INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.259/2012

In the matter between:

VUSI NDZINGANE Applicant

And

SWAZILAND BUILDING SOCIETY Respondent

Neutral citation: Vusi Ndzingane vs Swaziland Building Society (259/2012) [2018] SZIC 42

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

Last Heard: 31st May 2018

Delivered 4th June 2018

Summary: 1) DISCIPLINARY CODE

Employer and Union agreed on a disciplinary code. Employer conducted a disciplinary hearing against an employee. Employee was found guilty of misconduct. Disciplinary code provides for a sanction of - written warning. Employer unilaterally deviates from code and issues a dismissal verdict instead of written warning.

Held: *Employer is not entitled to unilaterally deviate from the code and impose a heavier sanction than is provided for in the code.*

Held further: *The Court would permit deviation from the code provided the party seeking deviation –*

1.1 *proves that the case has exceptional and appropriate circumstances which warrant a departure from the code, and,*

1.2 *that the other party has been consulted and has agreed to the deviation.*

2) *DEFALCATION*

Defalcation is an offence that is listed in the code and involves fraudulent misappropriation or dishonest appropriation of money held in trust. Intention on the accused – employee is a necessary element to prove defalcation.

3) CHANGE OF PLEA

An accused employee is legally entitled to change his plea in the course of a disciplinary hearing from guilty to not guilty. A change of plea by an accused employee is not an aggravating factor to the offence with which he is charged. An accused-employee cannot be penalised for exercising his right to a change of plea.

JUDGEMENT

1. The Respondent is Swaziland Building Society, a financial institution established in terms of the company laws of Swaziland. The

Respondent operates business as a building society and a bank. The Respondent has several branches in the Kingdom of Swaziland.

2. The Applicant is Vusi Ndzingane a former employee of the Respondent. The Applicant was an employee in respect of whom section 35 of the Employment Act No.5/1980 (as amended) applies.

3. By letter dated 8th October 1999 the Respondent employed the Applicant as a Bank Teller. The Applicant was based at a branch in Manzini town. The Applicant remained in the Applicant's employment until June 2011.

4. About the 6th May 2011 the Respondent served the Applicant with a notice to attend a disciplinary hearing. The notice is marked exhibit A1. The Applicant was facing three (3) charges of misconduct which read as follows:

> *"Count 1. Fraud, Dishonesty or Defalcation (D.C.5.2.1.1):*
>
> *In that you knowingly processed a fraudulently prepared withdrawal for E500.00 against the account of Fikile Maphosa Account No. 120177702 and could not provide plausible answers on why you did this.*

Count 2. *Failure to carry out Employer's procedures, fair, legitimate and lawful instructions or neglect of duty. (D.C. 5.5.1.20):-*

In that you processed a third party withdrawal without following necessary procedure.

Count 3. *Gross Negligence:-*

In that your actions in the processing of a withdrawal of E500.00 from the Account of Fikile Maphosa Account No. 12077702 that [sic] show total inaptitude on your part given the length of experience in your job."

5. The disciplinary hearing proceeded as scheduled. The Applicant attended the hearing without a representative and conducted his own defence. The Applicant had been notified in exhibit A1- of his right to bring a representative at the hearing. The Applicant had previously brought an attorney to represent him but the attorney was denied audience by the chairperson. The disciplinary hearing was postponed. On a subsequent date the hearing proceeded.

The Applicant was not represented. However the absence of a representative at the disciplinary hearing is not among the Applicant's complaints before Court.

6. The charges were read and the Applicant pleaded as follows:

Count 1: Not Guilty

Count 2: The Applicant pleaded not guilty, but later changed his plea to guilty.

Count 3: Not Guilty.

7. The chairperson found the Applicant guilty on the first and second charges. According to the chairperson the third charge was combined with the second. By letter dated 27th June 2011 the Applicant was summarily dismissed from work on the basis of the chairman's verdict and recommended sanction. The letter of dismissal is marked exhibit A5. The Applicant reported the dismissal as a dispute at the Conciliation, Mediation, and Arbitration Commission for the purpose of conciliation. The Commission failed to conciliate and the Applicant has referred the dispute to Court for adjudication – armed with a 'Certificate of Unresolved Dispute'.

8. Inter alia, the Applicant has challenged the procedure that was followed at the hearing. The letter of dismissal (exhibit A5) was signed by a certain Mr Mazwi Simelane as a representative of the Respondent.

Mr Simelane was then Manager Human Resources at the Respondent's establishment. According to the Applicant, the said Mr Simelane took an active role in the prosecution of the disciplinary charges yet he was also involved in taking the decision to dismiss the Applicant. The Applicant referred to several instances in the minutes of the hearing (annexure A7) which the Applicant claimed they support his assertion concerning Mr Simelane.

9. The Applicant referred to the following excerpts in the minutes (annexure A7) in support of his claim aforementioned.

9.1 *"REP: Just to help the chairperson to understand this. This kind of occurrence once happened to Sibusiso Maphosa and coincidentally it has happened to the accused."*

(Minutes page 17)

9.2 *" REP: Maybe we should start from the beginning for the understanding of the chairperson because there is an incidental case. Just give a background on the issue."*

(Minutes page 18)

9.3 "*REP: Where was the money going to?*

INITIATOR: He has to understand the meaning of defalcation."

(Minutes at page 20)

9.4 "*REP: What we have here is that this voucher is one of many vouchers that Mr Maphosa confessed about. Mr Maphosa confessed that he is the one who wrote the voucher and he signed it. He says he then proceeded to cash the vouchers but he did not cash this one. Now in the prosecutor's submission he said Mr Ndzingane confessed that he knows Fikile which means if he says he wrote it and signed it and it was not written by Fikile who then did the money go to?*

CHAIR: This is hearsay." …

(Minutes at page 21)

9.5. *REP: I have some questions to ask the accused. I understand that he is examining the evidence may be I will ask the accused when he is leading evidence."*

(Minutes page 24)

9.6 *"REP: Like I said chairperson that there is[a] letter that Mr Ndzingane wrote. I don't know if he would like to consider what he said."*

CHAIR: On what basis?

INITIATOR: I was just reminding him that there is this letter that he wrote. But otherwise I do not understand the answer he has given on the processing of the vouchers except to say he relied on trust and the team but what is he saying on the processing of the vouchers.

CHAIR: When he states his defence you are going to get an opportunity to ask him those questions but for now he was cross-

examining your evidence. So on charge 1 do you have any more redirections."

(Minutes at page 25)

10. The fact that an officer representing the employer at the disciplinary hearing has rendered some assistance to the chairperson – is not by itself irregular. It would depend on the nature and extent of the assistance rendered-in order for the Court to determine whether or not the officer's conduct is irregular. A disciplinary hearing is not always conducted by lawyers. In other instances a disciplinary hearing may be conducted by lay persons, some of whom may be workmates of the accused- employee. A disciplinary hearing may not necessarily follow the rigid rules of procedure that apply in Court. What is of paramount importance is that the accused – employee must be given a fair hearing both substantively and procedurally. There must be a distinction however between an officer who is assisting the initiator in prosecuting the disciplinary charges and one who takes part in the decision to dismiss the Applicant. The following legal maxim applies both in a trial in Court and in a disciplinary hearing:

"Nemo Debet Esse Judex In Propria Sua Causa

No man can be a judge in his own cause"

BROOM H: A SELECTION OF LEGAL MAXIMS, 8th edition, Sweet and Maxwell, 1911 (ISBN not available) at page 94.

10.1 In the excerpt that appears in clauses 9.1 and 9.2 above, Mr Simelane gave the chairperson a brief background regarding the Applicant's disciplinary hearing. Mr Simelane informed the chairman that there had been a related incident that the Respondent had dealt with previously concerning an ex-employee called Sibusiso Maphosa which is linked to the charges that the Applicant was facing. It is common cause that the name of Mr Sibusiso Maphosa featured prominently both in the trial before Court and the disciplinary hearing. Based on the information that is before Court, the Court is unable to conclude that Mr Simelane played the role of prosecutor and decision maker – in relation to the same matter.

10.2 In the extract that appears in clause 9.3 above Mr Simelane asked *"where was the money going to?"* That question was

not answered, instead the initiator went off at a tangent. The Applicant's argument is that Mr Simelane assisted the initiator in the prosecution of the disciplinary charges. The Court does not find evidence of that allegation in this excerpt.

10.3 The statement that was made by Mr Simelane as stated in clause 9.4 above was dismissed by the chairperson as hearsay evidence. Since that statement was disregarded by the chairman, that would mean that it did not contribute towards building a case against the accused – employee. Also the question asked (by Mr Simelane) does not appear to have prejudiced the Applicant in the disciplinary process.

10.4 In the excerpt that is reproduced in clause 9.5 above it appears that Mr Simelane stated that he had a question to ask the accused – employee. Mr Simelane however did not ask that question and opted to defer it. When considering this particular statement, it cannot be said that Mr Simelane assisted the Initiator.

10.5 In the excerpt that appears in clause 9.6 above Mr Simelane reminded the accused employee about a letter which the latter

had submitted to the Respondent. It is not in dispute that the Applicant (accused – employee) wrote a letter to the Respondent explaining his role in the transaction that is subject of the disciplinary hearing. The chairman however did not permit Mr Simelane and the initiator to pursue that line of questioning. That statement by Mr Simelane did not incriminate the accused – employee or advance the initiator's case. The Applicant did not suffer prejudice as a result of this particular statement which the Applicant is complaining about.

11. The Applicant further complained about the way the charges were drafted as well as the manner the evidence was led at the disciplinary hearing. It is common cause that the Applicant had a work colleague who was also a Bank Teller known as Mr Sibusiso Maphosa (hereinafter referred to as Mr Maphosa). On the 29th June 2009 Mr Maphosa deposited a sum of E1, 900-00 (One Thousand Nine Hundred Emalangeni) into the account of a certain Ms Fikile Maphosa. Ms Fikile Maphosa had a bank account at the Respondent's establishment. Later in the day Mr Maphosa presented a withdrawal

voucher for E500-00 (Five Hundred Emalangeni) in the same account. The withdrawal voucher is marked exhibit R2.

12. Both the deposit and withdrawal were processed through the Applicant. The Applicant then paid out the sum of E500-00 (Five Hundred Emalangeni) to Mr Maphosa in accordance with the said voucher. The Applicant was informed some months later (by the Respondent) that the withdrawal had not been authorised by the account holder. Consequently, the Applicant was charged with the offences that are listed in paragraph 4 above. Ms Fikile Maphosa and Mr Maphosa are family members. During the trial Ms Fikile Maphosa was referred to as the Applicant's mother.

13. According to the Respondent, the signature that appears in the withdrawal voucher (exhibit R2) was not that of Ms Fikile Maphosa. Ms Fikile Maphosa did not testify at the trial. It is however not in dispute that Ms Fikile Maphosa did not sign the said voucher. According to the Applicant he later learnt from the Respondent that Ms Maphosa's signature on exhibit R2 had been forged. The Applicant's evidence reads as follows:

13.1 *"AW1: He tried to forge the signature of the owner of the bank book, this very same Sibusiso Maphosa.*

JUDGE: When did you realize that this signature was forged?

AW1: My Lord, I never realized that the signature was forged until he had been dismissed for having unlawfully withdrawn moneys …"

…

13.2 *"AC: And when you processed the withdrawal, were you aware that the signature was a forged one?*

AW1: My Lord, when I processed the withdrawal I never verified the signature.

AC: Would you elaborate, what caused you not to pay attention?

AW1: My Lord, the reason I did not very [verify] was because I had no idea that Mr Maphosa was doing something unlawful.

…

13.3 *JUDGE: the question was, why didn't you pay attention and verify the signature?*

AW1: It was because Sibusiso Maphosa was my colleague and I never thought he could do something bad to his parent.

AC: So, by implication you were aware that Sibusiso was making a withdrawal on his mother's account?

AW1: My Lord, I knew it was his mother's account but I did not know he was withdrawing illegally, as at times he would deposit into the same account."

(Record pages 9-11)

14. At the time the Applicant processed the withdrawal voucher he was aware of the fact that Mr Maphosa was making a withdrawal from the account of Ms Fikile Maphosa. The Applicant knew the procedure; that he had to verify the signature on the withdrawal voucher. The Applicant admitted that he omitted to verify the signature on the withdrawal voucher (exhibit R2).

14.1 The Applicant's explanation was that he made a mistake, in that – it did not occur to him that Mr Maphosa was making an illegal withdrawal from his mother's account. In other words the Applicant placed too much trust on his colleague (Mr Maphosa) to the point of overlooking established procedure pertaining to withdrawals.

14.2 The Applicant mentioned further that he together with Mr Maphosa and the other tellers worked together in the same branch as a team, and they interacted with each other regularly about work. The virtue of trust and honour developed among the team members since they had a common goal, to wit – to serve the interests of the Respondent and its customers. As a result of that relationship, the Applicant expected honest work only among the team members. While the Applicant understood that an ordinary bank customer or a member of the public could try and trick a bank teller in order to get money illegally, he did not anticipate that a bank teller could trick a fellow bank teller both of whom are in the same team.

14.3 The said Mr Maphosa had in the past deposited money into the same account and everything appeared normal. Also on the day in question Mr Maphosa deposited more money than he withdrew. When Mr Maphosa presented a signed voucher (exhibit R2) the Applicant assumed the voucher had been properly executed and did not suspect any irregular or dishonest conduct from his colleague – Mr Maphosa.

15. An extract from the Applicant's evidence pertaining to his admission of error, reads thus:

15.1 *"AW1: My Lord, as I had said in my examination in chief that the person who did this to me was a fellow colleague and I do admit I made a mistake on my part. As I mentioned I never believed that someone would defraud their own parent."*

(Record page 116)

15.2 *"My Lord, I think I did bring it up that I made a mistake by not following procedure"*

(Record page 117)

16. The Respondent pointed out another element in the aforesaid transaction which it has criticized and also portrayed as misconduct - on the part of the Applicant. There is another withdrawal procedure which is permissible at the Respondent's workplace which is referred to, in banking parlance, as a 'third party withdrawal'. The Respondent's witness (Mr Mngomezulu) explained this process as follows:

16.1 "*RW1: … when you process a transaction of a customer and the customer is not there, the procedure states that the customer has to write an additional note which says 'I have sent so and so to make a withdrawal on my behalf' the so and so will be the third party who will then be expected to come with his ID for identification purposes."*

(Record page 162)

16.2 "*RW1: The Applicant received a completed voucher, supposedly signed by the account holder and the account holder was not there, secondly she did not write any notes authorising anyone to do any transaction on her behalf. But nonetheless the transaction went through."*

(Record page 182)

17. The third party procedure is not in dispute. The Applicant admitted that he failed to follow that procedure when processing the aforesaid withdrawal voucher and he explained that it was a mistake on his part. The Respondent's witness viewed the Applicant's conduct not as a mistake but as negligence.

18. As aforementioned the Applicant pleaded guilty to the second charge. The chairperson found the Applicant guilty as charged. The Applicant has accepted the verdict but challenged the sanction. According to the Applicant there is a Disciplinary Code and Procedure Agreement that is applicable at the Respondent's establishment (hereinafter referred to as the code). It is common cause that the Applicant is among the employees to whom the code applies.

19. The Applicant considered himself a first time offender even though he had previously been issued an oral warning by the Respondent. The warning was issued in the year 2008. According to the Applicant the warning had lapsed by the year 2011 – which is the time he was found guilty of some of the disciplinary charges in question. The Applicant's evidence reads thus on this issue:

"AW1: My Lord I had a prior verbal warning in 2008, and according to our disciplinary code [it]elapses after 4 months. So when this case happened, when I was charged in 2011 this warning had elapsed a long time ago. What surprised me was that the chairperson used that same warning, when according to my understanding [it] could not be used as it had elapsed"

(Record page 35)

20. The code reads as follows in clause 5.1.3:

"5.1.3 Time scales

Verbal warnings noted shall be valid for a period of four (4) months from date of issue (Agreed)."

21. The Court finds that the code supports the Applicant's contention that an oral warning is valid for four (4) months only- from date of issue. Therefore the warning that had been issued to the Applicant in the year 2008 had already lapsed in the year 2011. At the time the verdict and sanction were issued (in the year 2011), there was no valid warning against the Applicant. Therefore, the Applicant was a first offender at the time of his disciplinary hearing.

22. The Applicant further referred the Court to a clause in the code which makes provision for certain specific offences and applicable sanction (in case of a conviction) – which he submitted are applicable to the present case. The clause reads as follows:

"OFFENCE	*DISCIPLINARY ACTION*
5.2.1.20	
Failing [to] carry out	*1st offence –written warning*
Employers procedures,	*2nd offence –written warning*
fair, legitimate and lawful	*3rd offence – dismissal.*
instructions or neglect of duty (Agreed)"	

23. The Applicant's argument is that the only competant sanction that could be recommended by the chairperson regarding the second charge was a written warning and not dismissal. The chairperson acted irregularly when she recommended a dismissal. The Respondent also acted irregularly when it dismissed him (Applicant) from work.

24. In respect of the second charge the Applicant was found guilty of contravening clause 5.2.1.20 of the code. In terms of the code an employee who had contravened clause 5.2.1.20 as a 1st or 2nd offender

was liable to be issued a written warning. A dismissal was reserved only for an employee who was a third offender. The Applicant was therefore correct when he argued that the chairperson's recommendation as well as the actual dismissal in respect to the second charge was irregular and unfair.

25. The Applicant argued further that during the disciplinary hearing he raised an objection against the third charge on the basis that it was prejudicial to him. Among his reasons was that the third charge was not reflected in the disciplinary code. In response thereto the Respondent's representative (Mr Simelane) made the following remarks which are recorded in the minutes of the disciplinary hearing (exhibit A7).

"*REP: … However as the table of offence [offences] is not intended to be exhaustive, the employer may exercise disciplinary action on an employee who has committed an offence even though the offence has not been mentioned in the table.*

CHAIR: May the Society [Respondent] lead evidence"

(Minutes at page 12)

26. The purpose of a disciplinary code, inter alia, is to promote consistency, predictability and convenience in managing disciplinary matters at the workplace. The absence of a disciplinary code at the workplace or the absence of a particular offence in an existing disciplinary code, should not prevent the employer from taking disciplinary action against an employee who is accused of having committed an offence.

27. The table of offences that appears on the disciplinary code is not exhaustive. New offences may be committed at the workplace which were not contemplated by either the employer or the contracting parties – at the time of drafting the code. Where necessary the employer may apply common law principles as a basis to formulate a disciplinary charge in circumstances where; either there is no applicable code at the workplace, or if there is one, it does not provide for the particular offence allegedly committed. In the matter of THEMBINKOSI FAKUDZE VS NEDBANK (SWAZILAND) LTD AND ANOTHER SZIC case no. 76/2018 (unreported) the Court made a similar observation at pages 25-26.

28. The code in question is a product of negotiation and agreement between the employer and the trade union. The contents of the code have formed part of the terms of the employment contract between the employer and employee. The code is binding on both the employer and employee. It is not open to the employer to unilaterally deviate from the provisions in the code. The party wishing to deviate from the code would have to engage the other and further establish that exceptional and appropriate circumstances exist which necessitated the proposed deviation. The same principle would apply where the code had been unilaterally introduced by the employer and its contents have formed part of the terms of the employment contract between employer and employee.

28.1 In the matter of NGCONGCO VS UNIVERSITY OF SOUTH AFRICA (2012) 33 JLJ 2100 (LC), the chairman deviated from the code and allowed legal representation for the employer from outside the work place. The employee was also permitted to be assisted by a legal representative. The Court approved the chairman's conduct in deviating from the code, the reasons being that:

"… there are exceptional circumstances and appropriate circumstance present warranting a departure from the disciplinary code."

(At page 2107)

28.2 In the matter of NEDBANK SWAZILAND LTD VS SWAZILAND UNION OF FINANCIAL INSTITUTIONS AND ALLIED WORKERS AND ANOTHER SZIC case no. 10/2012 (unreported) the employer, a bank and the union had agreed on a disciplinary code. The code provided that the chairperson in a disciplinary hearing should be drawn from senior management of bank from another branch or department. The employer appointed a chairman from outside the bank without prior engagement with union. The employer argued that it was necessary for the sake of neutrality to appoint a chairman from outside the bank. The Court endorsed the principle that was expressed in the Ngcongco case.

28.3 The Court succinctly summarised the principle in its head note as follows:

"Disciplinary code and procedure –article 2.4.1.2 –deviation thereof by one party – as the code is the result of elaborate consultation and negotiation between the employer and employee, deviation thereof should only be in exceptional circumstances with both parties agreeing to the deviation – unilateral deviation will be viewed by courts as resulting in procedural unfairness."

(Underlining added)

(at page 1)

28.4 The principle expressed in the Nedbank case is supported by other authorities.

"The sanction prescribed by a disciplinary code for a specific disciplinary offence will often be regarded as the primary determinate of the appropriateness of a sanction. Thus, where a disciplinary code provides for the imposition of a specific sanction such as a warning for a breach of a rule, it will generally be regarded as unfair to impose a more severe sanction such as dismissal for such a breach…"

(Underlining added)

Le Roux and Van Niekerk: THE SOUTH AFRICAN LAW OF UNFAIR DISMISSAL, Juta, 1994 (ISBN not provided) at page 112.

28.5 The principle laid down by the Courts and the submission made by the learned authors as aforementioned are consistent with the dictates of justice and fairness as provided for in the code.

29. This Court respectfully agrees with the principle as expressed in the Ngcongco and Nedbank cases. In the matter before Court, the chairperson and/or employer (Respondent) has not established exceptional and appropriate circumstances to warrant deviation from the code. In addition, the Respondent failed to engage the Applicant on the requirement to deviate from the code, especially on the issue of imposing a heavier sentence than that which is agreed upon in the code.

Consequently the chairperson acted irregularly when she recommended a dismissal in respect to the second charge. The

Respondent also acted irregularly when it dismissed the Applicant. The dismissal was therefore unfair.

30. In the course of the disciplinary hearing the chairperson made a ruling that the third charge was a duplication of the second. The chairperson further emphasized the fact that it was irregular for the employer (Respondent) to charge an employee (Applicant) twice for the same offence. The minutes of the disciplinary hearing contain the following detail.

"CHAIR: Count 2 says

'in that you processed a third party withdrawal without following the necessary procedure'.

Count 3 says

'in that in your actions in the processing of a withdrawal of E500 from the account of Fikile Maphosa that showed total inaptitude on your part [sic].'

It is basically the same thing. He has pleaded guilty on count 2.

…

He has admitted that he has not followed procedure. <u>You cannot charge him twice for the same offence.</u>

INITIATOR: Did he say he is guilty on charge 2?

CHAIR: Yes he did. I am putting it to you. Do you have any arguments against that? He admits that he did not follow procedure when processing a third party withdrawal."

INITIATOR: Can you give us five minutes adjournment?

CHAIR: I will give you five minutes.

ADJOURNMENT

CHAIR: Mr Ngcamphalala what has the society got to say?

INITIATOR: <u>I think we can combine these charges. They are similar.</u>

CHAIR: Very much so.

INITIATOR: <u>We don't object to combining the two charges</u>."

CHAIR: It is now time for you to tell me what is the Society's prayer with regards to charges 1 and 2 then Mr Ndzingane [Applicant] will give me mitigating factors and the society will give me aggravating factors. Do you want the society to give me aggravating factors first?"

(Underlining added)

(Minutes pages 58-59)

31. When the chairperson made her decision on the sanction (which is contained in exhibit A5), she made the following observation:

"Count 3

Gross negligence

It must be noted that this charge was combined with count 2 at the agreement, of both parties."

(Underlining added)

(Exhibit A5 page 4)

32. According to the chairperson, the parties had agreed that the third charge should be combined with the second. This observation appears clearly in the immediately preceeding quotation. However the agreement which is alleged by the chairperson is not supported by the evidence and it is accordingly baseless.

32.1 According to the minutes of the disciplinary hearing (exhibit A7) it is the Initiator who suggested to the chairperson that the third and the second charges should be combined. It is also the Initiator who confirmed that he-together with Mr Simelane

and/or the Respondent, have no objection to the two (2) charges being combined. In other words the Initiator re-iterated his previous statement.

32.2 The minutes do not indicate that the Applicant also agreed to that proposal. There is no indication in the minutes that the Applicant was ever asked whether or not he agreed to that proposal. The Applicant did submit before the chairperson and repeated his submission before Court that he objected to the third charge as it was being prejudicial to him. The Applicant expected the chairperson to strike off the third charge from the charge sheet. The chairperson's conclusion that the second and third charges were combined by agreement of the parties is factually incorrect and is accordingly irregular. The chairperson's decision to convict the Applicant of '*gross negligence'* and the recommendation for a dismissal were based on a wrong conclusion and are consequently irregular. Likewise, the employer's decision to dismiss the Applicant on the second charge was predicated on an irregular recommendation, and is consequently tainted with irregularity.

33. The Applicant pleaded *'Guilty'* to the second charge but pleaded '*Not Guilty'* to the third. The Applicant was not called upon to plead to the allegedly-combined charge. There is no indication as to how the combined charge was drafted and what were its elements. The alleged combined charge was not brought to the attention of the Applicant. The Applicant could not prepare his defence to an unknown charge. The Applicant testified as follows regarding this issue when examined by his counsel:

33.1 *"AC: Assuming that the respondent is correct that the two charges were combined, were you informed how the new charge read, the hybrid charge now which combines 2 and 3?*

AW1: There was nothing like that my lord.

AC: Were you aware of the nature of this new combined offence and the elements to be proved in support of the new charge which combines 2 and 3?

AW1: I knew nothing about the 3rd one"

(Record page 135)

33.2 *"AC: Now let us go to the charges. It was put to you in cross-examination that count 3 was never withdrawn but was combined with count 2. Do you recall that?*

AW1: Yes my Lord I do remember.

AC: Who made this application or objection to count 3, was it the initiator or yourself?

AW1: I am the one my lord who firstly complained that it was not contained in the disciplinary procedures [code].

AC: So when you made this application were you complaining that this [these] two be combined or one be struck off?

AW1: My understanding my lord was that the 3rd one be struck off my Lord."

(Record page 134)

34. There are serious irregularities in the manner the chairperson dealt with the second and third charges. The chairperson had made a ruling that the third charge was the same as the second. The chairperson expanded on the ruling and added that the Respondent could not charge the Applicant twice for the same offence. The effect of that ruling was that: the third charge was irregular for being a duplication

of the second, the Respondent could not therefore proceed with the third charge. The legal requirement concerning the drafting of disciplinary charges is that:

34.1 *"Charges must be clearly specified with sufficient clarity to enable accused employees to answer them; employees cannot be expected to prepare their defences if they are unaware of the charges.*

…

34.2 *There must at least be some relationship between the allegation an employee is required to respond to and the charge on which the employee is found guilty.*

34.3 *Charges should not be duplicated in a manner which gives the appearance that a single incident of misconduct is more serious than it is. This is known as 'splitting' (more properly duplication) of charges."*

GROGAN J: DISMISSAL, 2010, Juta ISBN 13:978-0-7021-8486-4 at pages 229-230.

34.4 A conviction and a sanction in respect to the allegedly combined charge was therefore irregular and unfair.

35. The chairperson issued the following sanction regarding the second charge as contained in exhibit A5

"Count 2

Failure/neglect to carry out employers procedures, fair, legitimate and lawful instructions or neglect of duty. (D.C. 5.2.1.20)

Mr Ndzingane [Applicant] pleaded guilty to this charge although his hesitation to do so was noted. The sanction recommended on this charge as provided by the disciplinary code is a First written warning. However, due to the fact that Ndzingane knew the procedure and specifically did not follow it I consider this to be gross negligence. This is further aggravated by the fact that Ndzingane [Applicant] was hesitant to plead guilty initially pleading not guilty and then changing his plea at a later stage. I am of the view that Ndzingane does not realize the gravity of his actions and the resultant financial loss and reputational damage caused by him to the Society. A financial institution such as the Society places great reliance on employees such as Ndzingane to safeguard its assets and those of their customers such

grossly negligent behavior by its employees is intolerable and must be treated as such. My recommendation therefore is that of a dismissal."

36. When delivering her sanction the chairperson confirmed that an appropriate sanction for an employee who is in the Applicant's position, particularly who is convicted of the second charge and is a first offender is a '*Written Warning*'. That confirmation by the chairperson was consistent with the code. The excerpt of the code is reproduced in paragraph 22 above.

    36.1 The chairperson noted that the Applicant amended his plea in the course of the disciplinary hearing. The chairperson observed that initially the Applicant had pleaded *'Not Guilty'* to the second charge but later changed his plea to *'Guilty'*. According to the chairperson the change of plea was an aggravating factor.

    36.2 The term '*aggravating factor'* or '*aggravated*' when used in connection with the occurrence of an offence has been explained as follows:

36.2.1 *"The term 'willful' affects the quality of the offence; <u>the term aggravated; …</u> <u>affects only the degree of seriousness of the offence."</u>*

(Underlining added)

CLASSEN C J: DICTIONARY OF LEGAL WORDS AND PHRASES, Vol1, 1975 Butterworths, (SBN 409 01890 2) page 70.

36.2.2 The English Dictionary explains the term as follows:

"*Aggravate*

To make worse, increase, intensify as an offence."

FUNK AND WAGNALLS: STANDARD DICTIONERY OF THE ENGLISH LANGUAGE, VOL1, 1963, Funk and Wagnalls Co. at page 27 (ISBN not provided).

36.3 According to the chairperson; when the Applicant changed his plea from '*Not Guilty* to '*Guilty*', his conduct made the offence in the second charge worse or more serious than it previously was.

36.4 The offence complained of allegedly took place on the 29th June 2009. The disciplinary hearing took place on the 11th May 2011. The Court has not been shown how a change of plea which took place in May 2011 could aggravate an offence which took place almost two (2) years earlier. If there was an aggravating factor, it should have been in existence at, and also in relation to – the occurrence of the offence. The Applicant's change of plea could not aggravate the alleged offence. The chairperson's decision on the alleged '*aggravating factor'* was baseless and irregular, consequently it influenced the Respondent to dismiss the Applicant unfairly.

37. An accused person has a right in law to change his plea during trial from 'Guilty' to 'Not Guilty'. This principle is supported by ample authority as shown below:

37.1 *"The accused may at any stage of the trial alter his plea to one of guilty"*

HIEMSTRA VG: THE LAW OF SOUTH AFRICA, Vol 4, 1978, Butterworths, ISBN 0409 00340 9 at page 411.

37.2 *"A plea of not guilty may without leave or notice be altered to guilty."*

HIEMSIRA VG (Supra) page 414.

37.3 The above stated principle applies in disciplinary proceedings as it does in criminal procedure. A change of plea is a right which the accused – employee should exercise within his discretion and it cannot amount to an aggravating factor. The chairperson acted irregularly when she decided that a change of plea was an aggravating factor. That irregular decision resulted in an irregular conviction. That irregular conviction led to an unfair dismissal.

37.4 If the Applicant has a right to change his plea as he did during the disciplinary hearing, then he cannot be penalised for exercising that right. The chairperson actually penalised the Applicant for changing his plea by treating that action as an aggravating factor.

38. When delivering the verdict on the first charge the chairperson stated the following

> *"I find Ndzingane [Applicant] guilty of defalcation as he misappropriated Fikile Maphosa's funds. The money from her account did not reach her due to the actions of Ndzingane."*

Among the three counts of misconduct that appear in the first charge, the Applicant was found guilty only of defalcation. By the process of deduction it would mean that there was no evidence to convict the Applicant of the other two (2) counts, namely: fraud and dishonesty. The Applicant has challenged that conviction on the basis that it is procedurally and substantively irregular.

39. The following terms are relevant to the issue before Court and therefore an authoritative definition of each term would assist the Court in understanding the offence of which the Applicant was convicted.

39.1 Defalcation

> *"A fraudulent appropriation of money in trust; embezzlement*."

(Underlining added)

FUNK AND WAGNALLS (Supra) page 335.

39.2 Embezzle

"To appropriate <u>fraudulently</u> to one's own use"

(Underlining added)

FUND AND WAGNALLS (Supra) page 412.

39.3 Fraud

"Fraud consists in unlawfully making, with <u>intent</u> to defraud a misrepresentation which causes actual prejudice or which is potentially prejudicial to another"

(Underlining added)

CLASSEN C J: (Supra) page 112.

40. In the present matter, in order for defalcation to take place, there must have been a fraudulent misappropriation (by the accused – employee) of money held in trust. Intention is a necessary element in the offence of defalcation. The onus is on the Respondent to prove the occurrence of defalcation.

40.1 There is no evidence before Court which suggests that the Applicant benefitted or stands to benefit from the aforesaid transaction.

40.2 There is no evidence to suggest that the Applicant appropriated to himself money belonging either to Ms Fikile Maphosa or the Respondent

40.3 There is no evidence to suggest that the Applicant associated himself with or participated - in the criminal conduct of Mr Maphosa.

40.4 The Respondent has failed to prove an intention on the Applicant to commit defalcation.

40.5 A failure by an employee to carry out the employer's procedures or lawful instruction does not amount to defalcation.

40.6 The Court does not find evidence to support the charge of defalcation. The Applicant was therefore irregularly convicted of defalcation. That irregularity led to an unfair dismissal.

41. The Applicant has inter alia, prayed for reinstatement with arrear salary. When the Court makes a determination that the dismissal is unfair, it has a discretion to order reinstatement. It may be in the interest of justice that compensation and ancillary relief be ordered in this case, instead of reinstatement.

42. Since the Applicant was dismissed by the Respondent he has not been able to find employment. According to the Applicant it is not easy to find employment when one has been dismissed by a bank. At the time of dismissal the Applicant had a sickly mother, a sickly wife and three children to support. The Applicant earned a salary of E8, 350-00 (Eight Thousand Three Hundred and Fifty Emalangeni) per month. The Court has further noted that the Applicant has incurred a considerable amount of costs in prosecuting his claim. It would be fair that the Applicant be compensated for that expense. The Respondent conceded that the Applicant was not paid terminal benefits.

43. The employer's right to dismiss its employee is restricted in terms of Section 42 of the Employment Act, which provides as follows:

42 (2) *"The services of an employee shall not be considered as having been fairly terminated unless the employer proves -*

a) that the reason for 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"

44. The Respondent has failed to present a justifiable reason to terminate the Applicant's employment. The termination of the Applicant's employment is unreasonable and unfair. Consequently the Respondent is liable to the Applicant in terms of payment of terminal benefits.

45. Wherefore the Respondent is ordered to pay the Applicant the following relief:

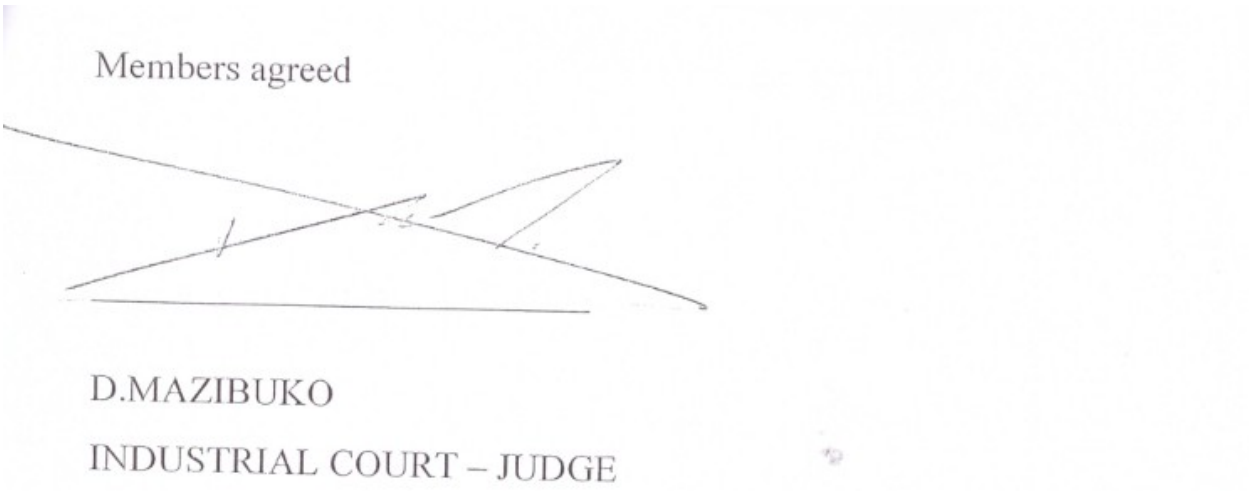
45.1 Compensation for unfair dismissal –

equivalent to 12 (twelve) month's salary	99,780-00
45.2 Notice pay	8,350-00
45.3 Additional Notice (40 days' pay)	12,792-00

45.4 Severance allowance (100 days' pay) 31, 980-00

152, 902 -00

45.5 Costs of suit.



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