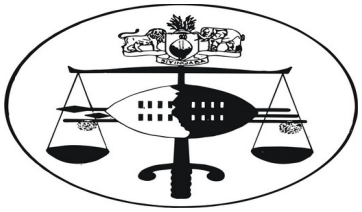

IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

JUDGMENT

Appeal Case No.05/2012

In the matter between:-

SWAZILAND BREWERIES LTD t/a SWAZILAND BEVERAGES **Appellant**

and

CHRISTOFFEL R. DELPORT **Respondent**

Neutral citation: *Swaziland Breweries LTD t/a Swaziland Beverages v Christoffel R. Delport* (05/2012) [2013] SZICA 05 (20th March 2013)

Coram: M. M. RAMODIBEDI JP, M. C. B. MAPHALALA AJA and N.J. HLOPHE AJA

Judgment: BY THE COURT

Heard: 12th March 2013

Delivered: 20th March 2013

Summary:

Appeal against judgment of the court a quo awarding Respondent compensation and repatriation allowance –Although finding Respondent guilty of gross misconduct as a result of manipulating documents to pay out some money as an unapproved and undisclosed loan, court a quo of the view dismissal unfair for failure to comply with section 36 (a) of the Employment Act of 1980 as it was not preceded by a written warning.

Whether section 36 (a) applies to a matter of gross misconduct –court a quo misdirected itself and confused the word conduct in section 36 (a) misconduct –court a quo erred in concluding that every misconduct except that covered in section 36 (b) –(i) of the Employment Act, required cadet questio, that for a dismissal to be fair it must be preceded by a written warning.

Meaning and effect of section 36 (j) of the Employment Act of 1980 discussed –section covers those instances of misconduct not covered in sections 36 (b) –(i) but which have similar detrimental consequences–Gross misconduct attended by dishonest conduct has similar detrimental consequences as section 36 (b) and therefore is covered by section 36 (j) of the Employment Act of 1980 since it falls squarely under the term "any other reason."

Contention that decision of the court a quo though not supported by the point of law relied upon by court a quo in terms of dismissal not being compliant with section 36 (a), stands in view of it having been reached in keeping with the provisions of section 42 (2) (b) of the Employment Act not accepted as it is not the point on which the matter turned on before the court a quo and in any event could not have been reached in circumstances of the matter.

Appeal allegedly noted out of time as it was noted after lapse of three months contrary to section 19 (3) of the Industrial Relations Act of 2000 as amended –Common cause appeal out of time by one day – Point raised on the eve of appeal hearing after 10 months of its having been noted without that being made an issue –Appellant not afforded an opportunity to file condonation application to explain its default and ask for condonation –Period preceding noting of appeal attended by no less than 5 public holidays –No prejudice shown as having been suffered due to the one day delay in noting of appeal.

Appeal upheld with costs.

THE COURT

[1] On the 30th January 2012 the court *a quo* per Judge Mazibuko granted an application by the current Respondent who, as Applicant therein, had instituted proceedings in the Industrial Court seeking an order of court declaring that he was unfairly dismissed and that he should be reinstated or alternatively compensated. He further sought repatriation expenses as he had been engaged as an expatriate.

[2] It is common ground that after having heard the evidence led, the court *a quo* came to the conclusion that the dismissal of the Respondent was unfair in so far as the said dismissal had not been preceded by a written warning as, in that court's view, was required in terms of section 36 (a) of the Employment Act of 1980.

[3] Expressing dissatisfaction with the judgment of the Industrial Court, the Appellant noted an appeal to this court on the following grounds:-

(a) "The court *a quo* erred in law in finding that before an employee may be dismissed for misconduct an employee must in all circumstances (sic) those set out except (sic), apparently, those set out in section 36 (b), (c), (d), (e), (f), (g), (h) and (i) may only terminate the services of the employee where the employee has a previous warning for similar misconduct.

(b) The court *a quo* erred in its finding that the circumstances of the Appellant's termination of the Respondent's services did not fall to be dealt with in terms of section 36 (j) of the Employment Act, which the Honourable court erroneously referred to as section 36 (l).

(c) The court *a quo* erred in that it failed to appreciate that the nature of Respondent/Applicant's conduct was such that it was appropriate to terminate the Respondent/Applicant's services in terms of section 36 (j) of the Employment Act of 1980, bearing in mind that the Respondent/Applicant had been found guilty by the Honourable court *a quo* of gross misconduct in that he diverted, by deceptive means a large sum of money and paid out for purposes not authorised by the Appellant/Respondent, when in fact the Respondent/Applicant was the manager in charge of the Appellant/Respondent's finances."

[4] Although framed in a confused manner, our understanding is that ground (a) above simply means that the court *a quo* erred in law in finding that before an employee may be dismissed for misconduct, he/she must, in all the circumstances of the matter, except for those set out in section 36 (b) –(i) of the Employment Act be shown to have at some stage been given a written warning or put differently, that his/her dismissal can only be fair if preceded by a written warning.

[5] A summary of the background facts of the matter as revealed in the evidence adduced before the court *a quo* are that the Respondent herein (applicant then) was employed as a Financial Director by the Appellant on the 1st March 2002. At the time the Respondent was employed by the Appellant, he had been in the employ of the Appellant's parent company known as South African Brewers Ltd, a company registered in terms of the laws of the Republic of South Africa, for a considerable period having started working there in 1989 as a management accountant and rising through the ranks to the position of Financial Director with the Appellant.

[6] Upon his employment by the Appellant the Respondent was housed at a housing estate called Ridgeview in the Malkerns area, owned by one Moses Hlophe, herein after referred to as the Landlord. This house was one of the two houses leased from the Landlord by the Appellant.

[7] The road inside Ridgeview Housing Estate was an undeveloped gravel road which used to present the tenants residing therein with problems particularly on rainy days. The Landlord had been engaged a number of times about upgrading the road concerned to a tarred one but had not

managed to do so apparently owing to unavailability of funds. At some stage the Landlord concerned informed the tenants who included the Respondent that he had since obtained or secured funding from the Swaziland Building Society.

[8] At this stage the Landlord had engaged the Respondent's wife as a manager of the estate. In terms of this arrangement, she would collect rentals and remit them to the Landlord after deducting a certain percentage as her commission with a further portion of the collected rentals forming what was called a maintenance fund for the houses. As the Respondent's wife had no bank account of her own, she ended up depositing the maintenance amount into her husband's bank account. This arrangement had, however, not been disclosed to the Respondent's employer, the Appellant herein.

[9] Meanwhile, the Appellant on the other hand, had engaged a company known as S & B Civil Works (PTY) Ltd, to do or upgrade road works at its Matsapha Plant. This included applying asphalt on the road leading into the Plant among other jobs.

[10] Having learnt from the Landlord that he had since secured funding for the project of upgrading the Ridgeview estate road, the Respondent, probably after an arrangement with the Landlord, engaged S & B Civil Works (PTY) LTD, who were already doing the work referred to above for the Appellant at its Plant, to undertake the road upgrading project at Ridgeview. S & B Civil Works (PTY) LTD agreed and actually commenced the gravel road upgrading to a tarred road at the Ridgeview Housing Estate, with the Respondent standing surety for the Landlord.

[11] It was to be discovered later that the funding the Landlord had claimed to have already secured from Swaziland Building Society was no longer available. According to the Respondent he was gravely embarrassed by this and forced to extend a loan from the Appellant's coffers. Although initially claiming to have had authority to do this, it was to transpire under cross –examination that he had none. The upgrading of the Ridgeview Housing Estate road had cost a sum of E89 825. 27.

[12] When payment for the S & B Civil Works Ltd (S & B) Project at the Appellant's plant was due, the Respondent directed S & B Civil Works (PTY) LTD to include in its invoice for the work done at the Plant, the sum of E89 825.27 for the Ridgeview Project. This was done and the full invoice which was now for a sum of E609 734.99 was paid by the Appellant. Of course a *prima facie* view of the invoice concerned was that it was only for the work performed at the Appellant's plant as the inclusion of the Ridgeview road project cost was not disclosed as having formed part of the invoice issued for the Plant project by S & B.

[13] It is not in dispute that the approval of the Appellant's Managing Director had not been sought for the loan allegedly extended unilaterally to the Ridgeview Landlord by the Appellant. It was common cause that the Managing Director had not approved that the cost for the Ridgeview project be included in the invoice prepared for the Appellant's Plant Project. Actually the Managing Director was not aware that this had been done. The Respondent had not disclosed this. The Respondent knew that these decisions called for the Managing Director's approval as was the case with the Plant Project whose extent

and pricing had been approved by the Managing Director, a Mr. Uys. Notwithstanding that the total amount for the project exceeded the Respondent's limit and required approval before it could be paid, the Respondent had caused same to be paid without such approval having been sought and obtained. The alleged loan was not documented anywhere in Appellant's records.

[14] As a result of this matter and other issues of alleged misconduct revealed in the charge sheet that was eventually issued against the Respondent, preferring two generic types of charges, under counts 1 and 2 being respectively gross negligence and gross misconduct, the Respondent was called to a Disciplinary Hearing. Among the charges contained in the gross misconduct cluster of charges, were three charges – (b), (c) and (e) – which were preferred against the Respondent. These were in relation to the payment of the sum of E89 825.27 to S & B for the Ridgeview Project as well as paying same as a loan without authority and lastly the Respondent's having caused it to be included in the S & B Civil Works invoice for the work done at the Plant.

[15] At the Disciplinary hearing or enquiry that ensued, some charges preferred against the Respondent were withdrawn whilst he was acquitted and discharged of all the others that remained except the three under the gross misconduct cluster quoted in detail above which were themselves consolidated into one charge. For the removal of doubt, these charges related as stated, to the extending of an unauthorized loan to the Landlord of Ridgeview, the payment of the sum of E89 825. 27 to S & B Civil Works (PTY) LTD without authority as well as the inclusion of the sum of E89 825 .27 for the Ridgeview project in the

invoice prepared by S & B Civil Works (PTY) LTD for the work carried out at the Plant.

[16] The Respondent was found guilty of gross misconduct on the consolidated charges and was dismissed from work with notice made up of a three months salary equivalent. Eventually the Respondent instituted the proceedings before the court *a quo*, claiming to have been unfairly dismissed and praying for reinstatement to his work failing which to be paid maximum compensation for unfair dismissal and other ancillary reliefs.

[17] In the Judgment that followed the trial, the court *a quo*, after an in-depth analysis of the evidence, stated the following at paragraphs 229, 230 and 231 of the Judgment found at pages 87 and 88:-

> "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."

[18] At paragraph 250 of his judgment, the learned Judge *a quo* also stated the following which in our view it is imperative to quote verbatim:-

"250…*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 (e) as combined under the heading 'Gross Misconduct.'"*

[19] Important to note from the above extracts is that the court *a quo* whose duty it is to assess the evidence and make findings of facts when it comes to appeals as provided for in the Employment Act of 1980 read together with the Industrial Relations Act of 2000 as amended, found that the Respondent had:-

(a) Imposed on Appellant without authority liability that was not its own;
(b) Made himself guilty of gross misconduct;

(c) Committed a serious offence yet he was occupying a very senior and responsible position;

(d) Manipulated records in order to deliberately conceal the truth and mislead the employer;

(e) Used the manipulated records and documents to support payment of a sum of E89 825.27 from Appellants funds when he knew Appellant was not liable;

(f) Interfered with a contract signed and concluded by an employee of the company senior to him without authorization;

(g) Purposely increased the liability of the employer to S & B without authorization;

(h) Concealed his conduct aforesaid to the Managing Director of the Respondent;

(i) For all the foregoing committed gross misconduct, and,

(j) Had correctly been convicted of gross misconduct in line with the charges preferred against him in terms of (b), (c) and (e) which were later consolidated.

[20] The court *a quo* having come to the above stated conclusions, then sought to address the sentence imposed by the Disciplinary Chairman. In this regard it considered section 36 of the Employment Act of 1980 as amended and in our view it correctly found that compliance with same was a *sine qua non* to a fair dismissal as covered by section 42 (2) (a) of the Employment Act of 1980. It also correctly emphasized in our view that in its view the misconduct for which the Respondent was found guilty of was serious, particularly because he occupied a senior position in the Appellant's undertaking.

[21] The court *a quo* however stated the following at paragraphs 259 and 260 of the Judgment:-

> "259. … *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 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."*

[22] In these paragraphs the court *a quo* clarifies why it came to the conclusion it did vis-à-vis the sentence that had been imposed by the Disciplinary Chairman against the Respondent. From this reasoning one can tell that in the view of the court *a quo* whilst the Respondent was correctly convicted of gross misconduct, he was unfairly dismissed when considering that he was a first offender who had no written warning in his record of employment.

[23] Further, whilst correct that for a dismissal to be found to be fair in law, same should be supported by one of the subsections of section 36 of the Employment Act as read together with section 42 (2) (a) and (b) of the same Act, the court *a quo* held the view that the dismissal in this matter was not supported by section 36 of the Employment Act because in its view same did not fall to be considered against any of the provisions of sections 36 (b) to (k) of the Employment Act of 1980 but fell to be considered against section 36 (a) of the said Act. In this regard the court *a quo* was clearly of the view that in so far as there had not been a

written warning as would be required in the case of a dismissal based on section 36 (a) of the Employment Act, then the dismissal was unfair.

[24] In fact the court *a quo* went further in its analysis to decree that no dismissal for misconduct can be fair without there being compliance with section 36 (a) of the Employment Act of 1980; put differently no dismissal for misconduct can ever be fair unless same was preceded by a written warning.

[25] The court *a quo*, did not agree with Appellant's argument that gross misconduct was not covered by section 36 (a) of the Employment Act1980 but by section 36 (j) of the same Act as amended (it used to be section 36 (l) in terms of the 1980 Act but became section 36 (j) in the 1985 amendment by Act 4/1985). Admittedly, it had been argued on behalf of the Appellant that the misconduct by the Respondent had similar detrimental consequences to those under sections 36 (b) to (i) of the Employment Act in which a dismissal would be appropriate, and as such was covered under section 36 (j).

[26] It is apparent therefore that the court a quo came to the conclusion it did because it was convinced that the misconduct that it found the Respondent to have been correctly convicted of was not governed by section 36 (j) but by section 36 (a) of the Employment Act which required a written warning, something which was not there hence its finding that the employee was unfairly dismissed and had to be compensated. It is common cause that because of this conclusion that it came to, the court then awarded the Respondent a compensation made

up of a sum of E273 834.00 (three months salary equivalent) plus E30 000.00 as repatriation costs.

[27] It was against the above background that the Appellant noted an appeal on the above stated grounds. At the commencement of the appeal it was agreed that there were two main or broad issues for determination in the appeal, namely, an issue of the interpretation of section 36 of the Employment vis-à-vis the fairness of the termination of the Respondent's employment and an issue over the propriety or otherwise of the appeal in view of the contention by the Respondent that same was filed out of time. We will deal with these issues starting off with the contention that the appeal was filed out of time and as such there is no appeal pending before this court.

APPEAL FILED OUT OF TIME.

[28] The basis for this contention is that the Judgment of the court *a quo* was handed down on the 30th January 2012 and the appeal was filed on the 2nd May 2012. The time for noting an appeal having lapsed on the 30th April 2012, it was contended that the appeal was therefore noted out of time and as such there was no appeal before court. It was noted out of time because in terms of section 19 (3) of the Industrial Relations Act No. 1 of 2000, an appeal to the Industrial Court of Appeal should be noted within three (3) months of the date of the handing down of the judgment.

[29] Whilst it is not disputed that the appeal was noted on the 2nd May 2012, the point itself was raised by means of the Respondent's Heads of

Argument which were filed on the 11th March 2013 for an appeal that was to be heard on the 12th March 2013.

[30] Opposing the point raised that the appeal be dismissed preliminarily on the grounds that same had been noted out of time, Mr. Kennedy SC who appeared before us on behalf of the Appellant submitted from the bar that there was no merit in the point raised and that it should be dismissed. He submitted that this should be the case because they were not afforded an opportunity at all to file at least an application for condonation and extension of time as he had become aware of the point very late the previous day, in fact during the evening when he was preparing for argument the next morning.

[31] The Appellant's Counsel further submitted that the Respondent had to take the blame for this state of affairs because, notwithstanding his having been served with the notice of appeal on the 2nd May 2012, ten months earlier, the Respondent had not indicated any objection to the notice of appeal having been filed out of time because then, a condonation application would have been filed timeously explaining why they delayed in noting the appeal as well as why they required an extension of time to file such a notice.

[32] It was argued further that the appeal was only out of time by one day when considering that the three months for its noting had expired on the 30th April 2012, yet it was filed on the 2nd May 2012 when the 1st May 2012 was a holiday. The court observed of its own accord that April 2012 alone had no less than four holidays with the 1st May 2012 being the fifth one. This latter point is not to say that the requirements of

section 19 (3) of the Industrial Relations Act 2000 as amended refer to days as opposed to months. It is a fact however that work matters are normally attended on working days.

[33] Above all the considerations raised, it was argued that the appeal having been filed on the very first court day after its lapse was not unreasonable and that no prejudice was suffered by the other side.

[34] It was argued on this basis that the point raised should be dismissed and the appeal be allowed to proceed.

[35] Considering the peculiar circumstances of this matter which comprise the fact that the period leading to the expiry of the period for noting an appeal was inundated with public holidays; that the delay itself was only one day; that the Respondent had not taken issue with the notice of appeal for a period of ten months and primarily the fact that no prejudice has been shown to have been suffered by any of the parties as a result, this court is of the view that this point cannot succeed. It is dismissed and the court is of the view that the merits of the appeal be dealt with.

INTERPRETATION OF SECTION 36 OF THE EMPLOYMENT ACT.

[36] The question for determination in this regard is whether the court *a quo* was correct in its finding that all misconduct should be preceded by a written warning as provided for in section 36 (a) of the Employment Act for it to amount to a fair ground of termination of an employee's

services. A further question is whether gross misconduct is covered under section 36 (a) of the Employment Act or under section 36 (j) of the said Act.

Does every misconduct have to be preceded by a warning before a dismissal can be fair.

[37] During the argument of the matter before us it was common cause that the court *a quo* erred in coming to the conclusion that a misconduct can only amount to a dismissible ground in terms of section 36 of the Employment Act if same was preceded by a written warning.

[38] It seems to us that the court *a quo* came to the conclusion it did in this regard after confusing the word "conduct" spelt out in section 36 (a) of the Employment Act for the word "misconduct". Clearly these words mean two different things in law and we take this to be a matter of common knowledge. In this regard, it is useful to note that Black's Law Dictionary: Eighth Edition at page 315 defines the word "conduct" as "personal behaviour, whether by action or inaction; the manner in which a person behaves." At page 1019 the word "misconduct" on the other hand is defined as "a dereliction of duty; unlawful or improper behaviour." We emphasise, therefore, that the two words denote two different concepts. "Conduct" under section 36 (a) is not the same thing as "misconduct" under section 36 (j). Indeed, we consider that conduct may be good or bad depending on the circumstances but misconduct is bad only under any circumstances. Properly construed in this way, it follows that misconduct falls under the term "any other reason" mentioned in section 36 (j). The misconduct which the Respondent was

found guilty of was of such a serious nature that it would have similar detrimental consequences with those contemplated in section 36 (b) of the Employment Act when considering that the conduct of the Respondent in committing the offence he did had traits of dishonesty which adversely affects the trust which forms the substratum of the relationship of the employer and employee as embodied by the Appellant and the Respondent in this matter particularly taking into account the position occupied by the Respondent as Financial Director of the Appellant.

[39] Matters that adversely affect the trust that an employer reposes on an employee have always been treated seriously by our courts and have always justified a dismissal in all those cases where, taking into account all the circumstances of the matter, it was found to be fair and reasonable to dismiss an employee. The facts of this matter in our view reveal those circumstances that would justify a dismissal of an employee without a written warning. This position has been held to be true even in those matters where a disciplinary hearing properly so called was not held. The case of ***Swaziland United Bakeries vs Amstrong Dlamini Industrial Court of Appeal case No.117/1994*** is of relevance in this regard.

[40] We are therefore of the view that the court *a quo* erred in coming to the conclusion it did that for every misconduct to form the basis of a dismissal such dismissal ought to be preceded by a written warning. It is for this reason that a dismissal would be lawful if it is for a ground contemplated by sections 36 (b) to (k) of the Employment Act as long as the employer would be shown to have properly considered that

taking into account all the circumstances of the matter it would be fair and reasonable to dismiss the employee concerned.

Is gross misconduct covered under section 36 (a) or (j) of the Employment Act.

[41] The judgment under appeal reveals that the court *a quo* was of the view that gross misconduct was covered under section 36 (a) of the Employment Act whereas the Appellant is of the view that it is covered under section 36 (j) of the Employment Act.

[42] An answer to this question lies in whether the incident of gross misconduct complained of has similar detrimental consequences with those types of misconduct listed in section 36 (b) to (k) of the Employment Act when taking into account all the circumstances of the matter.

[43] In a matter where it is common cause that a Financial Director manipulated company documents and later used such documents to pay out a large sum of money to a party not for any cognizable business transaction without disclosing all such facts to the employer it can hardly be said that such misconduct would not have similar detrimental consequences to the employer. At least it shows reckless disregard of company policy by a senior manager and at worst it shows dishonest conduct which adversely affects the trust the employer was entitled to repose on the senior manager.

[44] In the case of ***Oscar Z Mamba vs Swaziland Development and Savings Bank case no. 81/1996***, the Industrial Court had occasion to consider what set of facts would justify a finding that the employee had violated the requirements of section 36 (j) of the Employment Act. It had found that a Branch Manager to a Bank who had failed to keep keys to the bank secured, including keeping a proper register for same as well as failing to repair broken security doors was guilty of gross negligence which was synonymous or compliant with section 36 (d) and (j) as he had been grossly negligent and guilty of dereliction of his duties.

[45] We bear in mind that each matter turns on its own peculiar facts and circumstances and that it would be difficult to lay down a hard and fast rule that every incident of gross misconduct would have similar detrimental consequences with the incidents of misconduct contemplated in sections 36 (b) to (k) of the Employment Act of 1980. On the facts, however, we have no hesitation in finding that the circumstances of this matter have similar detrimental consequences with those contemplated by the above stated sections, particularly section 36 (b) as it clearly had traits of dishonesty which adversely affected the trust which is paramount in a relationship of employer and employee.

[46] In his argument before us, counsel for the Respondent Mr. Smith SC, whilst agreeing that the court *a quo* had misdirected itself in finding that for every misconduct to be dismissible it has to be preceded by a written warning, submitted that that was not the end of the enquiry before us as the Employment Act contemplated a three pronged enquiry which, simply put, could be listed as follows:-

(a) Was the employee guilty of a dismissible misconduct,

(b) When taking into account all the circumstances of the matter was it fair and reasonable to dismiss him and,

(c) Lastly, were there any factors mitigating in his favour and were they considered.

In this regard the court was referred to the cases of ***Swaziland United Bakeries vs Amstrong Dlamini Appeal*** (supra) at page 10 of the unreported judgment as read together with the case of ***Maria Vilakati and Fikile Dlamini vs Ngwenya Glass (PTY) Ltd Industrial Court case no. 139/2004.***

[47] Whilst counsel could be correct in his submission, it is a fact that the court *a quo* did not come to the conclusion it did because in its view the Appellant had not considered the three pronged enquiry he referred to. The fact is that the court *a quo* came to the conclusion it did because in its view, the dismissal was not preceded by a written warning given against the Respondent or put differently the offence with which the Respondent was convicted was not dismissible against a first offender.

[48] We are convinced though that the court *a quo* could not have possibly concluded that when taking into account all the circumstances of the matter, it was not fair and reasonable to terminate the services of the Respondent consideration being had to the facts of the matter, nor could it have found that there were mitigating factors which superseded the aggravating ones against the Respondent which the court *a quo* found and are listed at paragraph 19 herein above. Furthermore all the grounds which were found to justify a dismissal in a case where even a hearing

was not held in ***Swaziland United Bakeries vs Amstrong Dlamini (supra) at page 15*** are present in this matter. In that case the factors which are substantially similar to those that exist in this matter were listed as follows:-

> *"1. The Respondent was a senior employee i.e Sales Manager.*
>
> *2. He was in a position of trust which he abused,*
>
> *3. Not only did he abuse his position of trust but relying on his seniority abused his position to persuade his junior colleague to hand over the money to him.*
>
> *4. The money stolen that is E40 000.00 was a large sum."*

[49] Arguing strongly on this point Mr. Kennedy SC distinguished the case of ***Maria Vilakati and Fikile Dlamini vs Ngwenya Glass PTY Ltd*** (supra) which Mr. Smith SC sought to rely on in his argument that the mitigating factors were not considered in favour of the Respondent in this matter . He submitted that in that matter the Applicants who were not given a disciplinary hearing by their employer were dismissed for having taken for their personal use some glass fish replica that was destined for destruction because they had broken tails and were of no use to their employer who sells such items in her business. Furthermore, the employer concerned had unlawfully ransacked their private rooms and violated their privacy without lawful authority.

[50] The Industrial Court dealing with the matter came to the conclusion that their dismissal was unfair because whilst their conduct could have been dishonest their mitigation had not been taken into account because according to the employer now that he was convinced they were dishonest, *cadet questio*, they had to be dismissed, yet the grounds did not reveal a very strong point of violation of trust when taking into account the circumstances of the matter.

[51] We agree with Mr. Kennedy SC that that case is distinguishable from the present one. For the reasons stated above and having taken into account all the circumstances of the matter and the submissions made by counsel, we have come to the conclusion that the Appellant's appeal should succeed and we make the following order:-

1. The appeal be and is hereby upheld with costs including certified costs consequent upon the employment of counsel.

2. The order of the court *a quo* be and is hereby set aside and substituted with the following order;

   2.1 The Applicant's application be and is hereby dismissed.

Delivered in open court on this the 20th day of March 2013.

M. M. RAMODIBEDI
JUDGE PRESIDENT

M. C. B. MAPHALALA
ACTING JUSTICE OF APPEAL

N. J. HLOPHE
ACTING JUSTICE OF APPEAL

For the Appellant: Adv. P. Kennedy SC

For the Respondent: Adv. D. Smith SC