IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case No. 481/07

In the matter between:

CRISTOFFEL R. DELPORT	**APPLICANT**
and	
SWAZILAND BREWERIES LTD.	
t/a SWD BEVERAGES	**RESPONDENT**

Neutral Citation:	**Cristoffel R. Delport v Swaziland Beverages Ltd. (481.07) IC SWD 03 (30. January 2012)**
CORAM:	**D. MAZIBUKO J, M.T.E. MTETWA, A.M. NKAMBULE**
Heard :	**August 2009**
Delivered :	**30th JANUARY 2012**

Summary: *Dismissal for misconduct. First offender dismissed for gross misconduct – dismissal unfair. Section 36 (a) Employment Act mandatory, section 36 (l) distinguished. A written warning a pre-requisite to dismissal for misconduct.*

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1. The Applicant is Mr Christoffel Rudolf Delport an adult male resident of Paarl in the Republic of South Africa.

2. The Respondent is Swaziland Brewers Limited, a Company incorporated in accordance with the company laws of the kingdom of Swaziland, having its principal place of business at Sobhuza II Avenue, Matsapha. The Respondent's head office is situated in Johannesburg in the Republic of South Africa.

3. About 1st March 2002 the Applicant was employed by the Respondent as a financial director. The Applicant was employed for an indefinite period.

4. Prior to joining the Respondent, the Applicant had been working for SA Breweries Ltd. The Applicant joined SA Breweries Ltd on the 1st October 1989 as a management accountant. He rose through the ranks until he was seconded to join the Respondent as a financial director in the year 2002. SA Breweries is a majority shareholder in Swaziland Breweries Ltd - the Respondent. Tibiyo Taka Ngwane is the minority shareholder.

5. About the 4th November 2005, the Respondent called the Applicant to a disciplinary enquiry. The Applicant was charged with two (2) counts namely, gross misconduct and gross negligence. The Applicant was suspended from work pending finalization of the hearing.

6. The disciplinary hearing (also referred to as an enquiry) proceeded on the 8th November 2005. On the 11th November 2005 the Applicant was found guilty on both counts, namely gross misconduct and gross negligence. The Applicant was thereupon summarily dismissed. For the sake of convenience, the disciplinary hearing of the 8th November 2005 shall be referred to as the first hearing. At this hearing the Applicant was represented by a fellow employee Mr Gerard Besson.

7. On the 16th November 2005 the Applicant filed an appeal. He challenged the disciplinary process as being substantively and procedurally unfair. He further challenged the dismissal as being too harsh in relation to the alleged offence and his personal circumstances.

8. The appeal was heard on the 24th November 2005. The procedural irregularities which the Applicant complained of were noted. The appeal was successful.

   A directive was issued referring the disciplinary hearing back, to commence *de novo.* The Applicant remained on suspension pending finalization of the second hearing.

9. The second disciplinary hearing proceeded from the 30th November to the 1st December 2005. A new chairman namely Mr Paul Knobel presided. The same charges as presented in the first hearing were preferred. The Applicant again brought a representative of his choice at the hearing, a certain Mr Gert Nel. Mr Nel was also an employee of the Respondent.

10. The charges read as follows on the 1st count:

A. Gross misconduct in that;

(a). You instituted a claim from the company's insurers in respect of a hijacking loss sustained by the company 'Mother Truckers' instead of holding 'Mother Truckers' liable for such loss and instructing them to make a claim from their insurers. Furthermore, in this matter you acted in conflict with the instructions given by your MD.

(b). You accepted and authorized payment to S&B Civil Roads Pty Ltd for work related to improvements to the private road at Ridgeview farm homes where you live.

(c) The loan, of approximately E90,000. which was effectively made to the owner of Ridgeview Farm for the construction of a road at the Ridgeview Farm houses was not authorised, documented or reflected as a loan in the balance sheet. Additionally this loan appears to attract no interest.

(d) *There are irregular practices in the conduct of the FD accrual account including the use of this account to pay S&B Civil Roads Pty Ltd and charging various IT over - expenditure and/ or expenditure to this account, rather than debiting the proper accounts.*

(e) *You acted in conflict with your level of authority to authorise payment for work done by S&B Civil Roads Pty Ltd to the amount of E609,734*

(f) *You opened an account with FNB on behalf of the company which is controlled solely by yourself through having only one signatory and the ability to operate the account without anyone knowing.*

11. On the 2nd count the charges read as follows:

B. Gross negligence of your fiduciary duties and responsibilities as financial director of SB in that in your relationship with Mr M Hlophe and the leasing of houses at Ridgeview Farm;

(a) *You were aware that Mr Hlophe, who leases property to SB, appointed you or your wife as administrator of the properties at Ridgeview Farm. This relationship was never declared to the company.*

(b) *Irregular advances were made to Mr Hlophe. Particularly, in the period September – November 2005, rental of E36,300 was prepaid (including for Mr Fuller), and further advances were made to Mr Hlophe of E55,955 were also made in this period.*

(c) *Rental money from SB was deposited in your personal bank account*

(d) SB cheques were authorised for payment by yourself, the cheques made out to yourself and on occasion countersigned by yourself

(e) You chose to secure alternative countersignatures on cheques made out to yourself despite a senior member of your staff refusing to do so as a matter of good governance

(f) Payments to Mr Hlophe were made to 3rd parties, namely Waterford school and Swaziland Building Society

_____ *28/Oct/2005*

Signed *Date*

I acknowledge that I have received a copy of this letter and understand its contents.

_____ *28/10/2005*

Signed *Date*

12. A formal hearing where the witnesses are examined in chief and subsequently cross examined was not followed.

Instead, by consent, an informal procedure was adopted and implemented by both sides. The charges were discussed and debated by the parties. The prosecution produced documentary evidence in support of its allegations. Likewise, the defendant (Applicant) submitted a detailed written defense in which he dealt with each of the charges he was facing. Where necessary oral explanation was required from either side to amplify the written evidence.

13. The Applicant pleaded not guilty to all the charges he was facing. Under the gross negligence count the prosecution withdrew charge 'e'. The Applicant was found not guilty of all the remaining charges in this count in particular charges (a), (b), (c), (d) and (f). The overall result was that in as far as the gross negligence count was concerned the Applicant was cleared of all the charges.

14. Under the count of gross misconduct, charges (b), (c) and (e) were consolidated before trial began. The Applicant pleaded not guilty to all the charges including the consolidated charge. The Applicant was found not guilty of charges (a), (d) and (f).

15. The Applicant was however found guilty of the consolidated charge. Thereafter the Applicant led evidence in mitigation of sentence. The Applicant was summarily dismissed with effect from the 1st December 2005.

16. About the 13th December 2005 the Applicant appealed both the guilt verdict and the dismissal sentence. The appeal was heard on the 20th December 2005. Both the verdict and sentence were upheld. The Applicant was effectively dismissed with effect from the 1st December 2005.

17. The Applicant was dissatisfied with the outcome of the appeal. With the help of their respective attorneys the parties entered into negotiation and further exchanged correspondence with the aim to settle this matter and avoid litigation. The negotiation failed.

18. On the 18th August 2006 the Applicant filed a report of dispute with CMAC. By CMAC is meant the Conciliation, Mediation and Arbitration Commission established under section 62 (1) as read with section 64 (1) (a), (b), and (c) of the Industrial Relations Act. No. 1 of 2000 as amended.

19. The parties failed to resolve their dispute at CMAC. A certificate of unresolved dispute was issued by CMAC dated 27th March 2007. Thereafter the Applicant filed his claim in Court.

20. In his pleadings before Court the Applicant challenged the dismissal for being substantively unfair. The following issues were raised by the Applicant in support of his case;

(a) The Applicant was innocent of the charges for which he was found guilty.

(b) Alternatively, and in the event it being found that the Applicant acted in the manner alleged in the charge sheet, same did not constitute misconduct, let alone gross misconduct.

(c) Further in the alternative, in the event that it being found that the Applicant acted in the manner alleged and that same amounts to misconduct it was not of such a nature as to justify summary dismissal.

(d) At no stage did the Applicant receive a written warning concerning the alleged behavior.

(e) The dismissal is not justifiable in terms of section 36 of the Employment Act.

(f) The Applicant acted within his authority as financial director. His conduct was transparent and based on precedent.

(g) The Respondent suffered no damage as a result of the Applicant's conduct complained of.

21. The Applicant further complained of gross misdirection on the part of the appeal chairman. Allegedly the chairman had elevated to evidence submissions that had been made by the prosecutor. The chairman allegedly made a finding of dishonesty on the part of the Applicant without evidence.

22. Initially the Applicant had claimed re-instatement with full benefits. When the trial began the Applicant indicated that he is no longer interested in re-instatement, instead he opted for an alternative claim for compensation plus incentive bonus, repatriation costs and mora interest.

23. The claim is opposed by the Respondent. The Respondent has defended both the guilt verdict and the dismissal.

24. When the Applicant joined the Respondent as the financial director, he was allocated a dwelling house as part of his employment benefits.

The house is No.9 in a housing complex situated on a piece of land known as Ridgeview Farm. The Ridgeview Farm as well as the housing complex is owned by a certain Mr Moses Hlophe (hereinafter referred to as the landlord).

25. The Respondent had an oral lease with the landlord for two (2) of the ten (10) houses in the complex. The Applicant and a certain Mr Joe Morgan occupied a house each in their capacities as employees of the Respondent.

26. There is a gravel road that runs through the Ridgeview Farm. This gravel road connects the housing complex with the public road. The gravel road gave the Applicant, his family and other residents in the complex endless problems especially on rainy days. The rain often resulted in a wet and muddy road. That caused difficulty for the residents to drive in and out of the complex. The problem resulted in a serious inconvenience to the residents especially when it is time to report for work or school and back.

27. The problem of the muddy road was reported to the landlord on numerous occasions by the Applicant as well as the other residents.

Several attempts were made by the landlord to improve the road, but the problem persisted. Thereafter the Applicant persuaded the landlord to upgrade the gravel road to the standard of tarred road.

28. The landlord agreed to upgrade the road from gravel to tar at his own expense. Thereafter the landlord informed the Applicant that he (landlord) had applied for a loan at the Swaziland Building Society to finance the proposed roadworks.

29. The Applicant thereafter wrote to the Swaziland Building Society an undertaking to pay over to the Society the monthly rent that is due to the landlord by the Respondent, for the leasing of the houses at the Ridgeview complex. This undertaking was meant to support the landlord's application for a loan to finance the proposed improvements (roadworks) at the Ridgeview Farm.

30. The Applicant stated further that he made the aforementioned undertaking to the Society in his capacity both as financial director of the Respondent as well as advisor to the landlord.

31. The Applicant and his wife felt the need to assist the landlord in the administration of the complex. The landlord appeared to be failing to properly manage the complex. The Applicant's wife (Mrs Karin Delport) volunteered her services to collect rentals from the tenants in all the 10 (ten) houses in the complex.

32. A portion of the rent collected by Mrs Delport namely ten percent (10%) was held over by her as a fund for the maintenance of the houses. Mrs Delport allegedly did this with the consent of the landlord.

33. Thereafter the Applicant and his wife took over from the landlord the responsibility to maintain the houses within the complex. This was done allegedly with the consent of the landlord and for the purpose of assisting him. Mrs Delport became the custodian of the rent that was collected from the tenants. A need arose for Mrs Delport to open a bank account in order to deposit the rent and keep the maintenance fund.

34. The Applicant testified that Mrs Delport failed to open the said bank account. She failed to meet the bank requirements for new account holders. Instead Mrs Delport deposited the money into Mr Delport's (Applicant's) bank account for convenience sake.

The Applicant stated that he gave the landlord a full reconciliation on a monthly basis of money deposited into his account, together with the remittance cheque.

35. The Applicant stated further that the landlord's problems were not confined to his failure to manage and maintain the complex and the gravel road. The Applicant had financial difficulties as well. The landlord occasionally requested and was granted loans by the Respondent which were payable by way of a set-off against rent. The Applicant felt the need to assist the landlord regarding the proposed road improvement.

36. Thereafter the Applicant consulted a company of Civil Engineers namely S&B Civil Works Pty Ltd (hereinafter referred to as S&B), to recommend the best method for the proposed road improvement. In all instances relating to this matter

S&B was represented by Mr Derek du Plessis (who appears in the letterhead as an alternate director).

37. There were several consultative meetings that were held between Mr du Plessis and the Applicant on the road issue. In some of those meetings the Applicant was also present.

About 3 (three) improvement options were considered, viz a tarred road, a concrete road or laying pre-cast pavers. The parties also considered 3 (three) quotations for the proposed roadworks, 1 (one) of which came from S&B.

38. An agreement was subsequently reached between the Applicant, landlord and Mr du Plessis (S&B) that the best option to improve the said road was to lay tar. This option is also referred to herein as asphalt roadway. The Applicant, landlord and S&B agreed on a contract price of E89, 825.27 (Eighty Nine Thousand Eight Hundred and Twenty Five Emalangeni Twenty Seven cents) for upgrading the road from gravel to tar.

39. In the consultative meetings aforementioned, the role of the Applicant was to assist the landlord. In the course of the negotiations aforesaid, the Applicant gave S&B an undertaking that he (Applicant) will make sure that the landlord pays S&B the agreed price for the road improvement. The Applicant was the go-between connecting the landlord with S&B which culminated in the contract for E89, 825.27 (Eighty Nine Thousand Eight Hundred and Twenty Five Emalangeni Twenty Seven Cents).

According to the Applicant, at the time he gave S&B that undertaking he was under the impression that the landlord's application for a loan at the Society will succeed.

40. The Applicant and Mr du Plessis knew each other on a friendly basis. They often met in places of entertainment for a drink and a chat. According to the Applicant, he has paid Mr du Plessis a visit at his house once or twice in order to socialize. The landlord did not know Mr du Plessis. The undertaking that the Applicant made to S&B gave S&B assurance that they will be paid for the work they were hired to do at the Ridgeview Farm.

41. Shortly thereafter, the landlord reported to the Applicant "*that finances are in place already"* to pay for the proposed road. Upon receiving that report the Applicant instructed Mr du Plessis (S&B) to go ahead with the construction of the road. According to the Applicant, he was merely a messenger of the landlord when he instructed Mr du Plessis (S&B) to go ahead with the road construction.

42. The construction work began and was almost complete. It was time to arrange payment. It then transpired that the landlord had failed to get the loan he had applied for. The landlord did not have the money to pay S&B the contract price. According to the Applicant that announcement threw him into a huge predicament.

43. The Applicant took a decision to honour the undertaking he had made to S&B through Mr du Plessis namely, that he (Applicant) will make sure that the landlord pays S&B for the road improvement. The Applicant felt obligated to "*make a plan"* in order to rescue himself from the predicament aforementioned.

44. Thereafter the Applicant arranged a payment to S&B of a sum of E89,825.27 (Eighty Nine Thousand Eight Hundred and Twenty Five Emalangeni Twenty Seven cents), being payment in full for the road improvement. S&B received this payment about the 2nd September 2005. The Applicant paid this money from the Respondent's funds.

45. The Applicant stated that he gave the landlord a loan from the Respondent's funds in the sum of E89, 825.27 (Eighty Nine Thousand Eight Hundred and Twenty Five Emalangeni Twenty Seven cents) which was paid to S&B. According to the Applicant the landlord signed an acknowledgement of debt dated 9th August 2005 relating to this particular loan.

This acknowledgement of debt is marked exhibit **A 36.** This exhibit has received more attention in the paragraphs that follow, it is therefore helpful to reproduce it in full.

46. Exhibit **A 36** reads as follows;

"August 9, 2005

Mr C. Delport
House no. 9

Ridgeview Farm
Malkerns

Dear Sir;

I, the undersigned, Moses Hlophe as Managing Director of VIP Dry Cleaners (Pty) Ltd hereby authorizes Mrs. Karin Delport to collect the rental for all the houses on Ridgeview Farm (including the old house) with effect from 1 July 2005. From the monthly rentals the following can be deducted:

- *E185 per month per house (excl. old house) for a period of 5 (five) years as repayment for the road.*

- *10% of the monthly rental per house (including old house) to be utilized as a maintenance fund to be regulated with my agreement.*

Sincerely,
Moses Hlophe
Lessor"

47. The dispute between the parties centers around the payment by the Applicant to S&B of a sum of E89,825.27 from the Respondent's funds. In the trial this amount was rounded off to E90,000.00. The Respondent's consolidated charge may be paraphrased as follows:

(1) the Applicant paid S&B the sum of E89,825.27 from the Respondents funds without the necessary authority, alternatively,

(2) the Applicant gave the landlord a loan for E89,825.27 from the Respondent's funds without the necessary authority,

(3) the loan of E89,825.27 which the Applicant gave to S&B was not documented, alternatively the Respondent is not reflected as a creditor in exhibit **A 36,**

(4) the Applicant acted in conflict with his level of authority in the manner he processed the payment to S&B of E89, 825.27.

48. According to the Applicant, his immediate superior was the managing director (Mr Gregory Uys). As the financial director, the Applicant was part of the company executive committee. This committee was responsible for the day to day running of the business of the Respondent. The Applicant was not a board member.

Occasionally the Applicant would be called in at board meetings in order to record the minutes.

49. The Respondent argued that, it had no obligation to pay S&B for the improvements done on a gravel road at the Ridgeview Farm - the property of the landlord. The Respondent had not commissioned S&B to improve that road. The road improvement was therefore a private matter between the landlord and S&B.

50. The Applicant therefore had neither duty nor authority to pay S&B the sum of E89,825.27 in the manner aforementioned. The Applicant was obliged to ask for

and get prior approval from the Respondent before paying S&B the aforesaid sum of money from the Respondent's funds. The Applicant has made himself guilty of gross misconduct in paying S&B the said sum of money without authority.

51. The Respondent further challenged the manner the Applicant gave the landlord a loan from the Respondent's funds. The Applicant had no authority to advance the landlord a loan in the manner he did. The Respondent added that the Applicant made himself guilty of gross misconduct in the manner the loan was advanced.

52. The Applicant conceded that he did not get authorization from the Respondent to pay S&B from the Respondent's funds the sum of E89,825.27. The Applicant further conceded that he did not get authorization from the Respondent to give the landlord a loan from the Respondent's funds in the manner aforementioned.

53. The Applicant stated that he did not need authorization from the Respondent to transact payment to S&B. He further stated that he did not need authorization to give the landlord the said loan. The Applicant averred that he was authorized to carry out the said transaction with S&B as well as the landlord by virtue of his office as the financial director.

54. As the financial director he was the custodian of the Respondent's funds. He had full authority to decide and act in the manner he did without consultation with or

approval from the managing director or any other official of the Respondent. The Applicant has given several reasons to support his assertion.

55. The Applicant argued that as the financial director of the Respondent he had general authority and power to enter into any agreement wherein he would give credit facilities to a third party.

There was no need for him to seek and obtain authorization from the managing director or any other official of the Respondent in order to give a third party credit facilities from the Respondent's assets.

56. In support of his allegation the Applicant referred the Court to exhibit **A 65** dated 13th December 2005. This is a notice of appeal that was filed by the Applicant following a conviction and sentence in the second disciplinary hearing.

57. Clauses 4.1 to 4.3 of the notice of appeal *(exhibit **A 65**)* read as follows:

"4.1 As financial director the Appellant was authorized to enter into any agreement in terms of whereof credit facilities were extended to third parties in excess of the amount in question and confirmation of such credit facilities did not require the authority of the managing director, Mr. Uys, and as much was confirmed by him during the hearing.

4.2 The managing director did not testify that Appellant required his authority, nor was the issue of authority canvassed with the managing director during the course of the hearing.

4.3 There was no evidence led during the hearing that the managing director's specific permission or approval for this transaction was required and on

the contrary the evidence clearly indicated that transactions of similar nature had in the past been concluded by financial directors and accepted by SBL [Respondent]".

58. The Applicant repeated in his evidence the allegations he had made in clauses 4.1 to 4.3 of the exhibit **A 65**. Under cross examination the Applicant explained that the phrase *third parties* meant the customers of the Respondent. What he therefore meant was that as a financial director of the Respondent he had authority to allow customers of the Respondent to purchase on credit the products which the Respondent was selling. It is common cause that the Respondent was in the business of brewing and selling beer and distribute other beverages under various brands.

59. The following exchange which took place between the Respondent's counsel (**RC**) and the Applicant's counsel (**AW1**) is apposite;

> ***"RC*** *Now credit facilities are facilities you give to customers of SBL [Respondent] not so ?*
>
> ***AW1*** *That's correct.*
>
> ***RC*** *And you were saying here but I had authority to give credit facilities to customers and I didn't need the MD's [managing director's] permission to do so and that was by virtue of my position as FD [financial director] correct ?*
>
> ***AW 1*** *That's correct.*

RC *Now Mr Hlophe was not a customer of SBL [Respondent], not so? He didn't buy beer from SBL [Respondent]*

AW1 *No he didn't.*

RC *So 4.1 doesn't apply to him, not so?*

AW1 *That's correct."*

(*Record volume 3 page 6)*

60. In the re-examination, the Applicant ***(AW1)*** made a similar statement when questioned by his counsel ***(AC).*** The exchange went as follows;

"AC *Perhaps I should put it otherwise. The loan that was given to Mr Hlophe [landlord] did that fall under the umbrella of a credit facility or not ?*

AW1 *Credit facility in the real meaning of the term would be referring to the customers buying the product from SBL [Respondent] which is what I said earlier as well. But the loan with Hlophe [landlord] would fall outside the credit facilities in terms of buying the product".*

(Record volume 3 page 62)

61. The Respondent has challenged the Applicant's interpretation of the phrase '*credit facilities'*. From the Applicant's evidence, it does appear that the loan which he gave the landlord was not related to purchasing beer or any of the beverages that are sold by the Respondent. Instead, the loan was used to pay S

&B for its services to improve the gravel road at the Ridgeview Farm. The landlord was therefore not a customer of the Respondent.

62 Credit facilities are reserved for customers who purchased the Respondent's products. The landlord was not eligible for credit facility since he was not a customer of the Respondent. He did not purchase any of the Respondent's products in the transaction aforementioned. In the eyes of the Respondent the payment by the Applicant of E89, 825.27 to S&B from the Respondent's funds was not a credit facility given to a customer of the Respondent.

63. In clause 4.1 of exhibit **A 65** (reproduced in paragraph 57 above), the Applicant alleged that Mr Uys (managing director) confirmed at the disciplinary hearing that the Applicant had authority to enter into the loan transaction with the landlord (Mr Hlophe).

64. Mr Uys denied in his evidence that he made the alleged statement at the disciplinary hearing in the manner alleged or at all. Mr Uys further denied that the Applicant had the authority which he alleged he had.

65. The minutes of the disciplinary hearing were produced in Court marked exhibit ***C***. It was pointed out to the Applicant that such a statement which he attributed to Mr Uys does not appear in the minutes. In short the minutes do not confirm what the Applicant has alleged.

66. The Applicant conceded that such a statement is not in the minutes. The Applicant however added that the minutes are incomplete. Some of the evidence that was adduced at the hearing has not been transcribed. According to the Applicant the absence from the minutes of the statement attributed by him to Mr Uys does not necessarily mean that it was not uttered.

67. Upon reading the minutes (exhibit ***C)*** the Court has noted an inscription therein to the effect that tape five (5) is blank. Though this allegation is hearsay, the parties are in agreement that the minutes are in fact incomplete. The Court is prepared to accept as correct the report that the minutes are incomplete.

It appears that no attempt was made by the parties to reconstruct the missing detail. The Court will accordingly treat the minutes as incomplete and no inference will be drawn from what is or is not contained therein.

68. The Respondent's counsel added that if indeed Mr Uys had made such a positive and important admission of authority concerning the Applicant at the hearing, the Applicant would and should have mentioned it in his grounds of appeal. Such a statement is at the heart of the matter. The Respondent's counsel added that the Applicant is the author of the notice and grounds of appeal (exhibit **A65**). The Applicant therefore had the opportunity and a reason to add that statement in the grounds of appeal (exhibit **A 65**). That statement would have served as a defense for the Applicant against the charges he was facing even at the appeal stage.

69. The Applicant conceded that his grounds of appeal as contained in exhibit **A 65** do not support the allegation he is making regarding Mr Uys. It is common cause that exhibit **A 65** contained the ammunition which the Applicant used or intended to use on appeal to attack the verdict and sentence which was meted out against him by the presiding officer, at the disciplinary hearing.

70. An extract of the cross examination of the Applicant when dealing with clauses 4.1, 4.2 and 4.3 of exhibit **A 65** reads as follows;

> ***"RC*** *But it doesn't say however at all in any of these three paragraphs I've read out, 4.1,4.2,4.3, that Mr Uys made a positive allegation that is that you had the authority to enter into the transaction with Mr Hlophe.*
>
> ***AW1*** *Correct.*
>
> ***RC*** *And on the contrary 4.2 suggests that he didn't say anything about authority at all. Firstly he didn't testify that you needed his authority you don't say that he testified that you had authority and on the contrary you say the issue of authority was not canvassed with Mr Uys during the course of the hearing. Now how can it seriously be true that you say that Mr Uys said at the second disciplinary hearing that you had the necessary authority to enter into the transaction with Mr Hlophe.*
>
> ***AW1*** *I do recall, my Lord, him saying that.*
>
> ***RC*** *You recall he said that ?*
>
> ***AW1*** *Yes*

RC *But you accept Mr Delport that that is contrary to what you have said in your own document ?*

AW1 *I agree.*

RC *Fine, thank you. Any explanation Mr Delport that you'd like to offer us as to why the document you prepared for your appeal that we have just looked at is contrary to your evidence here, yesterday, Monday and today ?*

AW1 *None I don't."*
(Record volume 3 page 8-9)

71. The Applicant stated that he did not know why he did not include in his grounds of appeal the allegation he is now making concerning Mr Uys.

72. According to the Applicant another reason he entered into the loan transaction with the landlord was that he was given authority to do so by the managing director (Mr Uys). That authority was in writing. That authority enabled the Applicant to legally bind the Respondent without limit in any contract that the Applicant in his discretion chooses to enter into. The Applicant stated that he was cautious in the manner he exercised his discretion. He took into account the limits of the budget which he had access to.

73. The evidence of the Applicant on this point reads as follows;

"***Assessor*** *Just for the information of the Court, following your saying you didn't need the MD's [managing director's] approval as FD [financial director] did that apply in all financial decisions that had to be taken for the company as a whole or it was just entirely for the matter that is before Court?*

AW1 *It applied to many aspects my Lord and as I earlier testified it could be creditors, it could be anything, agreements, lease agreements signed. In fact he sent an e-mail to all the staff where he authorized me as the F D [financial director] the only person that can sign any legal [legally] binding contract within the company with no limits. So I could sign any agreement, an agreement means basically anything.*

Assessor *No limits in terms of amounts ?*

AW1 *No limits whatsoever.*

Assessor *On a point of clarification again to whom did you report to?*

AW1 *I reported to the M D. He gave me the powers to actually approve or authorize anything, I had the power.*

Assessor *You had it in writing?*

AW1 *There was the e-mail specifically, there is a document…"*
(Record volume 2 pages 223-224).

74. The Respondent's counsel notified the Applicant that the written authority or copy thereof which the Applicant allegedly acted on has not been brought

before Court. Despite this notification no such document was made available to the Court.

75. Mr Uys denied that he gave the Applicant the alleged authority. According to Mr Uys giving such authority as alleged by the Applicant would have been beyond his jurisdiction. Even if he had been approached he would not have given the Applicant the authority alleged by him.

76. Thereafter Mr Uys referred the Court to the transaction between S&B and the Respondent and the role he played therein. Mr Uys testified that he signed a contract with S&B in which he gave S&B instruction to do roadworks at a specified place, namely the Respondent's plant in Matsapha. The contract was for a specific sum of money E485,000.00 (Four Hundred and Eighty Five Thousand Emalangeni).

77. The Respondent accepts that the contract price for the work done by S&B at the Respondent's plant had an increase in expense of about E34,909.72 (Thirty Four Thousand Nine Hundred and Nine Emalangeni Seventy Two cents). This increase is not subject of dispute between the parties. The dispute is focused solely on the E89,825.27 that was paid to S&B by the Applicant for the road construction at the Ridgeview Farm.

78. Mr Uys stated that he did not give the Applicant authority to enter into the aforementioned transaction with S&B and the landlord. He had not been made aware of the said transaction. He came to know of the transaction when he was confronted by his superior from head office who had come specifically to investigate the same matter.

79. The additional payment of the E89, 825.27 which the Applicant made to S&B had the effect of changing the amount and the scope of work which Mr Uys had agreed to with S&B. It was therefore imperative that his approval be secured before the amendment of his agreement with S&B and the subsequent payment is made.

80. Mr Uys added that he would not have approved the extra payment of E89, 825.27 to S&B if it had been brought to his attention. The road which S&B built at the Ridgeview Farm fell outside the scope of business of the Respondent. Furthermore that road had no benefit to the Respondent.

81. As the managing director of the Respondent, he (Mr Uys) was senior to the Applicant - the financial director. The Applicant overstepped the boundaries of his authority as financial director when he amended a contract which had been concluded by the managing director without the approval of that managing director. According to Mr Uys he was in contact with the Applicant at all times material to this matter. There is therefore no reason for the Applicant's failure to seek and obtain his approval to the loan transaction with the landlord and for the

payment of E89, 825.27 to S&B. Even at the time when Mr Uys was on leave for a few days he was still contactable to the Applicant by mobile telephone and e-mail.

82. A third reason advanced by the Applicant for paying S&B the aforementioned sum of money without seeking and obtaining the Respondent's approval was that he (Applicant) was guided by precedent.

The Applicant took over the position of financial direction from a certain Mr Duane Birkholtz.

83. During his tenure Mr Birkholtz allegedly advanced the

landlord loans in various sums of money and at irregular intervals. From these loans the landlord was able to access money which he used to improve and maintain his housing complex at the Ridgeview Farm.

84 To illustrate his point, the Applicant tendered exhibit ***A 35*** dated 12th April 1999. This is a contract written on a letterhead and signed by Mr Birkholtz as financial director and Mr Moses Hlophe as landlord. The letterhead is that of Swaziland Bottling Company, a division of Swaziland Beverages (Pty) Ltd. Swaziland Beverages (Pty) Ltd is the former name by which the Respondent was known.

85. The argument between the parties frequently touched upon this exhibit. It may be helpful to reproduce exhibit ***A35*** which reads as follows;

"Swaziland Bottling Company **P.O.Box 22**
Division of Swaziland Beverages (Pty)Ltd. **Matsapha**
King Sobhuza II Ave, Matsapha, Swaziland **Tel:(268) 5186011**
Telefax:(268)5186056

To : Mr Moses Hlophe

From : Duane Birkholtz

Date :12th April 1999

RE: RENTAL PAYMENT - HOUSE NO.9 RIDGEVIEW FARM MALKERNS.

The following pre-payments have been made in respect of the abovementioned house.

Cheque No. 21927	*E20 000*
Cheque No. 21737	*E15 000*
Cheque No. 22203	*E6 000*
	E41 000

Payment will also be made for E22 000 to Maintenance Services for the construction of a swimming pool at the above property. This will push the total rental pre-payment to E63 000.

The pre-payment will be for a period of 26 Months commencing 1 may 1999 and ending 30th June 2001. If we should wish to continue renting the property from 1 July 2001 the new monthly rental shall be calculated using E3000 as a base rental and adding to that an inflation factor that will be negotiated but will not exceed the official inflation factor over the preceding 12 months.

The completion of the following is necessary to ensure the commencement date of 1 may 1999:

1. Completion of concrete driveway to the entrance of the house.

2. Ground to be leveled to start planting grass

3. Electricity to be laid up to pool motor

4. Carpets replaced with beige (agreed to)

5. Main gate re-hung to the level.

Regards,

D. BIRKHOLTZ

FINANCIAL DIRECTOR

AGREED _____

MOSES HLOPHE ***DATE :13.04.99"***

86. The Applicant argued that according to exhibit ***A 35*** the Respondent advanced the landlord (Mr Moses Hlophe) a loan of E41,000.00 (Forty One Thousand Emalangeni). The loan was advanced in three (3) stages. In the same letter the Respondent agreed to advance the landlord a further loan of E22,000.00 (Twenty Two Thousand Emalangeni) in order to pay for the construction of a swimming pool.

87 According to the Applicant the manner he advanced the landlord a loan of E89,825.27 to pay S&B is comparable to the manner Mr Birkholtz advanced the same landlord (Mr Moses Hlophe) a sum of E22,000.00 to pay Maintenance Services in order to build a swimming pool. The purpose of each of these 2 (two) loans is to improve the landlord's property namely Ridgeview Farm. The loan that was advanced by the Applicant was to construct a tarred road. The loan that was advanced by Mr Birkholtz was to construct a swimming pool.

88. The Applicant argued that Mr Birkholtz advanced the said loan to the landlord without approval from the Respondent the same way he (Applicant) did. The Respondent did not condemn the purpose for and manner in which Mr Birkholtz advanced the landlord the loan of E22,000.00 (Twenty Two Thousand Emalangeni). According to the Applicant the Respondent's conduct aforesaid created a precedent which he (Applicant) has followed in the manner he advanced a loan of E89, 825-27 to the Landlord.

89. The Applicant stated further that the 3 (three) cheques which are listed in exhibit ***A 35*** which in total amount to E41,000.00 (Forty One Thousand Emalangeni) are a confirmation that the Respondent has a history of lending money to the landlord. He (Applicant) has followed an already existing practice in lending the landlord money taken from the Respondent's funds.

90. The Court has noted that the Applicant has not adduced evidence to support his assertion that Mr Birkholtz advanced the loans mentioned in exhibit ***A35*** without authorization from the Respondent. The Respondent's counsel alerted the Applicant that the contents of exhibit ***A 35*** do not show that Mr Birkholtz had no authority from the Respondent to advance the landlord the said loans. The Applicant acknowledged that the contents of exhibit ***A 35*** do not support his assertion. Notwithstanding that acknowledgement no such evidence was produced to the Court.

91. Still on the issue of precedent, the Applicant introduced a second example being exhibit ***A 80***. This is a letter dated 23rd December 2004, written by Mr Gregory Uys in his capacity as managing director of the Respondent. Mr Uys also testified at the trial for the Respondent. The letter was written to the Applicant and copied to Mr Vincent Manyatsi who was the human resources director.

92. It may be helpful to reproduce this exhibit (***A 80***) at this stage;

*"**Christoff Delport***

From : Greg Uys
Sent : Thursday, December 23, 2004 7:39 AM
To : Christoff Delport
Cc : Vincent Manyatsi
Subject : Electrification of house

The invoice for the cost of the electrification of the house in Malkerns that I stay in has been completed and payment needs to be made.

The agreement was that the number of guards at the premises will reduce from four to two as from the beginning of January 2005 and the offset saving of E4000 pm will payback the costs of the electrification within 8 months.

The owner of the house, Mr Rocky Palmer has agreed to pay for the repairs to the gate and this needs to be deducted from his next annual rental payment in Jan [January] 2005. This total amounts to E7422.00 as per the invoice.

The radio and alarm system linked to the Malkerns Security Association to the value of E4000.00 is removable.

Process the full payment to Mr Dan Packard to the value of E38 187.00. I require you to sign off the invoice as discussed when you return from leave. In the interim I will request that Vincent Manyatsi sign as to process payment.
Greg"

93. In his capacity as managing director of the Respondent, Mr Gregory Uys was allocated a dwelling house situated at Malkerns. The house is owned by a certain Mr Rocky Palmer. The Respondent rented the house from Mr Palmer. The house was previously occupied by the managing director who preceded Mr Uys.

94. At the time when Mr Uys moved in, the house had 4 (four) security guards posted. There were 2 (two) guards at night and 2 (two) during day time. This arrangement continued even during Mr Uys's term of office.

95. In the course of the year 2004 the house was broken into during the night. The intruder attempted to steal inter alia a motor vehicle that was parked in the yard. The police were called and they Respondent promptly. As the police did their work gunshots were heard outside the house. Following this incident, Mr Uys felt the need to improve security at that house.

96. Mr Uys arranged for an electric fence to be mounted on the perimeter of the yard. There were other security features that were improved including installation of an alarm system and hanging the main gate. These improvements were done with the consent of Mr Palmer.

97. The work of improving the Palmer house was carried out by a certain Mr Dan Packard trading as Green Valley Farm. The security improvements amounted to E38,187.00 (Thirty Eight Thousand One Hundred and Eighty Seven Emalangeni).

98. Mr. Palmer was liable for a portion of the invoice which he agreed to pay namely E7,422.00 (Seven Thousand Four Hundred and Twenty Two Emalangeni). The Respondent was liable for the balance namely E30,769.00 (Thirty Thousand Seven Hundred and Sixty Nine Emalangeni).

99. The Respondent paid Mr Dan Packard (Green Valley Farm) the full amount on the invoice. Mr Palmer's share of the expense was deducted by the Respondent from his 2005 rent. Mr Palmer's rent was payable annually, in advance and in one transaction.

100 The Applicant's argument was that the work which Mr Uys did at the Palmer house, using the Respondent's funds, had the effect of improving that house. The Respondent had no obligation to improve Mr Palmer's house. The Applicant noted that the Respondent did not discipline or even rebuke Mr Uys for his conduct.

101. In the Applicant's eyes, the improvements that Mr Uys did at the Palmer house are comparable to the road improvements at Ridgeview Farm, which he (Applicant) had done. The Applicant argued therefore that what he did at the Ridgeview Farm was to follow a precedent which had been established by Mr Uys.

102 It is not in dispute that the Palmer house was improved at the initiative of Mr Uys. He used the Respondent's funds in the process. It is further not in dispute that the road at the Ridgeview Farm was improved at the initiative of the Applicant.

The Applicant also used the Respondent's funds in the process. The Respondent however denies that these 2 (two) transactions are similar. According to the Respondent these two transactions differed markedly in contrast to each other. The difference appears in 3 (three) features.

103 Mr Uys stated in his evidence that before he engaged Mr Dan Packard to carry out the security work, he first discussed that proposal with his fellow directors namely the Applicant (financial director) and Mr Vincent Manyatsi (human resources director). An agreement was reached between the 3 (three) directors regarding the purpose and the payment details of the proposed security improvements. The work was carried out and payment was made after an agreement had been secured with the two directors concerned. Mr Uys together with the Applicant and Mr Manyatsi formed the company executive committee referred to in paragraph 48 above. The company executive committee had the mandate to authorize security improvements in the Palmer house.

104. Mr Uys stated further that over and above the two (2) directors aforementioned, he requested and was granted authority to carry out the security improvements by Mr Manuel Fandeso.

Mr Fandeso was the immediate superior to Mr Uys and was based at head office as operations director.

105. According to Mr Uys he was authorized to carry out the security improvements at the Palmer house by the company executive committee as well as a head office director. Despite being the managing director, Mr Uys felt the need to get specific authorization to carry out this particular exercise. This exercise fell outside the normal business function of the Respondent. The Respondent's normal business function was to brew and sell beer and distribute other beverages - hence the need for Mr Uys to get specific authorization.

106. According to the Respondent the improved security at the Palmers house resulted in the Respondent reducing the number of security guards from four (4) to two (2). The reduced number of guards had a cost saving effect to the Respondent of E4, 000.00 (Four Thousand Emalangeni) per month.

107. The Respondent argued that the improved security expense was off set against the reduced security fee. Within 8 (eight) months from the date of installation of the improved security features, the Respondent had saved E32,000.00 (Thirty Two Thousand Emalangeni) as a result of reducing the number of guards on site.

That meant that the Respondent fully recovered the cost of improving the security at the Palmers house within 8 (eight) months of installation. After the first eight months the cost saving element was a continuous bonus to the Respondent.

108 According to Mr Uys, his letter to his fellow directors namely exhibit ***A 80,*** was a confirmation of the agreement he had reached with the said directors before the work began. In his evidence Mr Uys highlighted paragraph 2 of exhibit **A 80.** It begins as follows;

"The agreement was that ...".

According to Mr Uys that phrase meant that an agreement had been reached between himself, Applicant and Mr Manyatsi (the company executive committee).

109. Mr Uys stated that the exercise to improve security was duly completed. He thereafter requested the same fellow directors namely the Applicant and Mr Manyatsi to process payment to Mr Dan Packard.

This request involved signing of the invoice, the payment requisition form and a cheque. The said directors gladly complied. As a result Mr Dan Packard was paid by the Respondent a sum of E38,187.00 (Thirty Eight Thousand One Hundred and Eighty Seven Emalangeni).

110. Mr Uys further drew the Court's attention to a sentence in the last paragraph of exhibit ***A 80.*** It reads as follows;

> *"I require you to sign off the invoice as discussed when you return from leave. In the interim I will request that Vincent Manyatsi sign as to process payment."*

111. The phrase *'as discussed'* , meant that Mr Uys had discussed in detail the security improvement exercise with his fellow directors Mr Manyatsi and the Applicant to the point of reaching an agreement. The discussion and subsequent agreement and the willingness on the part of Mr Manyatsi and the Applicant to sign and pay Mr Packard was confirmation of the authority that Mr Uys needed to carry out the improvement exercise at the Palmer house.

112. The Applicant cited a third example to support his argument that his conduct was based on precedent. When the Applicant joined the Respondent in March 2002 he was subordinate to Mr Gavin Brown who then was managing director.

113. The Applicant was allocated a company house namely house No. 9 Ridgeview complex. The Applicant felt that the house was not big enough to accommodate his family. Mr Brown gave the Applicant permission to build a cottage as an extension to the house. An extract of the Applicant's evidence reads as follows;

> *"…he [the managing director Mr Gavin Brown] then said to me I can build a cottage onto [on] that house or extend the house."*
>
> *(Record Volume 3 page 76)*

114. Thereafter the Applicant negotiated a building contract with a builder who eventually built the cottage. According to the Applicant he drew the basic building plans for the cottage. The cottage was thereafter built at a cost estimated by the Applicant at E110, 000.00 (One Hundred and Ten Thousand Emalangeni). The Applicant paid the builder's fee from the Respondent's funds.

115. The Applicant stated that there was no limit and control as to which builder to hire and how much should be spent on the building costs. He paid the builder his fee without obtaining authority from the managing director.
The cottage had the effect of improving the landlord's property.

The Respondent did not recover the expense of building the cottage. The managing director did not condemn the Applicant in the manner he handled the building of the cottage.

116. According to the Applicant the manner the cottage was built is comparable to the manner he advanced the landlord a loan to pay for the road improvement. The incident involving the cottage created a precedent which the Applicant later followed when he advanced the said loan to the landlord.

117. The Respondent has denied that the manner the cottage was built is comparable to the manner the Applicant advanced a loan to the landlord. The Respondent relied

on the Applicant's evidence that the building of the cottage was discussed with Mr Brown who gave his approval. The fact that Mr Brown approved the proposed cottage meant that the Applicant was authorized to commission the builder to carry on with the building work.

118. According to the Respondent, the approval by the managing director, (Mr Brown) that the building should proceed and be funded by the Respondent gave the Applicant the authority he needed to carry out the work that he did. On the other hand, the loan of E89,825.27 which the Applicant advanced the landlord was neither discussed nor approved by the managing director (Mr Uys) or any other official from the Respondent. On that basis the Respondent denied that the Applicant's conduct was based on precedent.

119. Another contention that was raised by the Respondent relating to charge (c) under the heading *Gross misconduct* is that the *loan of approximately E90,000.00 which the Applicant advanced the landlord was not documented or reflected as a loan in the balance sheet*. In response, the Applicant conceded that he made an error in his accounting records.

120. The Applicant acknowledged that as the financial director it was his responsibility to ensure that the loan transaction which he negotiated with the landlord was

properly concluded and documented mainly to protect the rights and interests of the Respondent.

121. In exhibit ***A 13*** the Applicant acknowledged his error as follows:

> *":… it was an oversight from my side not to journalise Hlophe's [the landlord's) loan portion into the balance sheet.*
> *This would have been picked up later on when the loan repayments were to be processed with no debit on the balance sheet to offset."*

The Applicant repeated this statement on numerous occasions in his evidence.

122. The Applicant has denied however that the loan which he advanced the landlord was not documented. The Applicant argued that the loan was documented in exhibit ***A 36.*** This exhibit has been reproduced in paragraph 46 above. The Applicant testified that he drafted exhibit ***A 36.*** He thereafter brought the exhibit to the landlord for signing. Exhibit **A 36** was introduced to Court as an acknowledgement of debt.

123. Exhibit ***A 36*** is written on a plain piece of paper as opposed to a letterhead. The Applicant testified that exhibit ***A 36*** is the only document which he relied on to prove the existence of the loan of E89, 825.27 which he advanced the landlord from the Respondent's coffers.

124. The following exchange took place during the cross examination of the Applicant (**AW1**) by the Respondent's Counsel (**RC**).

> "***RC*** *There is no other document that you were relying on to prove that there was a loan between SBL [Respondent] and Hlophe [landlord] ?*
>
> ***AW1*** *No there is no other document."*
>
> *(Record volume 2* page 139)

125. The landlord (Moses Hlophe) has reported in exhibit **A 36,** inter alia that he is the managing director of VIP Dry Cleaners (Pty) Ltd. The relevance of VIP Dry Cleaners (Pty) Ltd in this context was not clear to the parties. The parties however agreed that for the purposes of this matter they both acknowledge the landlord as owner of the Ridgeview Farm. The Court proceeded on the same basis.

126. Exhibit ***A 36*** has received sharp criticism from the Respondent on a number of points. The Respondent argued that exhibit ***A 36*** is addressed to Mr C Delport (Applicant) and not the Respondent yet it was the Respondent's money that was used to pay S&B. The Respondent has not been acknowledged as a creditor in the loan transaction.

127. The Applicant conceded that exhibit ***A 36*** does not acknowledge the Respondent as the creditor. The Applicant stated however that he relied on his personal knowledge that Respondent is the creditor. The Applicant knew this to be the fact since he handled the loan transaction.

128. A second criticism directed at Exhibit ***A 36*** is that there is no indication of the amount of money loaned to and received by the landlord. The Applicant again conceded this flaw in the exhibit. He again averred that he relied on his personal knowledge regarding the amount of the loan.

129. The Respondent further criticized the exhibit in that it lacks the necessary detail regarding the terms of payment of the loan. The Applicant argued that there is sufficient detail on the exhibit regarding payment terms.

130. According to the Applicant, the landlord had planned to collect rent from his tenants at the Ridgeview complex. The landlord was being assisted by the Applicant and his wife (Mrs Karin Delport) in managing the complex and collecting rent. This arrangement is mentioned in paragraphs 31 to 34 above. According to the Applicant the landlord intended to use the rent to pay the loan in monthly installments over a period of 5 (five) years.

131. The Applicant conceded that exhibit ***A 36*** does not disclose the number of houses from which a monthly deduction of E185.00 should be made. Again the Applicant argued that he relied on his personal knowledge of the number of available houses at Ridgeview Farm. He further relied on his oral agreement with the landlord regarding to some details of the loan which are not in the exhibit.

132. The Applicant stated further that the landlord had orally spoken of 9 (nine) houses from which rent is to be collected by Mrs Delport. The Applicant therefore concluded that the total rent which Mrs Delport was mandated to collect over the period of 5 (five) years was E99,900.00 (Ninety Nine Thousand Nine Hundred Emalangeni) calculated as follows;

E185.00 per house x 9 houses x 60 months = E99,900.00.

133. The Respondent pointed out further that exhibit ***A 36*** does not give any direction as to how the Respondent should gain access to the rent payments which are in the possession or control of Mrs Delport.

The exhibit authorized Mrs Delport to collect rent from the tenants at Ridgeview Farm with effect from 1st July 2005. Mrs Delport was further authorized to retain 10% (ten percent) of the rent collected and keep it as a maintenance fund.

134. There is no instruction in exhibit **A 36** as to what Mrs Delport should do with the balance of rent on hand, the 90% (ninety percent), in so far as the Respondent is concerned. The Respondent noted that exhibit **A 36** does not instruct Mrs Delport or any person to pay the Respondent the rentals that were to be collected by her or any portion thereof.

135. Again the Applicant conceded this defect in exhibit **A 36**.

The Applicant added that between himself, Mrs Delport and the Landlord, there was neither an agreement nor an intention to pay the Respondent the rentals that

were to be collected from Ridgeview complex or any portion thereof. According to the Applicant he drafted exhibit **A 36** solely for his own records. He added that there was no intention on his part (Applicant), Mrs Delport as well as the landlord to implement the contents of exhibit **A 36**.

136. The Applicant then referred to the oral lease which subsisted between the Respondent and the Landlord regarding 2 (two) of the houses at the Ridgeview Farm. The lease is mentioned in paragraph 25 above. According to the Applicant, the Respondent is liable to the Landlord for monthly rent for those houses, which was estimated by the Applicant at E8, 000.00 (Eight Thousand Emalangeni).

137. As long as the oral lease subsisted for the 2 (two) houses aforementioned, the Respondent will continue to be liable to the landlord for monthly rent. At the same time the landlord was indebted to the Respondent in the sum of E89,825.27 for the loan transaction which the Applicant facilitated. According to the Applicant, he had planned to set-off one debt against the other.

138. In particular, the Applicant's plan was to withhold a portion in value of the rent that was payable to the landlord by the Respondent on a monthly basis, and with the same to credit the landlord's loan account in the Respondent's records. There would be no money changing hands. This arrangement was meant to continue until the landlord's debt with the Respondent was fully paid.

The Applicant had arranged this payment plan to last 5 (five) years calculated from the first monthly deduction.

139. As the financial director of the Respondent, the Applicant confirmed that he had control over every payment that was processed by the Respondent. That power enabled the Applicant to exercise control over the rent payments as well which the Respondent processed monthly in favour of the landlord. The Applicant believed that he had the capability to see to it that his 5 (five) year payment plan is implemented.

140. The Applicant admitted that his payment plan was not recorded in any of the documents that have been exhibited before Court. Furthermore, the payment plan had neither been discussed with nor agreed to with the managing director (Mr Uys) or any of the Respondent's officials. The Applicant confirmed that he was the only person who knew about his payment plan.

141. The Applicant was adamant that the interests of the Respondent were protected even though the payment plan was not in writing and existed only in his mind. The Applicant did not implement his payment plan because he was suspended from work.

The disciplinary process commenced soon after the suspension-which culminated in a dismissal. He was thereby denied a chance to implement his plan.

142. The Applicant conceded that his payment plan differed markedly from the contents of exhibit ***A 36***. The Applicant was cross examined by the Respondent's counsel on this issue and he gave the following response;

> ***"RC*** *Do you at least agree that what this document* ***[A 36]*** *does not say is that SBL [Respondent] will withhold payment of rentals to Hlophe [landlord]?*
>
> ***AW1*** *The document* ***[A 36]*** *does not say that."*
>
> *(Record volume 2 page 177)*

143. The remainder of the charge "c" under the heading Gross misconduct which deals with interest was withdrawn by the Respondent at the disciplinary hearing. This portion reads as follows in the charge sheet;

> *"Additionally this loan appears to attract no interest".*

The evidence of the Respondent's second witness (Ms. Charlene King) confirmed this withdrawal.

144. A third charge which the Applicant had to answer at the disciplinary hearing was charge "e" under the heading Gross misconduct. The Applicant was accused of having acted in conflict of his level of authority. This incident occurred when the Applicant prepared the necessary paperwork leading up to the payment to S&B of a sum of E609,734.99 (Six Hundred and Nine Thousand Seven Hundred and

Thirty Four Emalangeni Ninety Nine cents). The Applicant paid S&B the said sum of money from the Respondent's funds.

145. It is common cause that about the 6th July 2005, the Respondent hired the services of S&B to improve an access road at the Respondent's depot and plant in Matsapha town. A written agreement of service was concluded between the Respondent and S&B. That agreement has been introduced before Court as exhibit ***B 160.*** In that agreement the Respondent was represented by its managing director Mr Uys. S&B was represented by its alternate director Mr Derek du Plessis.

146. Exhibit ***B 160*** was initially a quotation which S&B presented to the Respondent for negotiation. The Respondent agreed on the proposed terms as contained in the quotation.

The Respondent communicated its acceptance by signing and thereby endorsing the quotation. Exhibit ***B 160*** therefore serves a dual purpose of being a quotation and a subsequent agreement.

147. The contract price was agreed at E485,000.00 (Four Hundred and Eighty Five Thousand Emalangeni). S&B began the construction work and brought it to completion. The Court has already pointed out in paragraph 77 above that the expenses for the construction of the access road at the Respondent's plant increased by E34,909.72 (Thirty Four Thousand Nine Hundred and Nine

Emalangeni Seventy Two cents). The Respondent accepted this increment. It is therefore not subject of dispute.

148. The date of completion of the Respondent's road at the Matsapha plant coincided with the date of completion of the landlord's road at the Ridgeview Farm referred to in paragraph 42 above. The same contractor S&B did the roadworks on both sites. It was time for S&B to present invoices to her clients for payment.

149. The Applicant directed Mr du Plessis (S&B) to issue the Respondent an invoice for the work they had done at the Respondent's plant.

Mr du Plessis was further instructed by the Applicant to include in that invoice, as a line item the work (and charges thereof) which S&B did at the Ridgeview Farm.

150. As directed by the Applicant, S&B proceeded to issue 1(one) invoice for the work that they did in the 2 (two) separate sites namely, the Respondent's plant in Matsapha and the Ridgeview Farm in Malkerns. That invoice is dated 23rd August 2005 and marked exhibit ***B 164.***

151. According to the invoice exhibit **B 164**, the total sum of E609, 734.99 (Six Hundred and Nine Thousand Seven Hundred and Thirty Four Emalangeni Ninety Nine cents) was due and payable to S&B by the Respondent. The Applicant confirmed receipt of this invoice which was written for his attention.

152. Exhibit ***B 164*** has been analysed in detail by the parties. It is apposite at this stage to reproduce it in full.

S & B CIVIL Roads Pty Ltd ***S & B***

Civil Engineering Contractors *P.O.Box 1181,Mbabane Swaziland*

23rd August 2005 *Plot 238, King MswatiIII Ave*

Swaziland Beverages *Matsapha Swaziland*

P.O.Box 100, Matsapha, M202, Swaziland *Tel:=268 518506Fax +268 5185015*

Attention: Mr Christoff Delport

ITEM	DESCRIPTION	UNIT	CLAIMED QUANTITY	RATE	CLAIMED AMOUNT
	CONTRACTOR'S ESTABLISHMENT ON THE SITE AND GENERAL OBLIGATIONS				

A	Fixed obligations	L.Sum	1	R 38,548.40	R38.548.40
					R -
B	Time related obligations	LS	1	R60,000.00	R60.000.00
					R -
C	Preliminary and General Asphalt				R34.910.93
	CONTACTOR'S ESTABLISHMENT ON THE SITE				
	Carried to summary				R133.459.33
					R -
	SITE WORKS				R -
					R -
C	Accommodation of traffic	sum	1	R5,961.60	R5 961.60
					R -
D	Cut existing surfacing, base course to spilt	m3	133.6	R47.04	R 6 284.54

					R -
E	Surface preparation and compaction	m3	133.6	R67.41	R 9 005.98
					R
F	Trimming of surface	m2	891	R4.14	R3 688.74
					R
G	40 Mpa Concrete, 150mm thick, including curing	m2	891	R202.10	R180.071.10
					R -
H	Reinforcing 617 mesh	m2	1,782	R90.90	R 161,983.80
					R -
I	Formwork 150mm high	m	287	R16.42	R4,712.54
					R
J	Sealing of joints	m	287	R46.09	R13,227.83
					R -
K	Saw cutting	m	95.9	R15.79	R1,514.26
					R
L	Asphalt roadway				R89,825.27

	SITE WORKS CARRIED TO SUMMARY				R476,275.66

	SUMMARY				
	CONTRACTOR'S ESTABLISHMENT ON THE SITE				R133,459.33
	SITE WORKS				R476,275.66
	TOTAL AMOUNT DUE				**R609,734.99**

153. Upon receipt of the invoice ***(B 164)*** the Applicant made arrangements to pay it from the Respondent's funds. The Applicant proceeded to sign a cheque authorization voucher dated 2nd September 2005 for payment to S&B of the full amount on the invoice. The voucher is marked exhibit **B 163.**

154. By signing the voucher (exhibit ***B 163)***, the Applicant as the financial director, issued a directive to the Respondent to pay S&B the full amount stated therein namely E609,734.99 (Six Hundred and Nine Thousand Seven Hundred and Thirty Four Emalangeni Ninety Nine Cents). The Applicant's signature further meant that payment for the individual items listed in the invoice is due and owing, and has further been duly approved by someone in authority namely the Applicant.

155. The Applicant proceeded to issue and sign a cheque from the Respondent's cheque book in favour of S&B for the full amount on the invoice (exhibit ***B 164***). The cheque was countersigned by a certain Glory Dlamini. The said Glory Dlamini was employed as an accountant subordinate to the Applicant. She co-signed the cheque on the Applicant's instruction.

Thereafter S&B was paid the sum of E609,734.99 which was the full amount demanded on the invoice **(B164).** The Applicant delivered the cheque to S&B.

156. The Applicant stated in his evidence in chief that the reason he directed S&B to issue 1 (one) invoice for work done on 2 (two) different sites was solely for convenience sake. It was convenient for him to issue 1 (one) cheque to S&B notwithstanding that the payment was for 2 (two) separate sites which are unrelated to each other.

157. Under cross examination the Applicant conceded that the convenience mentioned by him was more imaginary than real. Even if S&B had issued separate invoices for each of the two (2) clients or sites, the Applicant could add up the amounts and pay both invoices in 1 (one) cheque. The Applicant was further capable of issuing separate cheques for each one of the invoices. There was therefore no need to direct S&B to issue 1 (one) invoice for the 2 (two) sites.

158. The Applicant had stated in his evidence that he could not issue a cheque from the Respondent's cheque book in favour of S&B on an invoice that had been issued to the landlord.

The Applicant regarded the landlord as a third party in this instance since the contract was between S&B and the Respondent. Instead the Applicant was willing to pay the landlord's debt using the Respondent's funds if the invoice was issued out to the Respondent

159. An extract from the record on this issue reads as follows;

"***RC*** *It was possible that Mr du Plessis could, but for your request, have issued one invoice in the name of Swaziland Beverages [Respondent] for the work [done] on Swaziland Beverages' property E500.000 odd and on a separate invoice to Mr Hlophe [landlord] [and say to Mr Hlophe for the work] I've done on your site I'll charge you E89,000.*

AW1 *SBL [Respondent] couldn't have paid the invoice because it was made out to Mr Hlophe [landlord].*

RC *You can't make payment on behalf of somebody else even if you are giving him a loan ?*

AW1 *No you can't. You can't make a payment on an invoice issued to a third party.*"

(Record volume 2 page 321)

160. After some intense cross examination on this issue, the Applicant admitted that his evidence is incorrect.

The Applicant conceded that he could have issued a cheque payment to S&B from the Respondent's funds to pay an invoice that S&B had issued to the landlord.

161. The Respondent's Counsel pressed the Applicant further for the real reason the Applicant directed Mr du Plessis (S&B) to issue one invoice in the manner aforesaid. The Applicant stated that he actually did not know why he gave that directive to Mr du Plessis.

162. An extract from the record reads as follows;

AW1 *I requested him to put it onto [into] one invoice.*

RC *Yes we're asking you why Mr Delport ?*

AW1 *I do not know why.*

(Record volume 2 page 319)

163. The exchange continued between the Applicant and the Respondent's Counsel as follows;

> *"**RC** …you are the one who asks [asked] them [Mr du Plessis (S&B)] to put it as one invoice not two, correct?*
>
> ***AW1** I requested him [Mr du Plessis] to put it on the same invoice so that I would make one payment.*
>
> ***RC** Is there any reason why if you had two invoices you couldn't make one payment for the two invoices added together ?*
>
> ***AW1** No reason whatsoever."*
>
> *(Record volume 2 page 318)*

164. Exhibit **B 164** is a written demand for payment of a sum of E609,734.99, made by S&B and directed to the Respondent for goods and services allegedly sold by S&B to the Respondent and delivered at a particular site. The site is not specified in the exhibit.

165. The demand for payment is divided into smaller units with a description of the work done and the goods supplied at each and every stage of the project. There is a subtotal owing for each unit. The items that appear in the exhibit are listed in alphabetical order from A to L (inclusive). Any reader can see from the exhibit how much has been charged for each unit, for what purpose and how did S&B arrive at the total of E609,734.99.

166. The Respondent thereafter highlighted a certain irregularity in the manner exhibit **B164** has been drawn and detailed. There is a line item in the exhibit which is identified by the letter "L". This item reads as follows;

"L Asphalt roadway E89, 825.27"

167. A reading of item "L" indicates that S&B has sold and delivered and has further performed services to the Respondent at the site which produced some *asphalt roadway* to the value of E89,825.27. This is in addition to items A to K that are listed in the exhibit. In the invoice, the prices are quoted in South African Rand (ZAR) instead of Swaziland currency. However these prices do not make any difference in this case as the currencies of these two countries are equal in economic value.

168. The Respondent argued that the *asphalt roadway* that is referred to in item "L" is work that S&B did at the Ridgeview Farm and not at the Respondent's plant. Item "L" therefore was inappropriately integrated into exhibit **B164**. The

Respondent added that, item "L" was grafted into exhibit **B164** at the instance of the Applicant.

169. The Applicant admitted that item "L" was engrafted into the invoice (**B164**) on a directive that was issued by him. This directive appears in paragraph 149 above. The Applicant however sought to distance himself from the consequences of inserting item "L" in the exhibit. He quickly shifted the blame to S&B.

170. The evidence of the Applicant reads as follows on this aspect;

> *"AW1: My Lord I don't think it actually mattered to me at the time whether it referred to one site or two sites as far as I'm concerned I asked him [Mr du Plessis] to include the asphalt road as well as a line in the invoice and how he did it I don't know. It wasn't up to me"*
>
> (*Record volume 2 page 310)*

171. The Applicant conceded that the invoice (exhibit **B164**) is misleading. It does not show that the total amount claimed therein for instance E609,734.99 is for work done on 2 (two) separate sites which are unrelated to each other.

172. The Applicant conceded further that there is no indication in exhibit **B164** or anywhere else that this line item "*L Asphalt roadway R89,825.27*" relates to

work that S&B did for the landlord at Ridgeview Farm. The Applicant further acknowledged that this omission is misleading.

173. An extract from the record reads as follows on this aspect;

> ***RC:*** *You agree with me that nothing on this invoice on item (l) [L] or anything else on this invoice indicates that this is for the asphalting of the roadway for Mr Hlophe's [landlord's] property?*
>
> ***AW1:*** *I agree it doesn't say that but I knew what it was."*
>
> *(Record volume 2 pages 311- 312)*

174. It was brought to the Applicant's attention that any person reading exhibit **B 164** is likely to conclude that the items that are listed therein belong to the same project or site. In addition, such a person is further likely to conclude that the phrase '*asphalt roadway'* refers to asphalt that was used to improve the access roadway at the Respondent's plant in Matsapha yet that is not the case. The Applicant acknowledged the irregularities complained of by the Respondent.

175. The Applicant's attention was further drawn to the use of the word "*site*" on the invoice. On 3 (three) occasions the invoice has mentioned this phrase;

"Contractor's establishment on the site"

The word "site" in the invoice (**B 164**) is consistently singular.

176. The impression that is being created when reading the invoice (**B 164**) is that S&B is owed by the Respondent a sum of E609,734.99 for work done on a particular site. That site is the Respondent's plant. That impression turned out to be deceptive. The correct position is that the invoice (**B164**) is for work done by S&B on 2 (two) different sites namely the Respondent's plant at Matsapha and the Ridgeview Farm at Malkerns.

177. The Applicant's attention was further drawn to exhibit **B 163.** This is a cheque authorization voucher which was prepared and signed by the Applicant dated 2nd September 2005. This exhibit has been mentioned in paragraphs 153 and 154 above. It may be proper at this stage to reproduce the exhibit in full;

Annexure B 163

SWAZILAND BEVERAGES

Cheque Authorisation Voucher

PAYEE: *S&B CIVIL ROADS PTY LTD*	***CHEQUE NO.*** 40795
ADDRESS:	*DATE: 2 SEPTEMBER 2005*

DETAILS	***G.L. CODE***	***AMOUNT***	
		E	***C***
S B L site road	*57020 000 085514*	*609 734*	*99*
Repairs			
	Paid stamp – 31.08.2005		
	TOTAL	609 734	99

AUTHORIZED ***BY:***

……

…

CHEQUE SIGNED BY: **…….**

……..……...

CHEQUE COLLECTED BY: **……..**

……...……

178. The detail that is written in italics in the voucher (exhibit **B 163**) particularly the reason for which payment is made, was written by the Applicant. By signing the voucher the Applicant as financial director placed a demand on the Respondent to

pay S&B a sum of E609,734.99. The Applicant's signature on the voucher further confirmed his approval of the invoice that is being paid (exhibit **B 164**) especially the contents therein.

179. With the phrase "SBL site road repairs" the Applicant meant that he was paying S&B for the work which they had done in repairing the road at the Respondent's site or plant.

180. The Applicant admitted that the information which he provided in exhibit **B 163** is incorrect. The payment aforementioned was in reality for work done by S&B on two sites namely the Respondent's plant in Matsapha and the Ridgeview Farm in Malkerns.

181. The Applicant admitted further that anyone who read exhibits **B 163** or **B 164** would have been deceived regarding the purpose for which payment was demanded and made.

182. The Applicant conceded further that at the time he paid S&B the sum of E609,734.99 using exhibits **B 163** and **B 164** as supporting or confirmatory documents he was aware that these exhibits contain incorrect information.

183. The Applicant admitted that he did not inform the managing director or any other official at work that he had given a loan to the landlord of E89,825.27 from the Respondent's funds. The Applicant further acknowledged that by reading

exhibits **B 163** and **B 164** aforementioned the board, his fellow directors and the other employees would not have known of the aforementioned loan. These documents are silent regarding that loan.

184. The issue before Court is whether the Applicant was wrong to transact the aforementioned payment of E89,825.27 to S&B (which sum was also issued as a loan to the landlord) without authorization by the Respondent. It is common cause that the Applicant carried out the said transaction without authorization from the managing director or any other official from the Respondent.

185. The Applicant argued that he exercised his power and authority as the financial director of the Respondent to carry out the aforementioned transaction with S&B as well as the landlord. According to the Applicant his office already had the necessary authority. There was no need therefore to seek further authorization from the managing director or any other official.

186. The Applicant has advanced reasons in support of his submission that he did not need authority over and above his position as financial director. The Applicant stated that he had the authority from the Respondent to give credit facilities to third parties. He did not need to consult any official at the workplace in order to give such credit facilities. The Applicant treated the loan transaction with the landlord as a credit facility.

187. The Applicant acknowledged that credit facilities apply to customers who purchased products that are sold by the Respondent. The parties are in agreement that the business of the Respondent is to brew and sell beer and further distribute other beverages.

188. The loan of E 89,825.27 which the Applicant gave the landlord did not assist the landlord to purchase any of the Respondent's products.

Instead the loan assisted the landlord to pay for the roadworks that was done on his property - the Ridgeview Farm. This fact was confirmed by the Applicant in the quotation that appears in paragraphs 59 and 60 above. The reason that was advanced by the Applicant regarding credit facilities fails to support his argument. The loan could not be classified as a credit facility. The Applicant's argument therefore fails.

189. Another reason that was advanced by the Applicant for the loan transaction was that he had been given authority by the managing director Mr Uys. That authority was in writing.

190. Mr Uys denied that he gave the alleged authority in writing or at all. The Applicant was thereafter challenged by the Respondent's counsel to produce the alleged written authority. Despite the challenge the Applicant failed to produce the alleged authority or give an explanation as to why it cannot be produced. That created doubt in the mind of the Court whether such authority does exist. The Applicant has failed to persuade the Court regarding the

authority he claimed to be operating under. This allegation by the Applicant also fails. It is not supported by evidence.

191. The Applicant stated that Mr Uys confirmed at the disciplinary hearing that the Applicant had authority to enter into the loan transaction with the landlord. Mr Uys however denied that he made such a statement.

192. The Respondent referred the Court to the minutes of the disciplinary hearing. The purpose of doing so was to demonstrate that the confirmation alleged by the Applicant was never made. Both parties however agreed that the minutes (annexure **C**) are incomplete. The Court will therefore place no reliance on those minutes

193. Following his conviction and sentence in the second disciplinary hearing, the Applicant filed an appeal. The notice and grounds of appeal were handed into Court as exhibit **A 65**. It is noted that the Applicant did not mention in his grounds of appeal the allegation that Mr Uys confirmed at the disciplinary hearing that he (Applicant) had authority to enter into the aforementioned loan transaction.

194. The Applicant acknowledged that such a confirmation allegedly made by Mr Uys at the disciplinary hearing was important for him to support his case.

The Applicant further acknowledged that he would have strengthened his argument on appeal if he had included the alleged confirmation in his grounds of appeal, and subsequently proved it. The chairperson of the appeal hearing would have heard a chance to investigate the allegation and make a finding on it. The Applicant failed to explain the reason he did not include the alleged confirmation in his grounds of appeal. The Applicant's argument accordingly fails due to lack of evidence.

195. Instead, the evidence points to the opposite direction. In clause 4.2 of the Applicant's (Appellant's) notice of appeal (exhibit **A 65**), the Applicant stated as follows;

> *"4.2 The managing director did not testify that the Appellant (Applicant) required his authority, nor was the issue of authority canvassed with the managing director during the course of the hearing."*
>
> *(Exhibit A 65 page 68)*

196. The Applicant states clearly in this quotation that Mr Uys (managing director) did not testify on the issue of authority at the hearing. In that case it follows logically that Mr Uys did not confirm that the Applicant had the necessary authority to carry out the loan transaction with the landlord.

The Applicant's evidence clearly contradicts his own grounds of appeal in particular clause 4.2 of exhibit **A 65.** This contradiction further weakens the Applicant's argument.

197. The Applicant acknowledged the contradiction between his evidence and the exhibit submitted by him (**A 65**). He was then given an opportunity to explain this contradiction. The Applicant replied that he had no explanation to give.

198. The Applicant testified as follows on this issue;

> "***RC*** *Fine, thank you. Any explanation Mr Delport [Applicant] that you'd like to offer us as to why the document you prepared for your appeal that we have just looked at is contrary to your evidence here, yesterday, Monday and today ?*
>
> ***AW1*** *None, I don't"*
>
> *(Record volume 3 page 9)*

199. The Applicant argued further that his exercise of authority as financial director in the loan transaction with the landlord was also based on precedent.

According to the Applicant his predecessor Mr Duane Birkholtz exercised the same authority also acting in his capacity as financial controller.

200. The Applicant referred the Court to exhibit ***A 35.*** This exhibit has been dealt with in paragraphs 84 to 89 above. According to the Applicant, Mr Birkholtz loaned the landlord various sums of money on several occasions, which had been taken from the Respondent's funds. The Respondent used these loans to improve his property – the Ridgeview Farm. The Applicant alleged that Mr Birkholtz exercised his authority as financial director and did not consult his immediate superior (the managing director) when he gave the landlord the said loans.

201. According to the Applicant, Mr Birkholtz advanced the landlord the said loans without authorization from the Respondent. The Applicant alleged that Mr Birkholtz relied solely on the authority that is vested in his office as financial director when he advanced the landlord the said loans. The Applicant noted that the Respondent did not take disciplinary action against Mr Birkholtz for this conduct.

202. The Applicant interpreted the Respondent's conduct to mean that Mr Birkholtz has done nothing wrong in the manner he advanced the landlord the said loans. The Applicant argued that the Respondent's conduct created a precedent which he (Applicant) has followed in the manner he carried out the loan transaction with the landlord of E89, 825.27.

203. The Applicant has not provided evidence to support his argument. Annexure **A 35** which the Applicant relied on does not advance his case. There is no indication in annexure **A 35** or any where else that Mr Birkholtz acted without

authority from the Respondent when he advanced the loans alleged by the Applicant. The Applicant's argument is based on assumption and speculation. This argument concerning Mr Birkholtz is accordingly baseless and therefore fails.

204. The Court has noted further that the Applicant was not employed by the Respondent during Mr Birkholtz's term of office. The Applicant succeeded Mr Birkholtz. The Applicant is accordingly not in a position to have knowledge of communication that took place in his absence between Mr Birkholtz and the managing director.

The Applicant cannot therefore state with certainty and under oath that Mr Birkholtz acted without authority when he advanced the landlord the alleged loans. This argument by the Applicant is purely speculative. It cannot succeed for this reason as well.

205. While the Applicant was arguing the issue of precedent, he referred the Court to another example which involved Mr Uys. Mr Uys spent a sum of E38, 187.00 which was taken from the Respondent's funds to improve security features in a house which he was allocated by the Respondent. Mr Uys admitted that he used the Respondent's funds to pay for the security improvement exercise at his official residence. The details of the expenditure incurred and savings made is dealt with in paragraphs 97 to 106 above.

206. Mr Uys denied however that he acted without authority. Though he was managing director, Mr Uys maintains that he needed to be authorized in order to expend company funds in the manner he did. He argued that he sought and obtained authorization before he incurred the expenditure.

207. According to Mr Uys, he discussed in detail, the proposal to improve security with two (2) members of the Respondent's executive committee. This discussion took place between Mr Uys, the Applicant and Mr Vincent Manyatsi. Mr Manyatsi was the human resources director for the Respondent. These two (2) directors gave Mr Uys the authority to proceed with the security improvement exercise as discussed. Mr Uys further obtained authority from his superior from the head office a Mr Manuel Fandeso.

208. When the time for payment came, Mr Uys requested Mr Manyatsi and the Applicant to sign the necessary financial instruments in order to effect payment. These two (2) directors complied. Payment was made. The request by Mr Uys to these two (2) directors to arrange payment is contained in a letter marked exhibit ***A 80.*** This exhibit has been reproduced in paragraph 92 above.

209. The Court has noted that the Applicant has not denied the allegation made by Mr Uys concerning the Applicant's joint participation together with Mr Manyatsi in the security improvement exercise. According to Mr Uys he made a

proposal to these two (2) directors as members of the company executive committee.

A detailed discussion took place. An agreement was reached which Mr Uys was authorized to implement.

210. The role that Mr Manyatsi and the Applicant played in making payment for the security improvement confirms that they had authorized the exercise. The Applicant has not denied that he knowingly signed and paid the service provider (Mr Dan Packard) the required fee. The contents of exhibit ***A 80*** further confirm the aforementioned agreement and authority that was given to Mr Uys.

211. Mr Uys has stated that he was further authorized by his superior from the head office Mr Manuel Fandeso. That statement has not been challenged. The Applicant has further not challenged the mandate of the company executive committee to authorize Mr Uys to implement the improved security features that had been agreed upon.

212. The Court is satisfied that Mr Uys carried out the security improvement exercise with authority from the company executive committee as well as the head office director.

This evidence does not support the Applicant's argument that Mr Uys expended company funds to improve property that belongs to a third party without authority. The manner the Applicant advanced a loan of E89,825.27 to the

landlord is not comparable to the manner Mr Uys improved Mr Palmer's house. In the Applicant's case there was no authority. In the case of Mr Uys there was authority. This particular example on precedent fails as well. It is not supported by evidence.

213. The Applicant thereafter referred the Court to another example to support his argument that his conduct was based on precedent. This example involved the building of a cottage at the Ridgeview Farm. The Applicant stated that he was granted permission by the managing director Mr Gavin Brown to build a cottage or extend the company house in which the Applicant was resident.

214. Thereafter the Applicant entered into a contract with a builder. The Applicant stated that he drew the basic building plans. He paid the builder the contract price of E110,000.00 from the Respondent's funds. He did this without consulting the managing director or any other official. Instead he exercised his authority as financial director in making decisions regarding the building and financing of the cottage.

The Respondent did not condemn the Applicant in the manner he carried out the building of the cottage.

215. The Applicant interpreted the Respondent's aforementioned conduct as confirmation that he had done nothing wrong in the manner he had handled the building of and the payment for the cottage. In particular, the Applicant in his capacity as a financial director exercised his discretion and expended the

Respondent's funds without consulting a responsible official, in a transaction that fell outside the Respondent's core business.

216. According to the Applicant the authority he exercised when he built the cottage is the same authority he exercised when he advanced a loan to the landlord to pay for the road. As the financial director he had full authority to handle the loan of E89,825.27 in the manner he did.

217. The Court is not convinced that the manner the cottage was built is comparable to the manner the loan of E89,825.27 was given to the landlord. In the eyes of the Court these two (2) incidents differ in a material respect.

218. The building of the cottage did not take the managing director (Mr Gavin Brown) by surprise. The Applicant and Mr Brown had discussed the need for the cottage and the options available. The idea was to create space for the Applicant's family and it seemed good to Mr Brown as well.

219. The Applicant's evidence is that Mr Brown told the Applicant to either build a cottage on the property or to extend the existing house. That amounted to an approval of the project by Mr Brown. That approval was sufficient authority to get the cottage built.

220. Mr Brown thereafter left the details of the project in the hands of the Applicant. That empowered the Applicant to initiate, follow up, and supervise the building

and financing of the cottage. By conduct, Mr Brown delegated his authority to commence and supervise the entire building project to the Applicant.

221. The Applicant accordingly exercised delegated authority in all the steps that he took regarding the building of the cottage. The same however cannot be said regarding the loan which the Applicant gave the landlord of E89,825.27 and the circumstances under which it was granted.

The managing director (Mr Uys) was not made aware of the loan. He played no role in the manner the loan was granted. These two (2) transactions are therefore not comparable, namely the loan that was advanced to the landlord and the building of the cottage. This example which has been submitted by the Applicant fails as well. It does not support the principle which the Applicant is trying to establish.

222. The Applicant's argument that he did not need authorization in order to carry out the loan transaction involving the landlord and S&B cannot succeed. The reasons for and the circumstances under which the loan was given created the need for the Applicant to obtain authorization.

223. It is common cause that S&B submitted a quotation to the Respondent for specific roadworks to be carried out at the Respondent's plant at Matsapha for a specific price. The quotation together with the annexures are marked exhibits **B 160** and **B 162**. These exhibits are dealt with in paragraphs 145 and 146 above.

224. Mr Uys, as managing director represented the Respondent in the negotiations with S&B. Mr Uys accepted the terms that were offered by S&B in their quotation. That acceptance was in writing and was endorsed in annexure **B 160**. A contract came into existence between the Respondent and S&B for specific work, at a specific site and for a specific amount. As a result of that contract S&B began the roadworks at the Respondent's plant (site).

225. The contract between the Respondent and S&B (annexure **B 160**) was concluded by a senior employee of the Respondent, the managing director. An employee that was junior to the managing director had no authority to interfere with that contract especially where the liability of the Respondent is unfavorably increased by that interference. The Applicant's conduct undermined the authority of the managing director. The Applicant required authority from the managing director in order to amend the contract. The Applicant proceeded to amend the contract without authorization. The Applicant's action amounted to misconduct.

226. Furthermore, the Applicant exceeded his level of authority by his conduct. The managing director was contactable by mobile telephone and e-mail.

If there was a genuine need to amend the contract or engage S&B in another contract the Applicant should have contacted the managing director for authorization.

227 The manner exhibits **B 163** and **B 164** were written indicates that there was no intention on the Applicant to reveal to the Respondent the vital information regarding the work that was done by S&B and the amount of money that was charged for each site. The Applicant admitted that the contents of exhibits **B 163** and **B 164** are misleading to the reader.

228. The Applicant prepared exhibit **B 163**. The Applicant manipulated the manner exhibit **B 164** was written. The Applicant paid S&B its fee on the strength of exhibits **B 163** and **B 164**. The Applicant as financial director had no authority to pay S&B on the strength of supporting documents which he knew contained incorrect information and which was prejudicial to the Respondent.

229. The Respondent was not liable to S&B for the work the latter did at the Ridgeview Farm. This fact was known to the Applicant.

Despite that knowledge the Applicant proceeded to pay S&B the sum of E89,825.27 from the Respondent's funds which sum was the landlord's liability. The Applicant therefore imposed on the Respondent without authority, liability which was not the Respondent's.

230. The Applicant carried out the loan transaction without authorization from the Respondent in circumstances where authorization was necessary. The Applicant has accordingly made himself guilty of gross misconduct.

231 It is not a minor offence for a financial director of a company to manipulate records in order to conceal the truth and mislead the reader, especially the employer. In addition the financial director proceeded to use those incorrect documents to support a payment of E89,825.27 from company funds for which the company (employer) was knowingly not liable. In the process the financial director interfered with a contract which had been signed and concluded by an employee of the company senior to the financial director. This interference purposely increased the liability of the employer without authorization. This information was not brought to the attention of the managing director or any other senior official of the company.

232. Another complaint that the Respondent raised in the charge 'c' under the heading 'Gross misconduct' was that the loan of E89, 825. 27 which the Applicant gave the landlord was not documented. The Applicant insisted that the loan was documented and he produced exhibit ***A 36*** as proof thereof. Exhibit **A 36** was introduced by the Applicant as an acknowledgement of debt.

233. The Applicant confirmed that exhibit ***A 36*** is the only written proof that he has of the loan of E89,825.27 which he gave the landlord. This document (**A 36**) has been dealt with in paragraphs 122 to 140 above. The Respondent has denied that

the loan is documented. In particular, the Respondent denies that exhibit **A 36** contains a record of the loan of E89,825.27 which the Applicant advanced the landlord from the Respondent's funds.

234. The Respondent argued that it has not been named as a creditor in exhibit ***A 36***. Since the loan was taken from the Respondent's funds, the Respondent should have been mentioned as the creditor in the exhibit (***A 36)***. Instead the exhibit is addressed to the Applicant. It authorizes the Applicant's wife (Mrs Karin Delport) to collect rent from the tenants at Ridgeview Farm. Exhibit **A 36** makes no mention of the Respondent at all.

235. The Applicant testified that he drafted exhibit ***A 36*** and asked the landlord to sign it. The Applicant conceded that the identity of the creditor in an acknowledgement of debt is essential and that it is missing from the document (exhibit ***A 36).*** The Applicant is adamant however that the omission of the name of the creditor in a written acknowledgement of debt does not render it defective. The Applicant is satisfied with exhibit ***A 36*** as it stands and considers its contents sufficient to protect the interests of the Respondent.

236. It is imperative in a written acknowledgement of debt that both the debtor and creditor should be identified ex facie the document. There must be an existing and identifiable debtor who acknowledges himself to be indebted to an existing and identifiable creditor in a fixed or determinable sum of money.

237. Exhibit ***A 36*** is defective and therefore unenforceable as an acknowledgement of debt. There is no creditor who can enforce it.

The omission of the creditor is critical and compromises the status of the document as a written acknowledgement of debt. Extrinsic evidence will have to be led in order to complete or supplement the deficiency.

Exhibit ***A 36*** is accordingly incomplete and invalid as a written acknowledgement of debt as a result of the omission of the name of the creditor.

238. The Respondent's second attack on exhibit **A 36** is that the amount allegedly loaned the landlord has not been mentioned in the document.

239. A written acknowledgement of debt that does not disclose the amount owing is incomplete and unenforceable. Extrinsic evidence will have to be led to supply the missing information. The written status of the document is thereby compromised.

240. The Applicant conceded the defects aforementioned. He then stated that he relied on his personal knowledge regarding the identity of the creditor and the amount owing.

241 A third attack on exhibit ***A 36*** related to the terms of payment of the loan which the Respondent claims are missing from the document. Alternatively, the payment terms are incomplete and therefore impracticable.

242. The Court has already made a finding that the exhibit **A 36** is compromised as a written acknowledgement of debt, in that it fails to disclose the creditor as well as the amount owing. Even if these defects were not present, still the exhibit would fail as it contains additional faults. The terms of payment of the loan are a material component of the acknowledgement of debt and they are missing from exhibit **A 36**.

243. The Applicant has drawn the Court's attention to a clause in exhibit ***A 36*** which according to the Applicant contains the terms of payment of the loan. The clause reads as follows;

> *"E185 per month per house (excl. old house) for a period of 5 (five) years as repayment for the road."*

244. Exhibit ***A 36*** does not disclose the number of houses that should be considered in the calculation of the monthly instalments scheduled for the payment of the loan. As a result it is not possible to arrive at a figure which the landlord undertook to pay on a monthly basis.

Extrinsic evidence would have to be led to supply the missing information.

245. Besides the arithmetical difficulty mentioned in the preceding paragraph, there is a contextual difficulty as well with the phrase;

"…payment for the road".

There is no explanation in exhibit **A 36** as to which road is being referred to and its relevance to the loan. Extrinsic evidence will have to be lead to complete the missing detail.

246. A fourth attack on the exhibit ***A 36*** related to absence of detail as to how the landlord had planned to convert his rent at Ridgeview Farm to payment of the loan due to the Respondent. The Applicant conceded that exhibit **A 36** is silent in that regard.

247. The Applicant explained that he had worked out a payment plan in his mind. The monthly rent owed by the Respondent to the landlord would be set off against the monthly payment of the loan owed by the landlord to the Respondent. No money would change hands. The rent owed to the landlord by the Respondent is dealt with in paragraphs 136 above.

248. Thereupon the Applicant disclosed that among himself, Mrs Delport and the landlord there was no intention to comply with the contents of annexure ***A 36***. Instead annexure ***A 36*** was a document which he (Applicant) drew up for his own records. The landlord did not testify at this trial. It is not clear as to what went on in his mind regarding exhibit ***A 36*** in view of the Applicant's averments.

249. When taking into consideration the defects complained of regarding exhibit ***A 36,*** the Court is convinced that the exhibit has failed to satisfy the requirements of a written acknowledgement of debt. There are crucial details that are missing in the exhibit, some of which the Applicant admitted that they existed only in his mind. Since the Applicant is the author of exhibit **A 36**, and he was the financial director of the Respondent, he had the duty, opportunity and the means to include in that exhibit the details that were necessary to protect the Respondent's rights and interests including those that existed in his mind.

250. The Respondent was correct in finding that the loan of E89,825.27 which the Applicant gave the landlord was not documented, and was not reflected as a loan in the financial records.

The Applicant created an unnecessary risk for the Respondent by giving out an unauthorized loan without the necessary documentation to protect the Respondent's rights and interests. This action amounted to gross misconduct. The Applicant was therefore correctly convicted of charges (b), (c) and (d) as combined under the heading "Gross misconduct".

251. The Applicant has also challenged the sentence of dismissal. According to the Applicant the dismissal is unduly harsh when taking into consideration the nature of the offence and his personal circumstances.

252. The Applicant states that he has worked for the Respodent and its parent company SA Breweries Ltd for 16 (sixteen) years. During that period he was never

disciplined for misconduct or any work - related offence. He stated that he is a first offender.

253. The Applicant argued further that his dismissal was unfair in that it contravenes section 36 of the Employment Act No. 5 of 1980 as amended. Section 36 provides as follows;

> "36. It shall be fair for an employer to terminate the services of an employee for any of the following reasons-
>
> *(a) because the conduct or work performance of the employee has, after written warning, been such that the employer cannot reasonably be expected to continue to employ him;*
>
> *(b) because the employee is guilty of a dishonest act, violence, threats or ill treatment towards his employer, or towards any member of the employer's family or any other employee of the undertaking in which he is employed;*
>
> *(c) because the employee wilfully causes damage to the buildings, machinery, tools, raw materials or other objects connected with the undertaking in which he is employed;*
>
> *(d) because the employee, either by imprudence or carelessness, endangers the safety of the undertaking or any person employed or resident therein;*

(e) because the employee has wilfully revealed manufacturing secrets or matters of a confidential nature to another person which is, or is likely to be, detrimental to his employer,

(f) because the employee has absented himself from work for more than a total of three working days in any period of thirty days without either the permission of the employer or a certificate signed by a medical practitioner certifying that he was unfit for work on those occasions;

(g) because the employee refuses either to adopt safety measures or follow the instructions of his employer in regard to the prevention of accidents or disease;

(h) because the employee has been committed to prison and thus prevented from fulfilling his obligation under his contract of employment;.

(i) because the employee is unable to continue in employment without contravening this Act or any other law;

(j) because the employee is redundant;

(k) because the employee has attained the age which in the undertaking in which he was employed is the normal retiring age for employees holding the position that he held;

(l) for any other reason which entails for the employer or the undertaking similar detrimental consequences to those set out in this section".

254. According to the Applicant any dismissal that is not protected by section 36 is unfair. This submission derives support from section 42 of the Employment Act. This section provides as follows;

> *"42 (1) In the presentation of any complaint under this Part the employee shall be required to prove that at the time of 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."*

255. After the dismissal the Applicant tried but failed to get new employment. He then started a jewellery business which he operates with his wife in Paarl in the Republic of South Africa. He has two (2) daughters at high school. His eldest

daughter is at college. All three daughters depend on both the Applicant and the wife for support. At the time of trial the Applicant was about forty seven years old.

256. The Applicant argued that the did not personally gain from the loan transaction that brought about the guilt verdict. He was merely helping the landlord who needed financial assistance to pay a debt he owed S&B.

257. The impression given (though without the necessary detail) was that the Applicant is worse off economically after the dismissal despite being involved in business as a supplier of jewellery.

258 In the eyes of the Court the misconduct which the Applicant was found guilty of is serious.

The Applicant occupied a senior position at work namely financial director. He was responsible inter alia for controlling and protecting the Respondent's funds.

259. The Court is satisfied that the Applicant was correctly convicted for gross misconduct at the disciplinary hearing. The Court however takes note of the fact that the Applicant has never been served with a written warning. It is not in dispute that the Applicant is a first offender.

260. The provisions of section 36 as read with section 42 of The Employment Act are mandatory. In terms of section 36 (a) it is unfair for an employer to dismiss an

employee for misconduct - even gross misconduct, unless the dismissal is preceded by a written warning.

261. The Respondent has supported the dismissal. The support is based on section 36 (*l*) of The Employment Act. This section permits the employer to dismiss an employee without notice -

> *"for any other reason which entails for the employer or the undertaking similar detrimental consequences to those set out in this section".*

262. The Respondent's argument reads as follows:

> *"It is submitted that the misconduct of which the applicant is guilty in this case does indeed entail for the employer similar detrimental consequences to the offences, and is therefore covered by s 36 (j) [36 (l)] of The Employment Act. It had serious consequences for the protection of the business of SBL (Respondent), for the transaction exposed it to serious risk, where there was a lack of authorisation and proper documentation that would safeguard the company's rights and interests".*
>
> *(Respondent's Heads of Argument page 65 paragraph 148)*

263. The Respondent's argument is that if an employee is found guilty of a work-related misconduct which has detrimental consequences similar to those listed

in section 36 (b) to 36 (k) of The Employment Act, the employer would be justified in terms of section 36 *(l)* in dismissing that employee without prior written warning.

264. The Court is not convinced that the Respondent has correctly interpreted section 36 *(l).* Dismissal for misconduct is governed by section 36 (a). If the legislature intended to provide an exception to section 36 (a) and permit an employer to dismiss a first offender for misconduct in certain cases, it would have done so in a clear language.

265. The Respondent's interpretation of section 36 *(l)* clearly contradicts section 36 (a). There is another interpretation available of section 36 *(l)* which complements rather than contradict section 36 (a). An interpretation of a statute that leads to an absurd conclusion should be avoided especially where there is another interpretation that leads to clarity and consistency.

266. The understanding of the Court is that section 36 *(l)* was designed for offences other than those listed in section 36(a) to 36 (k). It is impracticable for the legislature to list all the possible offences that may take place at the workplace and for which an employee may be dismissed.

267. Sections 36 (a) to 36 (k) contain a list of those offences which in the opinion of the legislature commonly occur at the workplace. However the legislature left the door open in section 36 *(l)* to include any other offence which has not been listed

in sections 36 (a) to 36 (k) whose occurrence attract a dismissal sanction for a first offender.

268. In terms of section 42 (2) of The Employment Act, the employer carries the burden to prove that a dismissal of an employee is justified in terms of section 36.

It is common cause that the dismissal of the Applicant for misconduct was not preceded by a written warning. That dismissal is therefore unfair in terms of section 36 (a) of The employment Act. The Respondent has failed to discharge its burden to justify the dismissal. The Applicant was therefore unfairly dismissed.

269. In the circumstances, the Applicant is entitled some relief for unfair dismissal. In section 16 (6) of the Industrial Relations Act the Court is allowed some discretion to make an award for compensation for unfair dismissal that is just and equitable in all the circumstances of the case.

270. The Court has taken into consideration the post- dismissal circumstances of the Applicant especially the fact that he is gainfully employed as a businessman. The Court hereby awards the Applicant an equivalent of 3 (three) months salary by way of compensation.

271. The Applicant has already received from the Respondent payment of notice equivalent to three (3) months salary. The issue notice is therefore is settled.

272. The Applicant has further claimed payment of performance bonus in the sum of E150,000.00 (One Hundred and Fifty Thousand Emalangeni).

273. According to the Applicant, there was an incentive bonus that the Respondent paid her employees based on some profit - related goals achieved within a financial year. In the year 2004-2005 bonus was not paid because the target was not achieved. However in the previous financial year 2003–2004 bonus was paid.

274. The Applicant expected payment of bonus in the year 2005–2006 since the company was performing well. The Applicant was dismissed before the end of the financial year. The year ended 30th March 2006. The Applicant was dismissed 1st December 2005.

275. The Applicant argued that the Respondent paid its employees bonus for the financial year ending 30th March 2006. Had he not been dismissed he would have been paid just like the others. The Applicant estimated his share of bonus at E150,000.00 (One Hundred and Fifty Thousand Emalangeni). The Applicant has based this estimate on payments he had received in the previous occasion.

276. A relevant portion of the Applicant's evidence reads as follows;

AC:…*can you explain to your lordship what that incentive bonus was ?*

AW1 *My Lord this was not a bonus that was inherent it was an incentive bonus paid for particular achievement by the company in terms of profits for the year and certain goals that I had.*

AC *How was the incentive bonus calculated ?*

AW1 *It was based on previous calculations it was purely just an estimate its not a 100% correct amount it was estimated based on prior year's payments.*

AC *Based on prior years' payments you estimated that this particular year you would receive E150 ?*

AW1 *That's correct.*

Judge *Was it [inaudible]*

AW1 *That's correct.*

AC *Previously had an incentive bonus been paid ?*

AW1 *The prior year not because we didn't achieve our target but the year prior to that yes there was a bonus paid.*

AC *And in the particular year you were dismissed had you achieved your specific goals.*

AW1 *Unfortunately I left before the end of the financial year but at the time we were on track to achieve the target amount."*

(Record Volume 2 Pages 18-20)

277. The passage that has just been quoted reveals certain facts that are pertinent to the bonus claim. Payment of bonus was subject to 2 (two) conditions. The company (Respondent) had a profit – related target. Also the Applicant had his individual performance target. Both conditions had to be met before the Applicant could claim payment of bonus for a given period.

278. On the one hand the evidence indicates that the amount that was payable as bonus was based on some calculation. The method of calculating bonus was however not revealed. The Applicant has failed to demonstrate how he arrived at the figure E150,000.00 (One Hundred and Fifty Thousand Emalangeni).
This figure appears both in the Applicant's pleadings and the evidence.

279. On the other hand the evidence indicates also that the amount which the Respondent had previously paid as bonus was based on estimates. This is what the Court understands by this statement from the Applicant's testimony;

*"**AC*** *How was incentive bonus **calculated**?*

AW1 *It was based on previous calculations **it was purely just an estimate its not 100% correct amount it was estimated** based on prior years payments."*

(Emphasis added)

(Record volume 2 Page19)

280. The Court has not been told how the estimates were done. Whether or not there is any predictable pattern or determinable format in the past estimates or payments which should influence the Respondent's decision regarding future payments. Alternatively, whether or not the estimates depended solely on the generous discretion of the Respondent. It is also not clear to the Court which portion of the bonus is subject to calculation (if any) and which portion is a result of estimates.

281. The Applicant stated that he was entitled to payment of bonus for the year ending 30th March 2006. However

the Applicant did not state whether or not he met his personal target for that period, and if so, what that target was.

282. The Applicant's evidence reads as follows;

"AC *And in the particular year that you were dismissed* ***had you achieved your specific goals****.*

AW1 *Unfortunately I left before the end of the financial year but at the* ***time we were on track to achieve the target amount".***

(Emphasis Added)

(Record Volume 2 pages 19-20)

283. In the passage that is highlighted, the Applicant seems to be talking in the plural. The Applicant appears to be talking about himself together with his fellow employees when he says "*we were on track*….". The Applicant confirms that at the time of his dismissal (1st December 2005) the Respondent had not reached its target yet.

There was hope though that the target might be reached at the end of the financial year as the Respondent was performing well. The Respondent is not saying that he reached his personal target.

284. The Applicant's answers to the two (2) questions that followed indicated that the Respondent did eventually reach its target for the year ending 30th March 2006. The evidence runs as follows;

AC *At the time you left had you achieved the target?*

AW1 *It would have only been calculated at the end of the financial year at the end of March if you look at the total financial year.*

AC *At the end of the financial year was the target reached?*

AW1 *It was reached.*

AC *Had you reached the target for this particular financial year would you had received the bonus ?*

AW1 *I would have received the bonus"*

(Record volume 2 page 20)

285. The Applicant seems to suggest that since the Respondent managed to reach its target he was therefore entitled to payment of his share of bonus. The difficulty with that claim was that there is no evidence that the Applicant met his personal target.

286. Even if the passage that is quoted in paragraph 285 above were to be interpreted to mean that the Applicant was talking about his own personal target being met, still there would be difficulty with that statement.

287. The Applicant has not defined his target. Further he has not led evidence to prove that he met that target. It is likely that someone in authority would have to assess the Applicant's performance and make a determination on whether or not that target has been met. It is not likely that the Applicant would assess his own performance, make a determination in his favour and proceed to make a declaration that his target has been met.

288. The Applicant has stated in his heads of argument that Mr Uys conceded that the Applicant would have been paid a bonus had he not been dismissed. The Applicant states as follows in his heads:

> *"As already submitted above, the Applicant seeks compensation of twelve months remuneration, which includes E150,000.00 bonus, which the MD [managing director] Greg Uys, conceded would have been paid to the Applicant but for his summary dismissal".*
>
> *(Applicant's Heads of Argument page 9)*

289. The evidence of Mr Uys has been misunderstood. Mr Uys stated as follows;

*"**AC** And so Mr Delport would have got a bonus if he hadn't been dismissed.*

A *Correct he would have got a bonus based on the company profit **and if he achieved his personal goals**.*

AC *If he wasn't dismissed he would have also got a bonus.*

A *Correct".*

(Emphasis added)

(Record volume 4 page 112)

290. The principle that Mr Uys is stating here is that the Applicant would under normal circumstances have been entitled to payment of bonus like any other employee.

However that bonus would have be payable based on company profit and **provided the Applicant has achieved his personal goals.** The answer that Mr Uys gave is therefore conditional and must be understood in that light.

291. Mr Uys did not say that the Applicant achieved his personal goals. Instead Mr Uys left the question unanswered when he said ***… if he achieved his personal***

goals. That meant that Mr Uys did not commit himself to say the Applicant has achieved his personal goals. There was therefore no confirmation from Mr Uys as alleged by the Applicant. What Mr Uys did was to restate the principle relating to payment of bonus.

292. Mr Uys further distanced himself from the amount of E150,000.00 claimed by the Applicant as bonus. The evidence of Mr Uys on this point reads as follows;

> *"**AC** You know how much that bonus would have been.*
>
> ***AC*** *The records would show, I haven't got the records here.*
>
> ***AC*** *Would you give us an estimate.*
>
> ***A*** *I see that Mr. Delport was netting E150.000, he was a Financial Director I would assume its about a lot ."*
>
> *(Record volume 4 page 112-113).*

293. Mr Uys was asked to give an estimate of how much the Applicant's bonus would have amounted to if he qualified for payment. Mr Uys answered that the Applicant would have been paid a lot of money for bonus. He quickly added that this was an assumption on his part.

294. The answer that Mr Uys gave does not assist the Applicant. It is based on an assumption and not fact. Mr Uys indicated that a correct answer to the question is in the records. But since he did not have the records with him he cannot give a correct answer.

295. The answer that Mr Uys gave does not confine itself to a particular figure or a range of figures. The phrase *it's about a lot"* could go either way. It could mean a sum of money in excess of E150,000.00. It could also mean a sum of money below E150,000.00. It depends on what in the opinion of Mr Uys is a lot of money. Mr Uys did not say that the sum of E150,000.00 was a correct figure for bonus payment.

296. The notion that Mr Uys confirmed that the Applicant has qualified for payment of bonus and is entitled of bonus in the sum of E150,000.00 is accordingly rejected for reasons aforementioned.

297. According to Mr Uys, payment of the bonus is based on 2 (two) requirements namely, the company profit and the achievement of the Applicant of his goals.

298 Even if the Applicant were to convince the Court that he achieved his personal goals (which is not the case), still the Applicant had a duty to bring before Court evidence concerning the company profit. The Applicant would have to

show how that company profit translates to his claim of E150,000.00. That evidence is not before Court.

299. The Applicant stated in his evidence that the amount of E150,000.00 is his estimate of bonus due to him. He further stated in his pleadings that bonus due could not be less that E150,000.00. The Applicant did not state how he arrived at that figure.

300. In answer to the Applicant's claim to payment of bonus the Respondent stated as follow in its pleadings;

> *"The Respondent submits that the Applicant was not* ***entitled*** *to an incentive bonus and that such bonus was purely at the discretion of the Respondent."*
> *(Book of Pleadings page.61)*

301. The Respondent made it clear to the Applicant at the early the stage of the pleadings that the claim for bonus is disputed. The Applicant should have realized the need to bring all the required evidence to satisfy the Court that he qualifies for payment of bonus in a particular amount.

302. The Court is not persuaded that the Applicant has achieved his personal goals which would entitle him to claim payment of bonus. The Court has no knowledge how the amount of E150,000.00 claimed by the Applicant was

arrived at. In the absence of evidence from the Applicant, and a further absence of a concession from the Respondent, the Court is unable to make any award on the claim for bonus.

303. The Applicant argued further that he was entitled to payment of repatriation cost in the sum of E30,000.00 (Thirty Thousand Emalangeni). It was company policy to pay the cost of moving its employees from one division to another. The company was further liable to pay the cost of moving an employee on retirement.

304. The Applicant stated that the Respondent paid the cost of transferring him together with his family and assets to Swaziland when he joined the Respondent in March 2002. The Respondent remained liable to pay the Applicant's relocation expense in the event that the Respondent assigned the Applicant work in another division of the parent company or retired from work. It is common cause that the Respondent is not liable to pay relocation expense for an employee who is dismissed.

305. The Applicant is indeed entitled to benefits arising from the employment contract which he would otherwise have received but for the dismissal. The Respondent has not challenged the principle under which the repatriation costs are claimed by the Applicant. The Respondent has also not challenged the sum of E30,000.00 (Thirty Thousand Emalangeni) which the Applicant has claimed as repatriation costs he incurred when he moved after his dismissal.

306. What the Respondent was challenging, is the basis on which the claim was framed namely the unfair dismissal. The Respondent's opinion was that the dismissal was fair. The Court has now made a determination that the dismissal is unfair.
The basis of the Respondent's resistance to this claim therefore falls away.

307. The Applicant is accordingly entitled to compensation for repatriation expense incurred in the sum of E30,000.00 (Thirty Thousand Emalangeni).

308. The Applicant has further prayed for costs of suit. Both parties are to some extent successful in this matter. The Respondent has succeeded in defending the guilt verdict at the disciplinary hearing but erred in the sentencing of the Applicant. The Applicant has succeeded in attacking the dismissal. In the exercise of its discretion the Court finds that it is fair that each party pays its costs.

309. The Court accordingly orders the Respondent to pay the following;

(1)	Compensation in the sum of	E273,834.00	(*E91.278 x 3 months)*
(2)	Repatriation costs	E30,000.00	
	TOTAL	**E303,834.00**	

The Members agree.

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D. MAZIBUKO –

INDUSTRIAL COURT JUDGE.