INDUSTRIAL COURT OF APPEAL OF ESWATINI

JUDGEMENT

Case No. 06/2022

In the matter between

NOMCEBO MASANGO Appellant

And

O.K. BAZAARS (PTY) LTD t/a SHOPRITE Respondent

Neutral citation Nomcebo Masango vs O.K. Bazaars (Pty) Ltd t/a Shoprite [06/2022] [2023] SZICA 08 (28 March 2023)

Coram: **MAZIBUKO JA, NKONYANE JA, VAN DER WALT JA**

Last Heard: 15th September 2022

Delivered: 28th March 2023

Summary: APPEAL AGAINST INDUSTRIAL COURT JUDGMENT

(i) Employee dismissed allegedly for misconduct. Employer fails to lead evidence to prove misconduct. Employer's witness relies on images he saw on a video footage. Employer fails to produce video footage before the Industrial Court.

(ii) Employer relies also on a written admission or confession that the employee committed the alleged misconduct. Employee leads evidence to prove that the alleged admission was written and signed by her under duress. Employer failed to prove that the admission was signed freely and voluntarily.

(iii) Employee was convicted at a disciplinary hearing and dismissed. Employee appeals conviction and dismissal. Employee argued she was not afforded a hearing on appeal. Employer fails to prove that employee was afforded a hearing on appeal.

(iv) Industrial Court relies on inadmissible evidence to arrive at a conclusion that the dismissal was fair procedurally and substantively.

(v) *Employer consults chairperson before the disciplinary hearing proceeded and privately discusses with chairperson the merits of the alleged misconduct. Chairperson fails to disclose; at the disciplinary hearing, her prior consultation with employer. Chairperson finds employee guilty of misconduct on evidence which was not presented during the disciplinary hearing but was communicated to chairperson at the private consultation with employer. Chairperson dismissed employee based on evidence obtained in a private consultation with employer.*

(vi) *Employee challenges dismissal before the Industrial Court. Employee's application dismissed. Employee appeals the Industrial Court decision.*

(vii) *Industrial Court relied on inadmissible evidence as proof that: the employee was afforded an opportunity to be heard on appeal, but that the employee failed to attend the hearing.*

Held: Dismissal of the employee was procedurally and substantively unfair.

Held further: The employer has failed to prove that the employee was given a hearing on appeal.

Held further: *The Industrial Court made errors of law which led to its decision being set aside on appeal.*

Held further: *The matter was ordered to revert to the Industrial Court for determination of the employee's claim for relief.*

MAZIBUKO JA

JUDGMENT

THE PARTIES BEFORE COURT

1. The Appellant, Ms Nomcebo Masango, was Applicant before the Industrial Court. The Appellant is a former employee of the Respondent. Hereinafter the Appellant shall be referred to as employee. The Respondent, O.K. Bazaars (Pty) Ltd, operates business as a food – retail shop. Hereinafter the Respondent shall be referred to as the employer. The employee was employed on the 3rd July 2006 and dismissed on the 5th February 2013.

2. The matter before Court is an appeal by the employee against the judgment of the Industrial Court dated 28th March 2002. Both sides have filed heads of argument for which this Court is grateful.

THE DISCIPLINARY CHARGE

3. About the 31st January 2013 the employee was suspended from work, in writing and with pay. The employee was further charged with a disciplinary offence. The offence reads as follows:

"Gross misconduct in that on 6/12/2012, 13/12/13 [13/12/12] you were caught on camera eating unknown food. '[sic] .

"Without authorization and without the item being paid for or cancelled ... your action were in breach of company rules" [sic]

4. Sometime early January 2013 and prior to the employee being suspended from work (as aforementioned), the employee was ordered to appear before the employer's Branch Manager, namely Mr Moses Mkhonto. The employee complied with that order. Mr Mkhonto was with another senior officer of the employer (from another branch) who was known as Mr Nkosi.

4.1 At Mr Mkhonto's office the employee was shown a video footage. The employee was told by Mr Mkhonto that the video footage shows the

employee together with her fellow employees eating unidentified food that belonged to the employer. Mr Mkhonto concluded there and then that the employee had committed misconduct at the workplace, and that accusation was based solely on the video footage.

4.2 The employee denied the allegation, particularly, that it was her image that Mr Mkhonto had seen in that video footage. The employee argued further that the video recording was poor, the images were blurred and were therefore unidentifiable.

4.3 The employee denied the accusation and maintained that denial even during the trial. An excerpt from the judgment from the Industrial Court has summarized the employee's evidence as follows, at paragraph 2.

"Detailing the circumstances that led to her dismissal the Applicant testified under oath that on a certain day around early January 2013, she was summoned by her branch Manager, Moses Mkhonto, to the butchery section of the shop. There she says she found the branch Manager together with a Mr. Nkosi from South Africa. She was shown a video in which the person in it was seen consuming food belonging to the Respondent. The person in the video was said to be the

Applicant, but she says the footage shown was not clear hence she denied that it was herself."

4.4 The employee was ordered by Mr Mkhonto to record a statement of what she had observed in the said video footage. The employee complied with that instruction. In her statement the employee denied that she had committed misconduct that Mr Mkhonto was accusing her of. The employee further denied that it was her image that was seen in the video footage. Mr Mkhonto tore the employee's statement and ordered the employee to record another statement in which the employee admitted to misconduct which Mr Mkhonto was accusing her of.

4.5 According to the employee, Mr Mkhonto dictated the actual words that the employee was ordered to write in order to incriminate herself in the alleged misconduct.

4.5.1 An extract of the employee's evidence reads thus under cross examination:

RC: *And you said that the statement that you had written he tore it and threw it away, isn't that so?*

AW1: *I do confirm that, my Lord*

RC: *Now what you did not tell the Court is what exactly did Mr Mkhonto detect [dictate] to you to write?*

AW1: *He said that I must write that: I Nomcebo Masango was the one that was seen on the camera consuming unknown food because we were earning peanuts.*"

(Record Page 137)

4.5.2 While still under cross examination, the employee testified as follows regarding Mr Mkhonto:

"Mr Mkhonto did force me to write a letter as he tore the first letter that I had written and detacted [dictated] to me what to write on the second letter"

(Record page 141)

4.5.3 *"I was forced to admit that I consumed the company stock, my Lord*"

(Record page 164)

4.6 Among the exhibits that the employer relied on in its argument is a document with the heading '*INTERNAL VOLUNTARY STATEMENT*'.

According to the employer, the employee admitted in that document that she had committed the offence which she had been charged with.

4.7 In paragraph 3 of its judgment the Industrial Court again summarized the employee's explanation as follows:

"She [the employee] was then made to write a statement explaining what she had observed in the video footage. She says in her initial statement she denied that the person seen in the video footage was herself but she says the branch Manager took that statement and tore it up. He instructed her to write another one confessing that it was her seen in footage consuming the Respondent's food. He threatened to call police if she did not do as directed and she ended up writing a statement in which she confessed to the alleged transgression. In effect she says she was made to write the statement under duress."

(Underlining Added)

4.7.1 The employee's evidence: that she wrote an exculpatory statement regarding the alleged misconduct and that it was torn and destroyed by Mr Mkhonto, was not denied by any of the employer's witnesses.

4.7.2 The employee's evidence that: she was forced by Mr Mkhonto to write a statement in which she incriminated herself, was also not denied by any of the employer's witnesses.

4.7.3 It is also not denied that Mr Mkhonto represented the employer in the event aforementioned.

4.7.4 When evidence that is delivered in Court by one party, is not denied by the other party, the Court is entitled to treat that evidence as admitted.

ADMISSION UNDER DURESS

4.8 According to the employee, she was made to write the incriminatory statement under duress. The employee explained her reasons for making this allegation; as shown hereunder.

4.8.1 The employee testified that she was forced to write an incriminatory statement since Mr Mkhonto was literally next to her and further dictated the actual words that he ordered the employee to write.

4.8.2 In addition, Mr Mkhonto had threatened the employee: that failing to write the incriminatory statement, Mr Mkhonto would have the employee arrested by the police. The employee

had a fear of the police generally, especially since she had never been under police – arrest.

4.8.3 At page 150 of the record the employee testified as follows, regarding intimidation by Mr Mkhonto.

"AW1 : Another threat that they made was that they would call police to come and arrest us.

...

AW1: My Lord, generally I am afraid of [the] police more so because I have never even been arrested before."

4.9 The evidence of the employee regarding the circumstances under which she wrote and signed the written statement, (which is also referred to as a confession or admission), indicates that the employee did not write and sign that statement freely and voluntarily.

4.9.1 The Court was not told the reason the first statement, that the employee wrote (in order to exculpate herself), was torn. However by so doing the employer destroyed crucial evidence which was favourable to the employee.

4.9.2 The onus was on the employer, to provide proof that the written confession or admission which it relied on, as the basis for the dismissal, was obtained freely and voluntarily. The employer failed to provide the requisite proof and consequently failed to discharge the onus.

4.9.3 Authorities have explained as follows, the meaning of the phrase: *'freely and voluntarily made'* in the context of a statement that is sought to be used in Court, as an admission or confession, against its author:

> *"The ... meaning of 'freely and voluntarily made' ... at common law [is the absence] of a threat or promise emanating from a person in authority."*
>
> (Underlining added)

HOFFMANN LH et al: THE SOUTH AFRICAN LAW OF EVIDENCE, 4th edition, 1988. (ISBN 0 409 03325 1)

page 216.

4.9.4 It is not in dispute that Mr Mkhonto, (in the company of Mr Nkosi), conducted a pre-hearing of the alleged misconduct (which the employee was eventually charged with), and that is the incident when the video footage was shown to the employee. In other words the witnesses that the employer called during the trial, were not in attendance in that event.

4.9.5 Mr Mkhonto exercised undue influence over the employee when he -

(i) tore the first written statement, and

(ii) dictated to the employee what to write in the second statement (which was before the Industrial Court, as evidence), and,

(iii) threatened the employee with police – arrest, in order to compel compliance, and

(iv) literally waited next to the employee in order to ensure that the employee incriminated herself, in writing, in the second statement.

4.9.6 The second statement is the one with the heading *'INTERNAL VOLUNTARY STATEMENT'*.

INVOLUNTARY ADMISSIONS ARE EXCLUDED FROM THE EVIDENCE

4.10 When a statement is presented as evidence before Court against its author, the Court is legally obligated to determine whether or not that statement was written or issued voluntarily. If the Court determines that, that statement was written or issued involuntarily, the Court is further legally obligated to exclude that statement from the evidence. Legal authority provides as follows:

"There have been different attitudes taken at common law about why involuntary statements are excluded. One view, which may conveniently be called the reliability principle, stresses that they are excluded because of the danger of their being untrue."

(Underlining Added)

HOFFMANN LH: (supra) page 216.

4.11 In the pleadings as well as the testimony before the Industrial Court, the employee has been consistent in challenging the manner the said statement was written and signed. As aforementioned, the employer failed to provide proof that the aforementioned statement was written and signed freely and voluntarily. Consequently, that statement should have been excluded from the evidence, on the basis that it was not written and signed freely and voluntarily. In other words that statement did not comply with the rules of evidence.

4.12 An extract of ground 3 of the Notice of Appeal reads thus:

"3. The Court a quo erred in law in holding that the Appellant had committed the offence with which she had be charged by virtue of the fact that she wrote and signed a document entitled 'Internal Voluntary Statement.'

APPEAL GROUND 3.1

4.13 Ground 3.1 in the Notice of Appeal ties in with ground 3 and the latter reads thus:

"3.1 The Court a quo erred in law further by disregarding the uncontroverted evidence of the Appellant to the effect

that the document aforesaid was written and signed by her under duress."

APPEAL GROUNDS 3 AND 3.1 UPHELD

4.14 For reasons that are stated below, grounds 3 and 3.1 of the Notice of Appeal are upheld.

4.14.1. The Industrial Court made an error of law by failing to apply an established legal principle viz: that a statement that has been presented before Court as an admission (or confession), against its author, is inadmissible if it was involuntarily issued or written. The Honourable Court overlooked this principle of law, and that error led to an erroneous judgment.

4.14.2 Alternatively, the Honourable Court made an error of law (in its analysis of the evidence), when it failed to exclude the alleged statement from the evidence, on the basis that it had not been issued freely and voluntarily, by its author.

EMPLOYEE CALLED TO A DISCIPLINARY HEARING

5. At some point, after the pre-hearing (which took place before Mr Mkhonto and Mr Nkosi), had been completed, the employee was called to a disciplinary hearing. The disciplinary hearing was chaired by Ms Matsibo Mahlalela, who then was manager in one of the employer's branches. Mr Mkhonto was the initiator. The outcome of the disciplinary hearing is dated 4th December 2013, and it is among the exhibits before Court. This Court has observed that the correct date could be 4th February 2013.

5.1 For the sake of completeness the Court hereby reproduces the outcome.

"Outcome on the disciplinary hearing for Nomcebo Masango on gross misconduct in that she was caught on camera consuming company stock without authorization and in an unauthorized area

Date 04.12.2013 [sic]

Having made my findings to you and after going through your mitigating factors I learnt that you do admit in your written statement to have consumed the company stock without paying for it and without authorization.

Your actions of breaching Shoprite company rule number 13 (dishonesty) and staff buying procedures is not acceptable.

I want you to know that the company will not tolerate staff members who are dishonest.

Your actions were against company rules and procedures; as a result you have contributed to the high shrinkage of 2.65%. The company is spending a lot of money in implementing shrinkage prevention measures in the stores, so I find your actions not acceptable in any way.

I therefore dismiss you based on the video footage and ShopRite company rule number 13 as from the 5th February 2013.

By Chairlady

Matsibo Mahlalela"

(Record Page 103)

5.2 The chairperson (Ms Matsibo Mahlalela) found the employee guilty as charged and proceeded to dismiss her from work. The chairperson based the dismissal on 2(two) grounds, namely –

5.2.1 the employee's aforesaid written statement which is headed '*INTERNAL VOLUNTARY STATEMENT*; and,

5.2.2 the video footage (aforementioned).

5.3 At the trial, the employer relied on the same defence in order to justify the dismissal viz: the *'INTERNAL VOLUNTARY STATEMENT'* and the video footage.

5.4 The aforementioned written document will receive further attention from this Court, later in this judgment. The employee challenged the dismissal before the Industrial Court. According to the employee the dismissal was procedurally and substantively unfair. The employer called 2 (two) witnesses in its defence namely; Mr Musa Ntshangase and Ms Matsibo Mahlalela. Mr Ntshangase and Ms Mahlalela are referred to as RW1 and RW2 respectively, in the record of evidence.

THE EMPLOYER BEARS THE ONUS TO PROVE FAIRNESS

APPEAL GROUND 2.2

6. Ground 2.2 in the Notice of Appeal reads thus.

"2.2 The Court erred in law in completely disregarding the position of law to the effect that the employer bears the burden of proof that the dismissal was fair"

(Underlining added)

6.1 The onus is on the employer to prove that the dismissal of the employee was fair and reasonable. Section 42 of the Employment Act 5/1980 (as amended) provides as follows:

"*Burden of proof.*

42. (1) In the presentation of any complaint under this Part the employee shall be required to prove that at the time his service were terminated that he was an employee to whom section 35 applied.[sic]

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

(a) that the reason for the termination was one permitted by section 36; and

(b) that, taking into account all the circumstances of the case; it was reasonable to terminate the service of the employee."

6.2 Ms Mahlalela confirmed in her evidence that the employer did not present the video footage at the disciplinary hearing. However, Ms Mahlalela had been shown the video footage, by the employer prior to the disciplinary hearing being carried out. An excerpt of the

evidence of Ms Mahlalela reads thus at pages 190 and 191 of the record of evidence, respectively:

6.2.1 *"AC: Who was in possession of the video footage?*

RW2: It was the Assistant Manager Musa Ntshangase; we were shown the whole video footage. We were shown the footage before the disciplinary hearing."

6.2.2 *"AC: During the disciplinary hearing, the video was not shown?*

RW2: Yes it was not because the Applicant did not dispute anything."

(Underlining added)

CHAIRPERSON WAS CONSULTED PRIVATELY BY EMPLOYER

6.3 The employee's argument raises a question, whether or not the disciplinary hearing was conducted fairly? If the disciplinary hearing was not conducted fairly, that fact would render the dismissal of the employee, unfair. The employee's relief before the Industrial Court was based on the claim of unfair dismissal.

6.3.1 It is common cause that the employer presented its evidence to Ms Mahlalela in a private meeting. The employee was not invited, so she was neither in attendance nor represented at that meeting. Ms Mahlalela was therefore persuaded to accede to the evidence of the employer in a private arrangement, which excluded the employee.

6.3.2 The private meeting which took place between the employer and the chairperson, especially to discuss the merits of the proposed disciplinary hearing, was irregular and consequently unfair to the employee.

CHAIRPERSON UNFAIRLY WITHOLDS CRUCIAL FACT

6.4 When Ms Mahlalela took her position as chairperson at the disciplinary hearing, she already knew the employer's evidence but did not disclose that fact to the employee. The chairperson was obligated to disclose that fact to the employee, so that the latter would make an informed decision, whether or not to apply that the chairperson should recuse herself. By withholding such crucial information, the chairperson acted dishonestly and

procedurally unfair toward the employee. The evidence indicates that Ms Mahlalela colluded with the employer in order to convict the employee of misconduct.

CHAIRPERSON WITNESSED THE EMPLOYER'S EVIDENCE

6.5 The private meeting between the employer and Ms Mahlalela as well as the viewing of the video footage prior to the disciplinary hearing, made Ms Mahlalela a witness to the employer's evidence. Ms Mahlalela's impartiality was compromised and that fact disqualified her from serving as chairperson in that disciplinary hearing. Ms Mahlalela was both chairperson and potential witness in the same disciplinary hearing. It amounts to procedural unfairness when a chairperson, in a disciplinary hearing, whose impartiality is compromised, proceeds to preside over that hearing.

CHAIRPERSON ACCUSED OF BIAS

6.6 In paragraph 8.6 of her Amended Particulars of Claim, the employee accused the chairperson of bias in the manner she handled the disciplinary hearing. The employer was made aware at an early stage in the legal proceedings that; the disciplinary

process was being attacked, inter alia, on the basis of bias on the part of the chairperson. An excerpt of the employee's Particulars of Claim reads thus at paragraph 8.6.

"The Applicant [employee] alleges further that the chairperson of the disciplinary hearing was biased."

6.7 In paragraph 12 of the REPLY, the employer denied the allegation of bias, on the part of the chairperson.

6.8 The Industrial Court made a finding regarding procedural fairness at the disciplinary hearing, as follows:

6.8.1 *"...the Court comes to the conclusion and finding that the dismissal of the Applicant [employee] was procedurally fair'*

(Underlining added)

(At paragraph 17)

6.8.2 *"...the dismissal of the Applicant [employee] ..., was initiated following fair procedures. [procedure]."*

(Underlining added)

(At paragraph 21)

6.8.3 The Honourable Court had a legal obligation to make a determination regarding the legality or propriety of the conduct of the chairperson prior to and during, the disciplinary hearing. In particular, the Industrial Court was legally obligated to make a determination regarding the manner the chairperson subsequently used that evidence as a basis for the verdict and the dismissal of the employee from work. The Honourable Court failed to make the requisite determination, yet it had a legal obligation to do so.

6.8.4 There was an obvious element of bias by the chairperson in favour of the employer. The verdict (at the disciplinary hearing), as well as the dismissal, was vitiated by bias on the part of the chairperson. A biased chairperson and a fair disciplinary procedure, cannot co-exist. When bias enters a disciplinary hearing, fairness automatically exits that hearing.

6.9. The rule against bias is explained by authority as follows:

"Every person who undertakes to administer justice, whether he is a legal official or is only for the occasion engaged in the work of deciding the rights of others, is disqualified if he has a bias which interferes with his impartiality."

CLASSEN C.J.: DICTIONARY OF LEGAL WORDS AND PHRASES, volume1, 1975, Butterworths; (SBN 409 01890 2) page 184.

6.10 In law, a dismissal of an employee that is based; on an irregular procedure or tainted with bias; cannot be regarded as procedurally fair. The requirement of impartiality on the decision – maker, is the cornerstone of every inquiry, including a disciplinary hearing. The determination whether or not; the chairperson in a disciplinary hearing was impartial, or whether he followed a fair procedure, is a question of law. It is the law that demands that: a chairperson should remain impartial throughout the disciplinary hearing; and should follow legal procedure.

THE INDUSTRIAL COURT FAILED TO CONDEMN BIAS

6.11 In a case where a chairperson, in a disciplinary hearing, has exhibited signs of bias or has failed to follow lawful procedure, the Court has a legal obligation to declare that: that disciplinary hearing is procedurally unfair. The Industrial Court made an error of law when it failed to condemn bias on the part of the chairperson, and furthermore, failed to declare that the disciplinary hearing was procedurally unfair on account of bias, as aforesaid, and that error led to an erroneous judgment.

APPEAL GROUND 2.2 UPHELD

6.12 When the Industrial court declared that the disciplinary hearing *'... was procedurally fair'* or that *it was initiated following fair procedures [procedure],'* the Honourable Court had overlooked the presence of bias at the disciplinary hearing. It is an error of law for the Industrial Court to fail to apply a relevant legal principle in a matter before it. Consequently ground 2.2 in the Notice of Appeal is upheld.

REAL EVIDENCE NOT PRESENTED BEFORE COURT

7. It is common cause that the video footage was not presented as evidence before the Industrial Court. The Industrial Court did not therefore examine the video footage and make its determination regarding the contents therein.

7.1 The employer's first witness, namely Mr Musa Ntshalintshali (aforementioned), testified before Court that he was shown the video footage, by the employer. As aforementioned, Ms Mahlalela did testify that herself and Mr Ntshalintshali were shown the video footage before the disciplinary hearing was instituted. The viewing of the video footage (by these 2 (two) witnesses), was done by private arrangement with the employer. At the expense of this Court repeating itself; the employee had not been invited to that meeting, and consequently, she was neither present nor represented.

7.2 As aforementioned, the employee was called by Mr Mkhonto to a pre-hearing of the alleged misconduct. According to the employee the pre-hearing, was attended by herself and the 2 (two) representatives of the employer (aforementioned), Mr Mkhonto and Mr Nkosi. Beside this pre-hearing, there is no evidence that there was another

event where the employee attended, in which the video footage was shown.

7.3 According to Mr Ntshalintshali he identified the employee as one of the persons who appeared in the video footage. In other words Mr Ntshalintshali interpreted the images, that he said he saw, in the video footage, and concluded that one of those images is that of the employee. Mr Ntshalintshali did not witness the employee commit the alleged misconduct, as he (Mr Ntshalintshali) was not present at the scene, particularly at the time it is alleged the misconduct was committed.

7.4 The same principle applies to the evidence of Ms Mahlalela (the chairperson), she did not witness the employee commit the alleged misconduct. The employee was therefore convicted for misconduct, (by the chairperson) not on the evidence of an eye witness, but on the interpretation of images that allegedly were seen in the video footage by Mr Mkhonto (the initiator) and Ms Mahlalela, herself, who also served as chairperson.

7.5 The absence of the video footage from the evidence, denied the Industrial Court the opportunity to exercise its authority –

7.5.1 to determine whether or not the picture resolution (in that video footage) was sufficiently clear to enable the Court (and other viewers), to identify the images and events that were meant to be recorded, and if so,

7.5.2 to further establish whether there is a particular image in that video footage which could be associated with the employee, and if so,

7.5.3 to further establish whether or not the images that are seen in the alleged video footage are consistent with the allegations that are made in the disciplinary charge, and also

7.5.4 to confirm whether or not the video footage itself, was authentic.

7.6 The absence of the video footage from the Industrial Court –

7.6.1 meant the absence of evidence that the employer relied on, as the basis for its decision, to dismiss the employee from work, and

7.6.2 it also meant the absence of evidence from which the Industrial Court could determine whether or not the dismissal of the employee was substantively fair and reasonable.

7.7 According to authority:

"*Real evidence consists of things which are examined by the Court as means of proof.*"

HOFFMANN LH et al: (supra) page 404.

7.8 In this case, the employer failed to present real evidence, which the Industrial Court was required by law to examine, in order to establish the truth regarding the alleged misconduct and the video footage. Without real evidence the employer could not prove that the employee committed the misconduct, which the employee was convicted of and dismissed for. Ms Mahlalela had testified that Mr Ntshalintshali (RW1) was in possession of the video footage.

Real evidence was therefore accessible to the employer, but the employer made it inaccessible to the Industrial Court.

7.9 In ground 2.2 of the Notice of Appeal, the employee had stated the correct legal position that: the employer carries the burden to prove that the dismissal was fair. In law, the concept of fairness manifests itself in 2 (two) dimensions, viz: substantive and procedural fairness.

EMPLOYER FAILED TO PROVE PROCEDURAL FAIRNESS

7.10 The Industrial Court made an error of law when it failed to determine the legal consequence of failure by the employer; to prove that the dismissal of its employee was reasonable and procedurally fair. The Industrial Court failed to deal with a legal principle that was before it for determination. It is an error of law when the Court overlooks a question of law, that was before it, and that error resulted in an erroneous judgment. Ground 2.2 of the Notice of Appeal is upheld also on this point.

8. In paragraph 5.1, above this Court reproduced a document that was written by the chairperson (Ms Mahlalela) which is headed "*Outcome on the disciplinary hearing for Nomcebo Masango ...*" and is dated 4.12.2013 [sic]. In that document the chairperson expressed herself as follows:

8.1 *"Having made my findings to you and after going through your mitigating factors I learnt that you do admit in your written statement to have consumed the company stock without paying for it and without authorization"*

(Record page 103)

8.2 The chairperson found the employee guilty of misconduct on the basis that the employee allegedly admitted in her written statement that she had committed the alleged misconduct. The written statement is headed '*INTERNAL VOLUNTARY STATEMENT*'.

8.3 This Court has determined that the Industrial Court should have excluded the written statement from the evidence, since the employer had failed to prove that, the employee had made that statement freely and voluntarily.

EMPLOYER FAILED TO PROVE SUBSTANTIVE FAIRNESS

8.4 The absence of the video footage from the evidence, as well as the exclusion of the written statement from the evidence, means that the employer has failed to justify the dismissal of the employee from work. The employer therefore failed to prove that the dismissal was reasonable and substantively fair. The Industrial Court had a legal duty to make a determination on that aspect of the case. That determination would have led the Industrial Court to a conclusion that the dismissal was substantively unfair.

8.5 In addition, the Industrial Court failed to make a determination regarding the legal consequence of failure by the employer to prove that the dismissal of the employee was reasonable and substantively fair.

APPEAL GROUND 2.2 UPHELD

8.6 The question whether the dismissal of an employee is substantively and/or procedurally fair, is a question of law. The Industrial Court is compelled by law including Section 42 (2) (a)

and (b) of The Employment Act, to determine that question. The Industrial Court failed to determine that question when this matter came before the Honourable Court for determination. It is an error of law for the Honourable Court to overlook a question of law, that had been placed before it for determination, and that error led to an erroneous decision This is another reason ground 2.2 of the Notice of Appeal is upheld.

APPEAL GROUND 2.3

9. In ground 2.3 of the Notice of Appeal, the employee challenged the failure by the Industrial Court to exclude hearsay evidence from the record. An excerpt from the Notice of Appeal reads thus:

"2.3 *The Court a quo erred in law in taking into account the uncorroborated hearsay evidence of the Respondent's [employer's] witnesses to come to the conclusion that the Appellant had committed the offence with which she was charged.*"

9.1 It has already been established by this Court that the employer's witnesses did not present the video footage before Court, as part of their evidence.

9.2 It has also been established by this Court, that the 2 (two) witnesses, (which the employer called during the trial), did not witness the employee commit the misconduct, for which she had been dismissed. The witnesses relied on what they had allegedly seen on the video footage. The employer's argument before the Industrial Court was that: the employee was guilty of misconduct, as charged, because the video footage says so.

9.3 The employer's approach was to make reference to the contents of the said video footage as if they are factually correct. The employer's evidence amounted to hearsay. The contents of the video footage, on their own, could not amount to evidence. Evidence is invariably brought to Court by a witness, who could be subjected to cross examination, particularly on the evidence which he has delivered in Court.

THE RULE AGAINST HEARSAY EVIDENCE

9.4 The general rule is that: hearsay evidence is inadmissible. Legal authorities have explained the principle which prohibits hearsay as follows:

9.4.1 *"Oral or written statements made by persons who are not called as witnesses are inadmissible to prove the truth of the matters stated ..."*

HOFFMANN LH et al: (supra) page 124

9.4.2 *"... hearsay evidence is untrustworthy because it cannot be tested by cross – examination."*

HOFFMANN LH et al: (supra) page125.

9.4.3 *"If something is alleged to have been seen, evidence must be that of the person who says he saw it; if heard, that of the person who says he heard it; otherwise it would be impossible to test by cross – examination the truth of the testimony, and the law rejects evidence which cannot be adequately tested."*

CLASSEN C.J. DICTIONERY OF LEGAL WORDS AND PHRASES, (supra) volume 2, page 168

APPEAL GROUND 2.3 UPHELD

9.5 The Industrial Court made an error of law by admitting into the record, hearsay, which is inadmissible as evidence. The employee's argument in ground 2.3 of the Notice of Appeal is upheld. The Honourable Court had a legal obligation to exclude hearsay evidence from the record.

APPEAL GROUND 2.1

10. Ground 2.1 of the Notice of Appeal reads thus:

"2.1 *The Respondent's failure to produce the video footage to the Court a quo not only caused prejudice to the appellant but was in direct violation of the well established principle of the law that matters at the Industrial Court are heard de novo.*"

10.1 The employee's argument is that the Industrial Court had a legal obligation to consider the evidence that had been placed before it, in order to make its determination: whether or not the dismissal, (of the employee) was reasonable and fair. The Honourable Court was not entitled to rely on the proceedings and the finding of the

chairperson, at the disciplinary hearing, in order to arrive at its conclusion.

10.2 In the matter of: THE CENTRAL BANK OF SWAZILAND VS MEMORY MATIWANE SZICA case no. 110/1993 (unreported) this Court stated the principle as follows at page 2:

"This indicates a grave misdirection of the Court a quo. 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 the Industrial Relations Act and the Employment Act have been complied with, and to make a fair award having regard to all the circumstances of the case."

10.3 The MEMORY MATIWANE case was quoted with approval in the case of SWAZILAND UNITED BAKERIES VS ARMSTRONG DLAMINI SZICA case no 117/94 (unreported). In the ARMSTRONG DLAMINI case the Honourable Court confirmed the principle as follows at page 13:

"I am satisfied, upon a consideration of the provision of Section 42 of the employment Act as well as the relevant authorities on the topic that the court a quo was bound to have regard to the evidence placed before it.'

(Underlining added)

10.4 The employee's ground of appeal has legal support, as shown in the cases cited above.

10.4.1 The 2 (two) witnesses that the employer brought before Court, failed to provide evidence that they saw the employee commit the offence she was charged with.

10.4.2 The said witnesses relied on inadmissible evidence, namely the alleged video footage, as well as the alleged *'Internal Voluntary Statement.'*

10.4.3 As aforementioned, the Industrial Court arrived at a decision that the disciplinary hearing was *'procedurally fair' and also 'substantively fair.'* The Honourable Court based its decision on the evidence of the employer

which was based solely on inadmissible evidence, as aforementioned.

10.4.4 In order for the Industrial Court to arrive at a conclusion, whether or not the dismissal was '*substantively*' and '*procedurally fair*' the Honourable Court had to exclude inadmissible evidence from the record and consider only admissible evidence. The failure by the Industrial Court to exclude inadmissible evidence from the record resulted in the Honourable Court endorsing a dismissal that is substantively and procedurally unfair. The Honourable Court treated the trial as if it was a continuation of the disciplinary hearing. That approach was an error of law, as it goes against the legal principle as stated in the MEMORY MATIWANE and the ARMSTRONG DLAMINI cases. That error of law resulted in an erroneous judgment.

11. The Industrial Court dismissed the employee's claim and based its reason on probabilities, as opposed to evidence. The Honourable Court further found *'inconsistencies'* or '*contradictions*' in the evidence of the

employee, which further led the Honourable Court to dismiss the employee's claim.

11.1 In particular, the Honourable Court made the following finding:

> *"21 As alluded to earlier on in this judgment, the case of the Applicant is riddled with so many inconsistencies and contradictions such that the Court is satisfied on a balance of probabilities that her version is not true and accurate and therefore unacceptable."*

11.2 *"22. Having weighed up and tested the Applicant's version against the general probabilities, the Court comes to the conclusion that it was fair and reasonable to terminate the services of the Applicant."*

(Underlining added)

11.3 With respect, this Court does not find *'inconsistencies'* or *'contradictions'* regarding the principle on which the employee has based her argument. The employee has based her argument on issues that are common cause, and which are repeated hereunder, (for the sake of emphasis).

11.3.1 It is a fact that the video footage, (which the employer had referred to as a basis for the dismissal), was not presented as evidence before the Industrial Court. Consequently, the employer failed to prove, (before the Industrial Court), that the employee was guilty of misconduct.

11.3.2 It is also a fact that the employer had also referred to the *'INTERNAL VOLUNTARY STATEMENT'* as a basis for dismissing the employee from work. It is a fact that the employer failed to produce evidence (before the Industrial Court), to prove that the alleged statement was written and signed (by the employee), freely and voluntarily.

11.3.3 It is also a fact that there is no witness who testified (before the Industrial Court), that he/she had witnessed the employee commit the misconduct, for which she was dismissed.

11.4 As shown above, the employee has built a case based on facts that are supported by the evidence. There are no *'inconsistencies'* or '*contradictions*' on the facts which form the foundation of the employee's case.

11.5 If there are indeed *'inconsistencies'* or '*contradictions*' in the remainder of the evidence of the employee, they are not material in determining the pertinent question: whether or not the dismissal of the employee was fair and reasonable. The question: whether or not the dismissal of the employee was fair and reasonable, was determinable on the facts that were before the Industrial Court and which are common cause, as aforementioned.

11.6 The Honourable Court made an error of law, when it based its decision on '*probabilities*', *'inconsistencies'* or '*contradictions*', instead of the evidence, that was placed before it, particularly facts that are common cause, as shown above.

SECTION 42 (2) (a) and (b) OF THE EMPLOYMENT ACT

11.7 In a matter that is before the Industrial Court, wherein the employer has failed to prove that the dismissal of the employee is fair and reasonable, the Court is legally obligated to declare that the dismissal is unfair. This principle is based on section 42 (2) (a) and (b) of The Employment Act. It is an error of law for the Court to fail to apply the correct law in a matter before it.

11.8 An excerpt of ground 2 of the Notice of Appeal reads thus:

11.8.1 *"The Court a quo erred in law in holding that the dismissal of the Appellant was substantively fair ..."*

11.8.2 The Industrial Court did not find evidence of misconduct on the employee. Consequently, the Honourable Court could not arrive at a conclusion that the dismissal of the employee was substantively fair. A determination by the Industrial Court that the dismissal of the employee was substantively fair, must invariably be based on the evidence.

11.8.3 The Industrial Court made an error of law in drawing a legal conclusion which is not supported by the evidence, and that error led to an erroneous judgment. A conclusion that the Honourable Court has drawn, to the effect that the dismissal of an employee is fair, is a question of law. Consequently, ground 2 of the Notice of Notice is upheld for this reason as well.

FAILURE BY A LITIGANT TO DISCHARGE THE BURDEN OF PROOF

12. An excerpt of ground 2.2 in the Notice of Appeal is again reproduced with emphasis on the issue of '*burden of proof.*'

"... *the employer bears the burden of proof that the dismissal was fair.*"

12.1 It is a fundamental principle of law, with authoritative support, that the party who makes an allegation, must prove it. In the absence of proof, that allegation would fail to qualify as a fact.

12.2 Authority provides as follows:

"... *the party who alleges or, as it sometimes stated, the party who makes the positive allegation, must prove.*"

CLASSEN C.J. (supra) volume 3 page 78.

12.3 It is the employer that accused the employee of misconduct. The burden was therefore on the employer to prove (before the Industrial Court), that the employee actually committed misconduct, for which she was dismissed. The determination as to which party carries the burden of proof, is a matter of law.

12.4 As shown above, the employer failed to prove that the employee committed the alleged misconduct. The employer therefore failed to discharge the burden of proof. When the employer fails to discharge its burden, the Industrial Court is legally obligated to dismiss the employer's argument and find in favour of the employee.

12.5 Where the burden of proof is concerned, the Industrial Court has failed to apply the correct principle in law, and that failure amounted to an error of law. Consequently, ground 2.2 in the Notice of Appeal, is upheld for this reason as well.

13. Another point that the employee raised on appeal is that, she was denied an internal appeal hearing by the employer. Grounds 1, 1.1 and 1.2 of the Notice of Appeal read thus:

"1. The Court a quo erred in law by holding that the Appellant was afforded an opportunity to appeal the decision of the Chairperson of the disciplinary hearing whereas there was no evidence adduced by the Respondent to prove that the appellant was afforded an opportunity to appeal the decision of the chairperson of the disciplinary hearing.

1.1 The Court a quo erred in law by relying on a document "R1" which was never formally tendered by the Respondent's witnesses as part of their evidence and whose author was never called to come to the Court to testify on it. The document was in terms of the law inadmissible to the Court.

1.2 The failure by the Respondent to afford the Appellant an opportunity to appeal the decision of the Chairperson of the disciplinary hearing was a direct violation of the well established

principle of the audi alteram partem and it rendered the whole disciplinary process procedurally unfair."

14. The Industrial Court made a finding that the employee was given a chance to argue her internal appeal but that she failed to appear on the day the appeal was scheduled to proceed.

14.1 An excerpt of the judgment reads thus at paragraphs 16 and 17:

> *"16. Thereafter exhibit 'R1' indicates that an appeal hearing sitting was convened for 19 March 2013 and it was chaired by a Vincent Sihlongonyane, and the Applicant was in attendance. However, the Applicant requested that the hearing be rescheduled because, according to her, '... she did not have time for the appeal right now ...' and that her lawyer would handle all her cases. The Chairperson advised her that she had to have an internal representative and further rescheduled her hearing to the next day. On the next day however the evidence before Court indicates that the Applicant did not show up for her appeal hearing and it proceeded in her absence, with the Chairperson upholding the decision to terminate her services."*

17 Clearly therefore, the assertion that the Applicant was never afforded an opportunity to appeal her dismissal is false and is no doubt one of the many untruths the Applicant has consistently peddled in her case before this Court. It is accordingly a finding of this Court that the Applicant was duly afforded the right to appeal her dismissal, and that she exercised it by lodging same only to spurn it when her appeal hearing was rescheduled. She cannot therefore come to this Court to complain that she was not afforded the right to appeal when she was. For that reason, the Court comes to the conclusion and finding that the dismissal of the Applicant was procedurally fair."

14.2 The 2 (two) witnesses that the employer had called, did not testify about the internal appeal which the employee had filed. Instead, the Honourable Court relied on a bundle of documents which are marked (R1) as its basis for its finding.

14.3 Exhibit R1 is a bundle of documents which were filed before the Industrial Court by the employer's attorney. The employer's attorney stated as follows regarding the said bundle of documents.

"RC: *My Lord, in the previous hearing we were using R1 as a reference point for the Respondent's Bundle of Documents and it was a bit mixed up My Lord. Some of the pages were appearing where they were not supposed to and I had undertaken to prepare a properly paginated one My Lord, with the proper pagination. May I beg leave to hand up the correct and paginated bundle.*"

(At page 136)

14.4 When the Industrial Court mentioned exhibit 'R1' (in paragraph 16 of its judgment), it particularly meant a document that is among those in exhibit R1 and which appears in pages 105 to 106 in the record that is before this Court. That document purports to report about an internal appeal process. There is however no indication as to who wrote that document and in what capacity. The author of that document (whose identity is not known) did not introduce that document before Court.

14.5 The fact that a stack of documents has been placed before Court by a litigant or his representative, does not make those documents exhibits.

14.6 The Industrial Court referred to the document in question as if its contents are factually correct. The said document was filed by the employer's attorney with an intention to prove the truth of its contents.

14.6.1 An exhibit is explained as follows, by legal authority:

"*EXHIBIT*

An item of real evidence which has been presented to the Court."

(Underlining added)

GIFIS S.H.: (supra) page 173.

14.6.2 "*Real evidence is seldom of much assistance unless it is supplemented by the testimony of witnesses.*"

14.6.3 *It goes without saying that a witness's explanation of an exhibit should be recorded so as to be intelligible to a reader of the transcript*"

(Underlining added)

HOFFMANN et al: supra page 405.

14.7 It is a legal requirement that an exhibit (such as the document under consideration), must be presented before Court, by its author, as part of his/her evidence. The author must be available to be cross examined on his/her evidence, including the contents of the document. In this case the said document was not presented before Court by a witness.

14.8 The Industrial Court made an error of law when it based its finding on the contents of that document, as if it was an exhibit before Court, and further, as if its contents are true. That document should have been excluded from the exhibits that were before the Honourable Court, since it

had not been presented before Court by its author, as part of his/her evidence.

14.9 The question whether or not a document qualifies as an exhibit before Court is a question of law. It is the law of evidence that regulates: which information or item is admissible, and also which should be excluded, from the evidence.

15. The aforementioned error led the Industrial Court to make an erroneous finding regarding the internal appeal. The Honourable Court came to a conclusion *'that the dismissal of the Applicant [employee] was procedurally fair'*, inter alia, because the employee was afforded a chance to prosecute his appeal.

15.1 The Industrial Court arrived at an erroneous conclusion –

15.1.1 that the employer rescheduled the hearing of the internal appeal, and,

15.1.2 that the employee was made aware of the new date of hearing of the internal appeal, and,

15.1.3 that the employee failed to attend the internal appeal hearing on the rescheduled date and,

15.1.4 that the internal appeal proceeded in the employee's absence and,

15.1.5 that the chairman (on appeal) upheld the decision to dismiss the employee from work.

15.2 The Industrial Court relied completely on the contents of a document which this Court has declared inadmissible, as evidence. Consequently, the finding by the Industrial Court relating to the internal appeal has no legal basis.

15.3 According to law:

"... *and employee is entitled to both a fair hearing* <u>*and a fair appeal.*</u>"

(Underlining added)

RIEKERT J: RIEKERT'S BASIC EMPLOYMENT LAW, 1986 (Juta) (ISBN 0 7021 2916 x) at page 107.

15.4 The general rule is that; a dismissed employee has a right in law, to be heard on appeal. It amounts to a miscarriage of justice for

the employer to fail to give a dismissed employee a hearing on appeal. That miscarriage of justice renders the dismissal unfair.

15.5 The law places the burden of proof on the employer, to present evidence to prove that the employee was afforded a hearing on the internal appeal. In this case, the employer failed to provide that evidence. Consequently, the employer failed to discharge its burden. The finding by the Industrial Court that: *'... the dismissal of the Applicant [employee] was procedurally fair'*, was an error of law and that error resulted in an erroneous judgment. That finding was based solely on the contents of an inadmissible document.

15.6 The employee has raised a valid point when she stated that she was denied a right to be heard on appeal and also that, that omission by the employer *'rendered the whole disciplinary process procedurally unfair'*

15.7 As a result, grounds 1, 1.1 and 1.2 of the Notice of Appeal are upheld.

16. The employee is successful on appeal. The Industrial Court is yet to determine the relief that the employee has prayed for.

17. Wherefore the Court orders as follows:

17.1 The appeal is upheld with costs.

17.2 The dismissal of the Appellant is declared procedurally and substantively unfair.

17.3 The matter hereby reverts to the Industrial Court to determine the Appellant's claim for relief.

D. MAZIBUKO
JUSTICE OF APPEAL

I agree

N. NKONYANE
JUSTICE OF APPEAL

For the Appellant: Mr C. Bhembe
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