiate them.

[11] Regarding the question of procedural unfairness, Applicant told the Court that no witnesses were paraded in the disciplinary hearing, to prove the Respondent's case. Indeed, Applicant complained about the fact that the chairperson of the disciplinary hearing allowed the initiator, Thokozani Hadebe to 'double-up' as a prosecutor and witness all at the same time. Applicant also complained that the chairperson of the disciplinary hearing was on par with him as they both reported to the Managing Director in their daily duties. The other procedural defect relied upon by the Applicant was that of being denied the opportunity to mitigate after the pronouncement of the verdict. Lastly, Applicant complained about not being afforded the opportunity of physically appearing before the appeal chairperson in order to motivate his grounds of appeal.

[12] Having dealt with the two-legged question of fairness, Applicant then proceeded to attack, through his evidence, the sanction that was meted out against him by the Respondent. Herein, Applicant contended that the sanction of a summary dismissal was rather too harsh and therefore unreasonable bearing in mind the following factors:-

12.1 That, he had served the Respondent for a combined period spanning over 15 years, under which he had never committed any transgressions.

12.2 That, there was no direct link between the transgression which formed the basis of Applicant's dismissal and the duties of his employment.

12.3 That, Respondent had other options available to it which it could have used to sanction the Applicant, one such being that of ordering the Applicant to repay the monies paid over by the insurer to the panel beaters, with and/or without a '**final written warning**'.

[13] Applicant further alluded to an offer, which offer had been made by Respondent and accepted by Applicant, prior to the date of his dismissal. From the 'Offer Letter' of the 20 November 2018, a copy of which was admitted into evidence, it would appear that the Respondent was on the verge of disposing of its business interests to a third party, who was also willing to take-over a portion of the Respondent's workforce. It was Applicant's evidence that he was part of those employees that had been offered jobs with the new entity. Herein, we understood Applicant's contention to be that Respondent should have granted him the favour to 'cross-over' to the new entity that was taking over the company.

[14] On the question of his social position, Applicant told the Court that he has never been employed since 2018; that he had two (2) minor dependents, with whom he depended on their mother (his girlfriend), who however passed away in October 2021. This state of affairs was, no doubt pretty dire for the Applicant who was still jobless but had to fed for two (2) children of school going age (the eldest still doing Grade 11 and the youngest doing Grade VI). For his support and for that of his family, Applicant now does odd jobs as a sales person as well as relying on his extended family. At the time of his dismissal, Applicant was 45 years old.

[15] In terms of relief, Applicant prayed for reinstatement, failing which 12 months maximum compensation for unfair dismissal together with all his statutory benefits minus notice pay.

APPLICANT'S CROSS-EXAMINATION

[16] Applicant's cross-examination unearthed a lot of untruths about and/or concerning the chain of events starting from the Monday of the 14 October 2018, when Applicant deliberately decided to tell lies to the police regarding the circumstances surrounding the occurrence of the accident. These untruths were extensively captured by Counsel for the Respondent under **paragraph 8** of his Heads of Argument. The specific averments of these sub-paragraphs have not been quoted **verbatim** in order to avoid prolixity of the judgement. Indeed, Mr. K. Simelane submitted that in the final analysis, Applicant's case was then predicated upon only three (3) grounds, **viz**:

16.1 Substantive unfairness, in that Applicant was guilty of dishonesty, a charge for which no evidence was ever led at the hearing;

16.2 Procedural unfairness, in that the chairperson allowed the Respondent's representative to double-up as the initiator as well as a witness in the case;

16.3 That the sanction of a dismissal was harsh under the circumstances.

RESPONDENT'S CASE

[17] In an endeavor to discharge the burden of proof vested upon it, the Respondent paraded only one (1) witness, being Thokozani Hadebe (RW1), who was the Finance Manager at the time. RW1 told the Court that she executed the role of initiator during Applicant's disciplinary hearing. The witness told the Court that Respondent maintained a motor vehicle insurance policy, which was managed under RW1's department. The said policy covered not just Respondent's fleet of cars, but also that of a certain cadre of its senior employees, one of whom was the Applicant. Respondent held its insurance scheme with the Eswatini Royal Insurance Corporation (ERIC) through AON, who was the broker.

[18] Regarding the case before Court, RW1 testified that sometime in October 2018, Applicant was charged with six (6) counts of misconduct all of whom related to Applicant's unauthorized filing of an insurance claim to ESRIC via AON for damages that were occasioned to Applicant's motor vehicle on the 13 October 2018. Under Charge #1, Applicant was charged for failing to follow the Respondent's laid down procedure as it related to the filing of an

insurance claim. Herein, it was RW1's evidence that the procedure was that an employee whose motor vehicle was involved in an accident was expected to report same to the Finance Department within 48 hours of its occurrence.

[19] The report of the accident would then be followed by the completion of the insurance claim form. Perhaps the procedure for the filing and processing of the insurance claim was unambiguous, what was controversial was the fact that in this case, Applicant clandestinely secured the claim form; proceeded to complete and file same with the broker without the knowledge of RW1 as the responsible official. That this was indeed a misconduct was admitted by Applicant himself at the very onset of the disciplinary hearing. Much time and effort was expended by Counsel for the Respondent towards demonstrating the commission of Charge # 1 by the Applicant. Again, it is regrettable that the purpose for the use of the pre-trial process is yet to be put to full use and effect. Had the pre-trial procedure been put to good use, it would have assisted in curtailing the hearing. And as we have already mentioned under paragraph 16 above, Applicant's evidence, especially on Charge #1, amounted to a web of lies and untruths, which untruths could have been exposed during the pre-trial conference.

[20] Regarding Charge#3, viz: "Applicant's failure to disclose all the information required by both the company as well as the insurer to make an informed decision on the processing of the claim". Herein, Respondent traversed the same terrain of putting together and adducing every piece of evidence that was there to prove that Applicant had withheld information that was key in the assessment of his claim. It would, however be very apposite to

mention, right here, that this charge too was actually admitted by the Applicant at the hearing. Applicant having pleaded guilty to this charge, it was then not immediately clear as to why Respondent deemed it to be necessary to prove its commission. Perhaps what might have motivated Respondent to lead such extensive evidence towards the confirmation of Applicant's guilt for this charge is the fact that in his evidence in-chief, Applicant appeared to cast some element of doubt upon these charges on the basis of unfair splitting of charges. This issue was again raised by Counsel for the Applicant in his closing submissions.

[21] RW1 went further to tell the Court about Applicant's fourth charge, being that of 'Dishonesty'. The evidence led on this charge was almost a word-for-word repetition of the events under Charge # 3. It being RW1's testimony that Applicant deprived the Respondent of the opportunity to decide as to whether to proceed with the processing of the claim or not. Applicant had pleaded 'not guilty' to this charge.

[22] As regards the sixth charge, viz: that of **Breach of Trust**, RW1 testified that Applicant had breached the confidence that the company had in him as a Manager. This, he did by abusing the relationship that Respondent held with its brokers or insurers for his (Applicant's) personal gain. It was RW1's evidence that Applicant was privy to the fact that Respondent was a preferred client for both AON, as a broker as well as ESRIC as the insurer. This therefore meant that claims from Respondent were often processed expeditiously and without the rigorous adherence to the insurers' processes for the filing of claims. Examples were given of how the broker proceeded

and passed onto the insurer Applicant's claim form notwithstanding the fact that same did not bear the Respondent's stamp of approval.

[23] As to the procedure that was followed during Applicant's appeal, RW1 conceded that there was no one who attended thereat on behalf of the Respondent. However, RW1 was quick to point out that Respondent's code did not make it mandatory for the Respondent's representative to be in attendance during the hearing of an appeal. One last item in RW1's evidence was her affirmation to the effect that Respondent did adduce its evidence at the hearing, which evidence was presented by RW1 herself. The witness went on to assert that there was nothing unprocedural with such conduct especially because Respondent had always done it that way in the past.

RWI'S CROSS-EXAMINATION

[24] A considerable amount of time and effort was spent, by Applicant's Counsel, towards trying to demonstrate that there was a considerable degree of culpability to be attributed to each of the four (4) parties regarding the processing of this particular claim. More specifically, Mr S. Simelane managed to get RW1 to concede that Respondent left the processing of Applicant's claim to proceed notwithstanding the fact that there were certain visible anomalities within it. Indeed, Mr. S. Simelane insisted that Respondent's conduct was inconsistent with what would have been done by a 'diligent employer' under similar circumstances. It can be stated, for the record, that a considerable amount of exchanges were made between Applicant; the Respondent; AON as well as ERIC on the question of liability for the panel beater's costs. It was also common cause that these exchanges were non-confrontational but rather aimed at maintaining what RW1 termed

as a 'Good Business Relationship'. Infact, it was in the said spirit that ERIC suggested that Applicant be surcharged for the panel beater's costs.

[25] Then there was the issue of Applicant's personal circumstances. In his cross-examination of the witness, Mr. S. Simelane got RW1 to concede that the witness did at some point come to know about Applicant's personal challenges, including alcohol abuse and depression as a result of a divorce that was then ongoing. RW1 further conceded that it was Applicant who came forth to advise the Respondent about these challenges. Applicant's aforesaid disclosure was communicated to the Respondent via email of the 14 November 2018, which was basically some time before the institution of the disciplinary proceedings. When RW1 was questioned as to why Respondent opted for the disciplinary process instead of placing Applicant on some form of social rehabilitation programme, i.e counselling, RW1 retorted by saying that it was because of the misrepresentations of facts that Applicant had committed against the Respondent and its insurer. RW1 was then asked as to what prejudice would have been occasioned to the Respondent if the Respondent had subjected Applicant to a final written warning plus a surcharge for the panel beater's costs. This was quickly dismissed by RW1 on the basis that same would have created a bad precedent.

[26] RW1 was then referred to Respondent's disciplinary code, which code appeared to permit the issuance of a "Final Written Warning" for Applicant's transgression. Whilst RW1 was ready to concede the aforegoing fact, she however, proceeded to point out that **Clause 7.4 – on the giving of a "Final Written Warning"** – was discretionary rather than prescriptive, meaning that Respondent had the discretion to sanction Applicant with a final written

warning and/or a dismissal. Indeed, Clause 7.5 of the Respondent appeared to sustain RW1's interpretation for it says: **"(NB: for serious offences, an Employee can be dismissed for a first offence)"**. To this, Mr. S. Simelane retorted by pointing out that this was Applicant's first offence in a cumulative period of about 15 years of service with the Respondent.

[27] The next witness to be paraded by the Respondent was Sylvia Ntombifuthi Olivier (RW2). In the main, this witness, testified about the facts which were never disclosed by the Applicant in the course of the completion of the insurance claim form. As already mentioned above, this Court has already made a pronounciation on this issue and it is for that reason that we shall therefore avoid repeating ourselves.

LEGAL ISSUES RAISED

[28] From the Heads of Argument filed of record, Mr. S. Simelane contested Applicant's dismissal on three fronts, viz: substantive; procedural as well as on Respondent's failure to discharge the onus laden upon it in terms of Section 42 (2) (b) of the Employment Act. The Court shall now proceed and interrogate these three heads which, it is alleged, sustains Applicant's relief before the Court as encapsulated in the context of the above factual matrix.

SUBSTANTIVE UNFAIRNESS

[29] From the evidence summed up above, it is clear that Applicant was, indeed guilty of all the three (3) counts for which he had pleaded guilty at the hearing. The aforegoing conclusion is subject to the legal enquiry, being the question of the unnecessary splitting of the charges. There is no doubt that Applicant's misconduct flowed from the dishonest act which he decided to embark upon

whilst in the course of lodging the insurance claim form with Respondent's insurer. Indeed, it is apposite to note that Respondent relied on one and the same set of evidence to prove all of the alleged counts that were levelled against Applicant. We therefore agree with Mr. S. Simelane, that Respondent did commit an unfair duplication of charges. This, however does not signal the end of the matter because the fundamental principle for the socalled charges in the workplace is that same must convey the allegations that are said to constitute the misconduct so that the employee may be made aware of the case to answer. The upshot of it is that we are satisfied that Applicant was served with a charge sheet which set out the misconduct which it was alleged that he had committed. We are further satisfied that from the evidence led, it was proved that Applicant did commit only one act of dishonesty, viz: the filing of the insurance claim form for his motor vehicle outside of the processes and procedures that were established by the Respondent.

PROCEDURAL UNFAIRNESS

[30] Regarding procedural unfairness, it was Applicant's case that he was deprived of a fair process in that at the hearing his case, RW1 played the role of being the initiator and witness all at the same time. It was common cause, as between the parties even before this Court, that infact, RW1 was Respondent's prime witness in that as Respondent's Finance Manager, she would have been the officer responsible for the completion and subsequent lodgement of Applicant's claim form with Respondent's insurers. Indeed, both the failure to disclose the information about the traffic accident as well as the lodgement of the claim form constituted the misconduct which occurred without RW1's knowledge and/or authorization. It was evident, from the minutes of the disciplinary hearing, that no other witness was led on behalf of the

Respondent. Instead, it was RW1, upon invitation from the chairperson of the disciplinary hearing, who started to narrate the Respondent's side of the case. There is no doubt that at this juncture RW1 had infact, assumed the role of a witness rather than that of being an initiator, for she then provided all the documentary evidence that formed the gravamen of the Respondent's case against the Applicant.

[31] The following are the key role players of a disciplinary process, viz: the chairperson; the initiator; the accused employee; the accused employee's h representative; the interpreter (where necessary) as well as the scribe. In the circumstances of the case before us, RW1 not only played the role of the initiator, which, under normal circumstances would involve to investigate Applicant's misconduct; prepare for the case by collecting all the evidence on the issues that needed to be proved and then to try and convince the chairperson of the disciplinary of the disciplinary hearing about Applicant's guilt, but went on to be the witness all at the same time. We agree with Applicant's Counsel that such a situation was clearly unprocedural. This we say because it has been said by our courts time and time again that procedural fairness is:

> **"a process of value in itself. It is an end in its own right... It is so fundamental in the context of labour relations that it should be enforced by the court as a matter of policy, irrespective of the merits of the particular case".**[1]

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[1] TWALA V ABC SHOE STORES (1987) 8 ILJ 714 (IC).

Again, in the famous case of **Administrator, Transvaal v Zenzile**[2], the Appellate Division cautioned that the procedure and the merits of a case must be kept strictly apart.

[32] Then comes in **Section 42 (2) (b), of the Employment Act**, which places an onus upon the Respondent to prove that taking into account all the circumstances of the case, it was fair and reasonable to terminate the services of the Applicant. We consider this to be the gravamen of this case. And it is towards that end that we agree with the except of Nduma JP, in the case **of Paul Mavundla v Royal Swaziland Sugar Co. Ltd**[3], which was erroneously cited by Mr. S. Simelane as being from the case of **Peterson Kunene v Swazi Wire Industries–SZIC Case No. 195/2000**, where the learned judge President opined that:

> **"Surely, the legislature contemplated a situation where the employer even after finding a reason permitted by Section 36 to dismiss the employee was bound by S 42(2) (b) to look further to determine whether or not the employee deserved the ultimate penalty".** At Pg 11.

[33] In the matter of **Zephania Ngwenya v Royal Sugar Corporation**[4], the then President of this Court gave a non-exhaustive list of the relevant factors which the Respondent may consider in order to prove to the court that the dismissal was reasonably fair under the circumstances. These factors are:

33.1 the Applicant's personal circumstances and service record;

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[2] 1991 (1) SA 21 (AD)
[3] IC CASE NO. 266/2002. ALSO SWAZILAND UNITED BAKERIES V ARMSTRONG DLAMINI SZICA CASE NO. 117/94 AT Pg 12.
[4] SZIC Case No. 262/2001.

33.2 the nature of the Respondent's undertaking and the workplace itself;

33.3 the disciplinary standards set by the Respondent as contained in the disciplinary procedure:

33.4 the seriousness of the offence.

Regarding the standards as set by the Respondent, RW1 testified that given the nature of this single act of dishonesty, Respondent would never be able to trust the Applicant again. And if that would be reasonable in the circumstances, then the dismissal would be fair.

[34] From the evidence that was adduced by the Applicant the following were his circumstances at the time of his dismissal, <u>viz</u>:

34.1 that he was 45 years old and had been under the employ of the Respondent for a cumulative period of 15 years, within which he had no misconduct.

34.2 He was married with two (2) minor dependents.

[35] It is common cause that Respondent's core business is a beverages company that is involved in the manufacturing, marketing and distribution of various beer brands. It is also common cause that Applicant occupied the position of being a sales analysist. We take it not to be too far-fatched to say that as an analysist, Applicant's position placed him within Respondent's marketing department where he analysed the marketability of Respondent's beer brands. The question to be asked therefore (in order to test the reasonableness of Respondent's sanction of the dismissal of the Applicant is: what was that risk that Respondent was no longer prepared to run in continuing to employ the Applicant in the light of his dishonesty. This must be so because the

sanction of a dismissal of an employee who has been found guilty of dishonesty is not meted out as a punishment but because of the negative impact that their misconduct poses on the employer's business. This reasoning was postulated by Couradie JA in the case of **De Beers Consolidated Mines v Commission for Conciliation Mediation and Arbitration and Others**[5]. And the burden of proving these facts vests upon the Respondent who must adduce evidence to show that Applicant's act of dishonesty stood to prejudice the element of trust which ought to exist between the two parties.

[36] Whilst it is a known fact that Applicant was not an honest individual, the Respondent, however failed to show as to how, in the specific circumstances of their relationship, Applicant's dishonesty stood to affect the scope of its core functions. We confirm that in her evidence before us, RW1 did make an attempt to allude to this fact, however the witness failed to give specific outlines as to how Applicant's unprocedural submission of the insurance claim form to Respondent's insurers stood to prejudice the employer/employee trust factor within Respondent's marketing department. In other words, this Court expected Respondent to parade a witness (s), from the marketing department, to give their testimony as to how Applicant's misconduct as aforesaid stood to affect and/or compromise Applicant's performance of the company's core functions. In the case of **Edcon Ltd v Pillermer No and Others**[6] the South African Supreme Court of Appeal rejected the evidence of a single witness on the basis that the said witness was

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[5] (JA 68/99) [2000] ZALAC 10 (3 March 2000). At Para 23.
[6] (191/08) [2009] ZASCA 135; [2020] 1 BLLR 1 (SCA); (2009) 30 ILJ 2642 (SCA) (5 October 2009).

not well-placed to testify about the specific impact of the employee's misconduct on the question of trust. Specifically, the Court said:

> **"The gravamen of Edcon's case against Reddy was that her conduct breached the trust relationship. Someone in management and who had dealings with Reddy in the employment setup, as already alluded to, was expected to tell Pillermer in what respects Reddy's conduct breached the trust relationship ...; no evidence was adduced ..... the importance of trust in the position that she held or in the performance of her work, or the adverse effects, either direct or indirect, on Edcon's operations because of her retention ...."** Para 20 (underlining is ours).

[37] In the **Woolworths (Pty) Ltd v Mabiza and Others**[7] the Court there opined that:

> **"The fact that the employer did not lead evidence as to the breakdown of the trust relationship does not necessarily mean that the conduct of the employee, regardless of its gross seriousness or dishonesty, cannot be visited with dismissal without any evidence as to the impact of the misconduct. In some cases, the outstandingly bad conduct of the employee would warrant an inference that the trust relationship has been destroyed. It is however always better if such evidence is led by people who are in a position to testify to such breakdown".** At Para 21-(underlining is for emphasis of matter).

This is so because the breakdown of the relationship of trust is but one of the factors that should be weighed together with others in order to arrive at the

[7] (PA 3(14) [2016] ZALAC 5; [2016] 6 BLLR 568 (LAC); 37 ILJ 1380 (LAC) (19 February 2016)

conclusion that the dismissal was fair in the circumstances of each case. The other factors being long service[8]; remorse; including the employee's willingness to reform. In the **De Beers case** supra, the Labour Appeal Court of South Africa overturned the commissioner's award on the basis that it was wrong of the commissioner to over-exaggerate the employee's long service record. The Court said:

> **"Where, as in this case, an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptably too high".** At Para 25.

[39] In this case, it is the attitude of this Court that the cumulative effect of the mitigating factors was so strong such that it would appear to the Court that the Respondent was not justified to apply the ultimate sanction of a dismissal upon the Applicant. This is so because Applicant pleaded guilty to the misconduct which was a sign of remorse. In her evidence, RW1 told this Court about the occasion wherein even the Respondent considered subjecting Applicant to a surcharge for the costs of the repairs – [as against a disciplinary action]. Applicant was not against such a cause of action as a form of reprimand.

[8] SEE JAMES JABULANI MBULI V MHLUME SUGAR COMPANY (IC CASE NO. 7/1990).

[40] Applicant is seeking for reinstatement to his former employment as the main relief and compensation as an alternative thereto. Section 16 of the Industrial Relations Act, 2000, as amended, provides that:

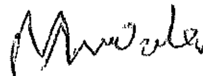
> **1. If the Court finds that a dismissal is unfair, the Court may-**
>
> **(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal; or**
>
> **(b) order the employer to reengage the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or**
>
> **(c) order the employer to pay compensation to the employee.**
>
> **2. The Court shall require the employer to reinstate or re-engage the employee unless-**
>
> **(a) the employee does not wish to be reinstated or re-engaged;**
>
> **(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;**
>
> **(c) it is not reasonably practicable for the employer to re-instate or re-engage the employee; or**
>
> **(d) the dismissal is unfair only because the employer did not follow a fair procedure.**

[41] In the case of **Thandie Kunene and 2 Others v Swazi MTN Ltd (01/2017) SZICA 03 31st October 2017**, the Industrial Court of Appeal affirmed that reinstatement is the primary remedy whenever it is found that the dismissal was unfair **unless** the employer adduces evidence to convince the Court otherwise.

[42] And from the record of these proceedings, Respondent adduced no such evidence. In the **Thandi Kunene** judgement, it is also revealed that the court has a discretion to either order for a reinstatement; a re-engagement and/or compensation. This would be appropriate where the Applicant has prayed for compensation in the alternative. For purposes of deciding as to whether to make an order for reinstatement, this Court has deemed it proper, in the interest of justice and fairness, to allow the Respondent to adduce evidence, if there be any, to show that it would be impractical to reinstate the Applicant onto the position that he previously occupied in December 2018, and/or any other suitable position that would be commensurate with his qualifications and experience.

[43] The Registrar is to facilitate that Counsel for the parties avail themselves before this Court for purposes of the delivering of this judgement and subsequent setting of a date for this purpose.

The members agree.



Manene M. Thwala
Judge of the Industrial Court of Eswatini

For Applicant	**:**	**Mr Skhumbuzo Simelane.**
For Respondent	**:**	**Mr Kenneth Simelane.**