IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

JUDGMENT

APPEAL CASE NO: 7/2020

In the matter between:

HAPPY VALLEY HOTEL & CASINO **APPELLANT**

And

AARON MKHATSHWA **RESPONDENT**

Neutral Citation: *Happy Valley Hotel & Casino vs. Aaron Mkhatshwa (7/2020) [2020]* SZICA *(23) 14th October 2020*

Coram: **MLANGENI AJA, FAKUDZE AJA, TSHABALALA AJA**

Heard: **21st September 2020**

Delivered: **14th October 2020**

Summary: *Labour law – application for unfair dismissal – employee dismissed by letter basing the grounds of dismissal on Section 36 (d) and (e) of the Employment Act 1980 read together with Section 42 (2) (b) of the same Act.*

At the court-a-quo the employee established that he was an employee of the respondent to whom Section 35 applied, hence the onus fell upon the employer to prove that the dismissal was within the rubric of Section 42 (2)(a) and (b).

Court-a-quo found that the employee's account of events leading up to his dismissal was plausible, and the employer having failed to justify the dismissal, the court a quo found that the dismissal was substantively unfair.

Employer's appeal mainly challenging the trial court's credibility findings in respect of the employee, alleging that he gave three different versions of the events that culminated in his dismissal, two of which were given in extra –curial proceedings.

On appeal it was held that: -

(i) *In the industrial court matters are decided on the basis of evidence that is presented to the court, and extra-curial proceedings are of no relevance except for purposes of cross-examination.*

(ii) *An appeal court is loathe to interfere with findings of fact and credibility by the trial court.*

(iii) *On the basis of available evidence the trial court was correct in finding that the employee was substantively unfairly dismissed.*

Appeal dismissed with costs.

JUDGMENT

MLANGENI AJA

[1] This is an appeal from the judgment of His Lordship Nsibandze J.P., sitting with nominated Members at the Industrial Court of Eswatini. To give a useful perspective to the judgment appealed against I will rehash the facts of the matter in detail.

[2] The respondent was dismissed by the appellant on the 5th April 2013. Prior to being dismissed he was in continuous employment for about twenty eight (28) years. From the record it appears that his history of service to the appellant was unblemished, to the extent that not even a warning against him, written or verbal, was disclosed. The *court-a-quo* accepted his evidence that in all the years of employment to the respondent he was never subjected to disciplinary action[1]. He was initially employed as stock-taker, and at the time of dismissal he had risen to the position of night security manager at the appellant's hotel and casino business premises. The facts that led to disciplinary proceedings against the respondent, and his eventual dismissal, as related by him, are as follows:-

2.1 While on duty at his workstation on the 21st January 2013 a private investigator known as Hunter Shongwe came to him. The time was approximately 10:30pm. The investigator told the respondent that he (the investigator) was instructed by the appellant's director, one Pedro Rodrigues, to conduct an investigation in the business premises in relation to a senior male employee who was suspected of sexually abusing female junior employees within the business premises, and doing this in unoccupied guest rooms. The respondent, being the one

[1] Para 39 of the judgment, at p137.

in charge of night security, was required to give the private investigator access to the guest rooms.

2.2 The respondent asked the investigator who the suspected abuser was and was told that it was one Peter Maseko. The respondent told the investigator that Peter Maseko had knocked off at 5:00pm and was no longer at the premises. The investigator, who clearly appeared to have information, insisted and said that Mr. Maseko was in one of the guest rooms with a girl staff member. The respondent refused to grant access and demanded proof that the investigator was instructed by the director. The proof offered by the investigator was a contact number on the investigator's cellphone, which the respondent recognized as being that of the director Mr. Rodriguez. Despite recognizing the contact number, the respondent refused to grant access to the investigator and told him that he would not do so unless the director came and instructed him to do so[2].

2.3 The investigator then made a call to the director's number and asked the respondent to speak to the director and he did so. The director then instructed the respondent to allow the investigator access to the guest rooms. Thereafter the respondent took the investigator to the reception where keys to the guest rooms were being kept. According to the respondent, at the reception he obtained keys and handed them to two security officers from Buffalo Soldiers to go with the investigator and open the rooms that the investigator wanted to look into. The respondent emphatically stated that he did not give the keys to the investigator, that he handed them over to the security officers and instructed them to open the rooms that the investigator wanted to see. Respondent's evidence is that he did not go with them.

2.4 It is apparent that the investigator targeted a specific room, room 39. After about fifty minutes the investigator came back. He had not busted the suspect. It is also apparent that the suspect was

[2] At page 8of the transcript of evidence.

one step ahead because at room 39 the bed was found unmade, yet the room was not allocated to any guest. At this late hour the suspect's car was still within the premises, not where it normally parks but hidden away somewhere, about fifty metres from room 39. It was shown to the respondent by the investigator and the respondent recognized it as being that of the suspect Mr. Maseko. According to the respondent Mr. Maseko later surfaced around midnight, took his car and left the premises.

2.5 After showing the suspect's car to the respondent the investigator left. Soon thereafter, the director Mr. Rodriguez came to the business premises, pulled up at the car park and called the respondent to come to him there. They spoke, and the respondent gave a report to the director on what had transpired. After receiving the report the director said to the respondent **"please do not speak of this matter,"**[3] and that it should be left to him to take it further.

2.6 Sometime thereafter, disciplinary proceedings were instituted against the respondent. He faced two charges which are captured in the judgment of the *court-a-quo* as appears below: -

ONE: **"Gross negligence – in that you allowed a private investigator to unlawfully invade the employer's hotel and hotel rooms on 21st January 2013 without a court order or any legal instrument sanctioning him to conduct private investigations in the hotel and such conduct caused unlawful invasion of the privacy of the employer and its guests."**

TWO: **"Breach of confidentiality in that in allowing the private investigator to unlawfully invade the Hotel and hotel rooms. The applicant failed to protect the confidentiality of the**

[3] At page 13 of the transcript of evidence.

employer's property and guests yet he had a privacy duty to do so."

2.7 Pursuant to the hearing he was dismissed. On appeal, it was ordered that the hearing should start *de novo*. The *de novo* hearing proceeded in the absence of the respondent, the reason being that his attorney was unavailable on the date in question and advised the respondent not to attend the hearing.

2.8 After the second hearing (the *de novo* hearing) the respondent was dismissed. On this occasion an appeal was not availed to him, the reason given by the employer was that the *de novo* hearing was conducted at the highest level of management, hence there was no one to appeal to within the employer's structure.

2.9 Thereafter, the respondent took the matter up at CMAC where the dispute was unresolved, leading to the application at the *court-a-quo*, and now this appeal.

[3] At the *court-a-quo* the applicant is the only witness who testified in support of the application. The then respondent, now appellant, led the evidence of two witnesses. On the substantive aspect of the matter, the appellant relied solely on the evidence of one Mlungisi Zakhele Shongwe who testified that he has been in the employ of the appellant since 2008 and occupies the position of night auditor. On the date in question his shift started at 10:00pm. He testified that at about 10:30pm the respondent approached him and asked for the rooming list – i.e. a list of rooms that were occupied by guests on the day. He obliged and handed the list to the respondent who then left. Fifteen minutes later the respondent came back to the witness and asked for the master key which opens all the rooms in the hotel. At this stage the respondent was with Hunter Shongwe, whom the witness claimed to know from the print media. Once given the master key the respondent, together with Hunter Shongwe, proceeded towards the rooms and were away **"longer than thirty minutes".** According to this witness the respondent subsequently came back and handed the key back to him without explaining what had happened or what he had

been doing. When he came back he was still in the company of Hunter Shongwe. In respect of the rooming list, the witness stated that he printed it out from the system that contains such information and it is accessed at the reception area. He also stated that the master key is the only key he gave to the respondent. Lastly, the witness stated that he is sure that the respondent did go to the rooms with Hunter Shongwe. Under cross examination the witness informed the court that the respondent disclosed to him that the purpose of the investigation was to establish the abuse of rooms by people who occupied them without paying for them.

[4] One thing that is clear is that the respondent did not tell Mlungisi Zakhele Shongwe about the suspicion around manager Peter Maseko. The importance of this will become apparent later on in this judgment.

[5] The second witness for the defence was one Mr. Luigi Rossi whose position at the appellant was that of General Manager. He was employed on the 8th April 2013, after the incident which is the subject of this litigation. This witness testified that he co-chaired the respondent's appeal hearing, together with the appellant's attorney at the time, and that this hearing led to the respondent's dismissal. What this witness is referring to is actually not an appeal hearing, it is a disciplinary hearing that started *de novo*, following an issue of collusion that the respondent raised in respect of the initial hearing. It is common cause that the respondent was not afforded an opportunity to appeal the dismissal within. The only other evidence of importance from this witness is that on the date of the *de novo* hearing the respondent did not attend, and the hearing proceeded in his absence. But prior to the hearing this witness telephoned the respondent to establish his whereabouts, whether he was on his way and if so how long it would take for him to get to the hearing. The answer he got was that the respondent was not coming to the hearing, having been advised by his attorney not to attend because his attorney was unavailable on the day due to other engagements and would make arrangements for the matter to proceed on

another day. It is clear that the respondent embraced his attorney's advice and expected to be informed of the next date of hearing.

[6] The two charges against the respondent suggest that he, on his own accord and initiative, brought in a private investigator to investigate suspected mischief of his superior Peter Maseko. This is borne out by his evidence in chief where he states that he was accused of hiring a private investigator **"who entered the hotel rooms and disturbed the guests."** It appears to us that not only are these charges contrived but could be vexatious as well. It is objectively unthinkable that an ordinary employee who is nothing more than a senior guard would take it upon himself to engage and bring into his employer's premises a private investigator, who would need to be paid by the employer for that work, without clear instructions from his employer.

[7] Apart from issues that came up in cross-examination, and they are not many, the above captures the essence of all the evidence that was placed before the *court-a-quo*. Having evaluated the evidence of both sides, very carefully in our view, the *court-a-quo* came to the conclusion that the respondent's evidence that he was acting upon the instruction of director Rodrigues was **"plausible"**[4]. In this regard Sibandze J.P. made the following trenchant observation:-

> **"where a director of a business suspects that a manager of his business is involved in deplorable activities that have the potential of bringing that business into disrepute, it is likely that he would want to have those suspicious either confirmed or dismissed by an investigation[5]."**

[8] Further, the *court-a-quo* came to the conclusion that, on the basis of the evidence that was led before it, the respondent was not guilty of either gross negligence or breaching confidentiality. The court went further and observed

[4] At para 38 of the judgment.
[5] See note 4 above.

that even if the respondent had been proved guilty of the two charges, the sanction of dismissal was too harsh because: -

8.1 there was no evidence of guests being disturbed by the investigation;

8.2 the respondent's record of service to this employer was unblemished over a period of about 28 years.

[9] The letter of dismissal, dated 10th June 2013, is at page 12 of the record of proceedings. According to this letter, the dismissal is based on Section 36 (d) and (e) of the Employment Act 1980, viewed in conjunction with Section 42 (2) of the same Act. Below I capture these provisions in full. Section 36 provides that it shall be fair for an employer to terminate the services of an employee for any of the reasons stated therein, which include: -

> **"36 (d).....the employee, either by imprudence or carelessness, endangers the safely of the undertaking or any person employed or resident therein;**
>
> **36 (e) .....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".**

Section 42 (2) creates what may be described as the double onus upon an employer who has dismissed an employee to prove that:-

(a) The reason for termination is permitted by Section 36;

(b) Taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee.

[10] In respect of Section 36 (d), which is about endangering the safety of the undertaking or any person employed or resident therein, no evidence in this respect was led by the appellant. Again, in respect of Section 36 (e), which is about revealing manufacturing secrets or matter of a confidential nature to another person, no evidence at all was presented to the court. Clearly, the appellant was on a fishing expedition, wanting the respondent dismissed at all costs. In respect of Section 42(2) (b) (the reasonableness of the termination) the

court-a-quo observed, correctly in our view, that the appellant's case fails this test.

[11] The conclusion of the *court-a-quo* was that there was failure of substantive fairness in the dismissal and ordered that the respondent be paid amounts under the heads that I mention below:-

i)	Notice pay	=	9,008.50
ii)	Additional Notice pay	=	36,033.92
iii)	Severance pay	=	90,084.80
iv)	Eight (8) months compensation	=	72,064.00
	TOTAL	=	**E207, 195.22**

[12] The respondent in the *court-a-quo* has appealed against the judgment on various grounds which are dealt with below. I deal with one ground at a time: -

GROUND ONE: **"The *court-a-quo* erred in law and misdirected itself in finding that the evidence of the applicant was credible whereat it had accepted that he had presented three versions on the question whether he had proceeded with the private investigations to the guest rooms. The versions presented by the applicant were contradictory and in conflict to each other. The *court-a-quo* ought to have rejected the evidence of the applicant."**

[13] The three different versions that are referred to by the appellant relate to three different circumstances. The first one is alleged to be in the form of a statement that the respondent recorded soon after the incident. The second one allegedly relates to the disciplinary hearing that was nullified, resulting in the hearing that subsequently proceeded *de novo*, culminating in the dismissal that is the subject of this appeal. The third one is the version of events that the respondent gave in the *trial-a-quo*.

[14] The statement that is alleged to have been recorded by the respondent must be seen in its proper context. The respondent's narrative at the trial that he acted upon the instruction of director Rodriguez was largely unchallenged, the appellant doing nothing more than cast doubt through cross-examination. Mr. Rodriguez was not introduced to say that he knows nothing of the sort. Given the *court-a-quo's* acceptance of the respondent's version of events, as given at the trial, it is likely that the respondent was enormously troubled by the turn of events when he had done no more than comply with an instruction of his employer. It would, in our view, be harsh to judge him adversely on the basis of inconsistent details in a situation where the essence of his evidence in the trial was not challenged at all. The essence being that he did not just conjure up the thought to investigate Peter Maseko; he was instructed by director Rodriquez to allow Hunter Shongwe in for purposes of carrying out the investigations.

[15] What transpired at the hearing that was declared null and void is a nullity, and there is no legal basis to bring it to bear in a subsequent hearing that starts *de novo*. It may, of course, be used in cross-examination, but where the cross-examination does not effectively challenge the version which is presented in court, it surely is inconsequential.

[16] Of more significance is that case law in this jurisdiction decrees that what transpires in pre-curial proceedings or other extra-curial proceedings is of no relevance or interest to the trial court. In the appeal case of THE CENTRAL BANK OF SWAZILAND v MEMORY MATIWANE[6] Sapire AJP put the position in the following manner: -

> **"The *court-a-quo* does not sit as a court of appeal to decide whether or not a disciplinary hearing came to a correct finding on the evidence before it. It is the duty of the Industrial Court to enquire on the evidence placed before it, as to whether the provisions of Industrial Relations Act and the Employment Act have been**

[6] Case No. 110/1993

complied with, and to make a fair award having regard to all the circumstances of the case[7]." (my underlining)

[17] This position was embraced some years later, in the case of MICHAEL BONGANI MASHWAMA v SWAZILAND ELECTRICITY BOARD[8] where Nkonyane A.J. observed that **"the Industrial Court makes a decision based on the evidence presented before it, and not on the basis of the findings of the chairman of the disciplinary hearing."**

[18] The judgments referred to above surely put to rest the appellants arguments about the three versions that are attributable to the respondent on what transpired on the night in issue.

[19] But even if extra-curial proceedings were of any relevance, on the basis of the respondent's evidence it is clear that he did not initially tell the whole story because he was warned by his boss Mr. Rodriguez not to tell anyone about Hunter Shongwe's failed mission, the fiasco of finding an un-made bed and nothing more. If he stated before any forum that the investigation was aimed at people who occupied rooms without paying for them he was being faithful to his boss by being confidential in dealing with what had clearly become a hot potato. It would not be far-fetched to think that if Hunter's mission was successful the respondent would most probably be still employed, bar other factors.

[20] The submission regarding the respondent's three versions was clearly linked to the issue of credibility, the argument being that a witness who gives desultory and inconsistent evidence is not to be believed. Granted that the trial court did not make an express pronouncement on the credibility of the respondent, there is no doubt that the court's position was that the respondent's account of the events of that particular night was more probable that that of the appellants

[7] At para 7 of the judgment.
[8] Case No. 345/2002

witness DW1. At paragraph 38 of the judgment the trial court described the respondent's version as **"plausible"**. This is the view of the court that saw and heard the respondent giving evidence in chief, that observed his demeanor during cross-examination and that had a feel of the overall aura of the proceedings. Is this court, as an appeal court, in a better position to make that determination? Put differently, is this court allowed to readily overturn the trial court's findings on credibility?

[21] The answer lies in a number of judgments, in this jurisdiction and beyond. But because the principle is to settled I make reference to only one judgment, the case of XOLANI D. LUKHELE v REX[9] where Masuku J. made the following: -

> **"The trial court found the complainant to have been a credible witness and there is no good reason for overturning that finding, considering that the trial magistrate had both the time and opportunity to see and hear the witnesses. Overturning credibility findings by a trial court.....is an exercise that appellate courts are very slow to resort to[10]"**

[22] The appellant relies on the judgment in REX v DHLUMAYO[11] in motivating this court to interfere with the trial court's findings on the credibility of the applicant. According to this judgment, an appeal court can interfere in certain limited circumstances, such as where the trial court has misdirected itself, or where the reasons for the finding are *ex facie* unsatisfactory or where the trial judge has overlooked other facts or probabilities. The law of judicial review has grown so much since 1948, I am therefore not certain if the position as stated above remains good law. But assuming that it is still good law, it cannot avail the appellant in this matter. The reason is that on the facts in *casu* there is no misdirection by the court, the court did not overlook any relevant facts, and there is nothing that is objectively unsatisfactory about the conclusion that the trial court came to.

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[9] High Court Case No. 24/08.
[10] At para 32 of the judgment.
[11] 1948 (2) SA 677 (SC)

GROUND TWO: **"The *court-a-quo* erred in law and misdirected itself in accepting the evidence of the applicant that he was called and instructed by the respondent's director one Mr. Rodriguez to allow the private investigator to carry-out (sic) the investigation and to allow the investigator to enter hotel rooms. The burden of proof rested on the applicant to prove that indeed he was instructed by Mr. Rodriguez. The evidence of the applicant was uncorroborated on this aspect. The *court-a-quo* misdirected itself and erred in law in finding that it was the respondent's duty to led (sic) Mr. Rodriguez to rebut the evidence."**

[23] In a matter that I dealt with recently I made a passing reference to **"the Stalingrad Defence,"** where anything and everything was thought to matter. That is how convoluted and desultory this ground of appeal is, demonstrating, perhaps, the unbridled effort to make out a case where none exists. I will break this ground down to the various and, in my view, distinct components.

23.1 ERROR IN ACCEPTING THE EVIDENCE OF THE APPLICANT THAT HE WAS INSTRUCTED BY RODRIGUEZ

This has been dealt with in respect of ground one above, and it boils down to this: the applicant and the respondent's DW1 presented two contrasting versions on factual issues of what and who motivated the investigation. The trial court found the applicant's version **"plausible"**, in effect holding that the applicant's version was more probable than the respondent's version, taking into account the totality of the evidence before it. And the fact of the matter is that at the trial the applicant's account of events was hardly challenged in that no evidence was led to show that the investigation was at the instance of the applicant acting *mero motu.*

In our view there was clearly no error or misdirection in the *court-a-quo* accepting the application's version, in as much as the respondent's version did nothing more than cast insignificant doubt on whether the applicant went with Hunter Shongwe to the rooms or not, an aspect that is obviously peripheral to the main issue that an investigation did take place. The trial court's understanding of the matter, in which we concur, was that in the absence of a cogent account to the contrary, the investigation could only be at the instance of the employer, acting through Rodriguez.

23.2 THE BURDEN OF PROOF RESTED ON THE APPLICANT TO PROVE THAT HE WAS INSTRUCTED BY RODRIGUEZ AND HIS EVIDENCE WAS UNCORROBORATED

The applicant did establish, on a balance of probabilities, that he was instructed by Mr. Rodriguez to allow the investigator in. Earlier on in this judgment I observed that it is objectively unthinkable that the respondent could have conjured up the idea of conducting an investigation, and actually carrying it out, without instructions from above. There was no legal requirement for corroboration, and there was nothing wrong in the court finding that the applicant's version was plausible.

23.3 MISDIRECTION IN FINDING THAT IT WAS THE RESPONDENT'S DUTY TO LEAD MR RODRIGUEZ TO REBUT THE APPLICANT'S EVIDENCE

The applicant having shown that he was in the permanent employ of the respondent, the onus then fell on the respondent to demonstrate that applicant's dismissal was fair in all the circumstances of the case. In the case of MENZI NGCAMPHALALA v SWAZILAND BUILDING SOCIETY[12] Dunseith J. expressed the position in the following manner: -

[12] Industrial Court Case No. 50/2005

"It is common cause that the applicant was, at the date of his dismissal, an employee to whom Section 35 of the Employment Act 1980 applied. In terms of Section 42 of the Act, the onus rests on the Respondent to prove that it had a fair reason to terminate the Applicant's services, and that such termination was substantively and procedurally fair and reasonable in all the circumstances."[13]

In view of the applicant's case that he was acting upon the express instructions of director Rodriguez it was the latter's call and his alone, to rebut this critical and damning evidence. Rodriguez was not led in evidence and no explanation was offered for this. Neither was Hunter Shongwe. The respondent was in a better position to find Hunter Shongwe and lead his evidence but it did not do so. The reason is not difficult to see. The result was that the applicant's version was not challenged, and the outcome became inevitable. If Rodriguez had given evidence that effectively gainsaid the applicant's version, the trial court would have been called upon to weigh the probabilities to determine which version was more probable than the other.

GROUND THREE: **"The court-a-quo erred in law and misdirected itself in finding that the version of the applicant was plausible whereat such version was not supported nor corroborated by any evidence."**

[24] This partly repeats what is raised in appeal ground No.2. In this type of matter there is no legal requirement for corroboration.

GROUND FOUR: **"The *court-a-quo* erred in law and misdirected itself in rejecting the evidence of Mlungisi Zakhele Shongwe in particular that the applicant took the master key to the hotel rooms and that he left with the private investigator. The evidence was not challenged by the**

[13] At para 18.

applicant and ought to have been accepted by the *court-a-quo*".

[25] First, I note that the respondent's version of events, including the suggestion that the applicant took the master key and proceeded to the rooms with Hunter Shongwe, should have been put to the applicant in cross-examination. It was not. When it was introduced by DW1, the applicant had no opportunity to deal with it. The result is that it does not have much probative value.

[26] But even if it was to be accepted that the applicant took the master key and proceeded with Hunter Shongwe to the rooms, that does not show that he was acting upon his own imagination, and sans that, count one is clearly unsubstantiated. The failure to substantiate count one had a decisive effect on count two. In other words, in the absence of proof that the applicant was grossly negligent in allowing the investigation to be undertaken, the allegation of unlawfully invading the hotel and hotel rooms is unsustainable.

[27] In any event throughout the trial applicant maintained his position that he acted upon the express and verified instruction of director Rodgriquez. When taxed on why he did not mention this at the beginning of the process against him, his explanation was that Rodriquez had warned him to not mention this to anyone, no doubt because the fiasco was an egg on his face. So clearly, to the extent that he could, the applicant did everything to abide by his boss' demand but at some point in time he needed the truth to save himself.

[28] It was not put to him that the director did not come to the hotel as alleged by him. More importantly, it was not put to him that the director never gave the instruction as alleged by him. It is our view that there is nothing wrong in the *court a-quo* rejecting the evidence of Mlungisi Shongwe.

GROUND FIVE: **"The *court-a-quo* erred in law and misdirected itself in finding that the respondent failed to establish that the dismissal was substantively fair in that the reason for**

dismissal was one permitted in terms of section 36 of the Employment Act. The court erred in law find (sic) that the dismissal ought to have been preceded by a warning. The evidence led at the *court-a-quo* established that the applicant without authorization allowed a private investigator into the hotel rooms. Privacy being a core value in the business of the respondent and the applicant having accepted same, the *court-a-quo* ought to have found that summary dismissal was justifiable in the circumstances."

[29] I confess to being lost in the appellant's maze of words, but to the extent that I can decipher the substance of this all-embracing ground of appeal I will endeavor to address it, at the risk of repeating matters that have already been covered in this judgment.

[30] The letter of dismissal, which is at page 38 of the record of appeal, purports that the dismissal is **"in accordance with Section 36 (d), and e....."** of the Employment Act 1980. Section 36(d) is about an employee who endangers the safety of the undertaking or any person employed or resident therein. No evidence was led before the *court-a-quo* to prove the transgression that is envisaged by the sub-section. Section 36 (e) is about an employee who has wilfully revealed manufacturing secrets or matters of a confidential nature which is detrimental or is likely to be detrimental to the employer. Nothing of this nature was alleged and proved before the *court-a-quo*. I mentioned earlier on in this judgment that the charges against the respondent pass for a fishing expedition and the avowed grounds of dismissal are not any better.

[31] The suggestion that the respondent, without any authorization, sanctioned the investigation, is not supported by the totality of the evidence. What is supported by the evidence is that the respondent was a victim of circumstances who was made a sacrificial lamb to cover up the embarrassment of the failed

investigation, and that although the respondent initially protected the director Rodriguez it became necessary for him to tell the story as it happened.

[32] On the basis of the above, it follows that the requirement of Section 42(2) (b) was not met by the appellant and that the dismissal could not be justified as being reasonable.

[33] On the basis of the foregoing the appeal stands to fail. The circumstances of the dismissal evoke a strong sense of injustice, to such an extent that had there been a counter-appeal this court could have been persuaded to raise the quantum of compensation. In future, this approach may be adopted as a means to discourage frivolous appeals whose purpose is no more than to delay the successful party's remedy.

[34] We therefore make the following order: -

33.1 The appeal is dismissed.

33.2 The appellant is to pay the respondent's costs of this appeal.

MLANGENI AJA.

I agree:

FAKUDZE AJA

I agree:

TSHABALALA AJA

For the Appellant: **Attorney H. Magagula of Robinson Bertram**

For the Respondent: **Attorney O.S. Nzima of Nzima & Associates**