



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 3206/2008

In the matter between:

**NGWENYA GLASS (PTY) LTD**

**Applicant**

And

**PRESIDING JUDGE OF THE INDUSTRIAL**

**COURT OF SWAZILAND**

**1<sup>st</sup> Respondent**

**MARIA VILAKATI**

**2<sup>nd</sup> Respondent**

**FIKILE DLAMINI**

**3<sup>rd</sup> Respondent**

**Neutral citation: Ngwenya Glass (Pty) Ltd v Presiding Judge of the Industrial Court of Swaziland and Others (3206/2008) [2013] SZHC 48 (28<sup>th</sup> February 2013)**

**Coram:** M. Dlamini J.

**Heard:** 3<sup>rd</sup> October 2012

**Delivered:** 28<sup>th</sup> February 2013

*Review application from Industrial Court – when appropriate – where dismissal is substantively fair but procedurally unfair – outcome thereof –*

*award only apportioned to the procedural unfairness – no award on substantive fairness made.*

Summary: The applicant, an employer of 2<sup>nd</sup> and 3<sup>rd</sup> respondents (hereinafter referred to as respondents) has lodged a review application on the basis that the Industrial Court failed to apply its mind fully on the matter before it in that having found that the respondents had committed a misconduct, it should have consequently concluded that their dismissal was fair and not make any award in favour of the respondents.

Resume:

[1] The applicant is a company duly registered and conducting business at Ngwenya. It specializes on glass ornaments and artifacts. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have been under applicants employ since 1987 as a grinder and 1994 as a waitress respectively. In October 2002, the respondents were summoned by the applicant together with all the employees of applicant. They were instructed to board two vans. The vans drove to their respective homes. In their individual homes, their houses were searched and a number of products belonging to applicant were retrieved. Due to time constraints and owing that it was about knocking off time, not all the employees' houses were searched. The employees were taken back to applicant's premises. The gate was locked and they were called from the yard into the office of applicant. Applicant caused each employee to sign an admission of guilt form before they were allowed exit from applicant's premises. It is worth noting that there were some who declined to sign the admission of guilt forms and these were excused. Those whose houses could not be searched were directed to bring back all products stolen from applicant the following day when they report for work. They complied.

[2] The two respondents herein also signed the admission of guilt forms having been found during the search with applicant's products. The following day, the respondents, like the rest of their colleagues, were allowed to resume their work. After some days one Mrs. Pretty John, who was apparently former manager of the applicant, summoned all the female employees to a meeting. She related to them that she had heard what had happened. She further informed them that the mistake they had committed should not be repeated and encouraged them to continue with their work. However, this was not to be so as two weeks later, they were served with letters of dismissal from their employment by the applicant.

[3] Respondent took their grievances to Conciliation, Mediation and Arbitration Commission (CMAC). Correspondences exchanged between respondents' representative at CMAC and applicant. Applicant stood its ground on the decision to dismiss respondents and this led to a certificate issued by CMAC official. The matter was then enrolled in the court *a quo*. Dissatisfied with the decision of the court *a quo*, the applicant has filed an application for review.

[4] In support of its application for review, applicant in very well articulated and lengthy grounds states:

*“15. The court in finding that the dismissal was unreasonable itself came to an unreasonable finding.*

*16. The finding of the court was unreasonable to the extent that no reasonable court, acting reasonably could have come to the same conclusion in that:*

- 16.1 *The court failed to properly apply its mind to the impact of an act of dishonesty such as theft to the employer-employee relationship.*
- 16.2 *The honourable court in finding that the dismissal of the respondents was unduly harsh unreasonably found that the employer/employee relationship between the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and the applicant did not require integrity and honesty as an essential requisite for the performance of their duties and it is submitted that any employer/employee relationship where employees are in a position where they could steal from the employer is a employer / employee relationship based on integrity and trust. Further integrity and trust is an implied and important term of any employer / employee relationship and the absence of trust renders the employer / employee relationship intolerable.*
- 16.3 *The honourable court also unreasonably found that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents showed remorse and condition and this finding was not borne out by the facts in that whilst yet 2<sup>nd</sup> and 3<sup>rd</sup> respondents had admitted the theft in writing, in the application before the Industrial Court and in their evidence before that Court, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents steadfastly denied the theft and gave dishonest exculpatory evidence which the 1<sup>st</sup> respondent dismissed.*

- 16.4 *In any event even in the event the and 3<sup>rd</sup> respondents had shown contrition, which is denied, the fact that an employer who has discovered employees dishonesty, upon discovering the dishonesty is faced with apology and contrition does not necessarily repair the damage done to the employer/employee relationship rendering it intolerable.*
- 16.5 *The court found unreasonably in the circumstances in that where the court finds that an employee has been dismissed for a proven act of dishonesty or other serious misconduct, the court should not lightly interfere with the employer's decision simply because it, [the court] may have come to a different decision but should apply the "Manager margin".*
- 16.6 *The finding of unfair dismissal in the circumstances and coupled with an award of notice pay and compensation amounts, with all due respect, to awarding the 2<sup>nd</sup> and 3<sup>rd</sup> respondents for their dishonesty by way of theft and for their denial of the theft before the honourable court and does not accord with any reasonable persons idea of reasonableness or justice and nor does the award accord with the objects of the Industrial Relations Act and / or the Employment Act.*

17. *The honourable court a quo followed its own judgment in the case of **Dalcrue Holdings v Alpheus Dlamini, Industrial Court Case No. 382/2004**, which judgment was at odds or misinterpreted with the judgment of the Industrial Court of Appeal in the case between **S. U. B. v Armstrong Dlamini** in that the 1<sup>st</sup> respondent, with respect, wrongly comes to the conclusion that the law of Swaziland is that the dismissal which is not preceded by a fair disciplinary hearing will only be fair in certain exceptional and demarcated circumstances whereas the laws of Swaziland as enunciated in the **S.U.B. vs Armstrong Dlamini** case is that there may be some instances where the failure to hold the disciplinary hearing in and of itself will result in an unfair dismissal.*

18. *The honourable court a quo due to its flawed application of the **S.U.B. vs Armstrong Dlamini** resulted in the honourable court first finding that:*

18.1 *The dismissal was unfair because there was no disciplinary hearing; and*

18.2 *Thereafter entering into enquiry whether the employer had any justifiable reasons for not holding a disciplinary hearing when the test ought to have been;*

18.2.1 *was the failure to hold a disciplinary hearing in the circumstances unfair given the consequences of the failure to*

*hold such a hearing such that it rendered the entire dismissal unfair.*

19. *Even in the event the honourable court correctly found that the dismissal was unfair for not according the employees a hearing, which is denied, the honourable court was unreasonable in awarding anything at all to former employees who had been found to have committed an act of dishonesty by stealing from their employer and acted unreasonable in awarding notice to such employees when the nature of their misconduct justify summary dismissal as contemplated by the Employment Act.*
20. *The honourable court was further unreasonable in awarding costs in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents notwithstanding their proven dishonesty towards their employer, the false version of evidence given in the open court with regard to their dishonesty and their lack of remorse displayed in court.*
21. *The Industrial Court does not award costs as a matter of course and just normally find some reason justifying an award of costs.*
22. *The honourable court has not justified nor stated why, when costs do not normally follow the event in the Industrial Court, costs were awarded against the applicant.”*

[5] Respondent has in *au contraire* raised a point *in limine* as follows:

“3. (a) *Applicant’s main gravamen is this that the trial judges understanding of the case law on procedural fairness in labour relations is “flawed” or the judge “misinterpreted” the law. This is alleged misdirection on a point of law which is appealable and not reviewable.*

b) *Applicant alleges mere unreasonableness of the judicial decision without any allegation of mala fides or ulterior motive, nor procedural impropriety. This court is thus being invited to interfere with the decision of the trial court if this court would not have arrived at the same decision.”*

[6] In the light of the point *in limine* raised by respondent, it is imperative that I address it at this stage.

[7] Section 19 (5) of the Industrial Court Act 2000 as amended reads:

*“a decision or order of the court or arbitrator shall at the request of any interested party, be subject to review by the High Court on grounds permissible at common law”*

[8] Discussing the term “review” **Innes C. J.** in **Johannesburg Consolidated Investment Co. v Johannesburg Town Council 1903 TS 111** at 114-116 stated:



*“If we examine the scope of this word as it occurs in our Statutes and has been interpreted by our practice, it will be found that the same expression is capable of three distinct and separate meanings. In its first and most usual signification it denotes the process by which, apart from appeal, the proceedings of inferior Courts of Justice, both Civil and Criminal, are brought before this Court in respect of grave irregularities or illegalities occurring during the course of such proceedings...”*

*But there is a second species of review analogous to the one with which I have dealt, but differing from it in certain well-defined respects. Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this court may be asked to review the proceedings complained of and set aside or correct them.....*

*Then as to the third signification of the word. The Legislature has from time to time conferred upon this Court or a Judge a power of review which in my opinion was meant to be far wider than the powers which it possesses under either of the review procedures to which I have alluded.”*

- [9] **Booyesen J. in Anchor Publishing Co. (Pty) v Publications Appeal Board 1987 (4) S.A. 708 at 728 D – F** defining the distinction between an appeal and a review pointed out as follows:

*“It is important, when considering a matter such as this, to bear in mind the main distinction between an appeal and a review and that is that the court will on appeal set aside a decision when it is satisfied that it was wrong on the facts or the law, whilst judicial review is in essence concerned not with the decision but with the decision-making process. .... upon review, the court is thus in general terms concerned with the legality of the decision and not its merits.”*

[10] Applying the above *dictum*, their **Lordships** in **Liberty Life Association of Africa v Kachelhoffer 2001 (3) S.A. 1094 C** at 1110-111:

*“Review and appeal are dissimilar proceedings. The former concerns the regularity and validity of the proceedings, whereas the latter concerns the correctness – or otherwise of the decision that is being assailed on appeal.”*

[11] In summary, in review proceedings, it is not for the presiding officer to pronounce on the correctness or otherwise of the decision of the court *a quo*, tribunal or body as the case may be, but to ascertain whether the decision has been arrived at judiciously. **Sapire C. J.** in **The University of Swaziland v The President of the Industrial Court & Another, Case No. 3060/2001** stated *simpliciter*:

*“It is not for this court on review to consider the correctness of his decision on whether he properly came to that conclusion on the facts before him.”*

[12] With this notion at its backdrops the legislature enacted under section 19 (5) of the Industrial Relations Act 2000 as amended:

*“a decision or order of the court or arbitration shall, at the request of any interested party, be subject to review by the High court on grounds permissible at common law.”*

[13] Common law grounds for review were well articulated by his Lordship **Terbutt J.A** in our *locus –classicus*, **Takhona Dlamini V President of the Industrial Court and Another case no 23/1997** at page 11 as follows;

*“...the jurisdiction of the High Court to review decision of the Industrial Court on common law grounds. Those grounds embrace inter alia the fact that the decision in question was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose or that the court misconceived its function or took into account irrelevant consideration or ignored relevant ones, or that the decision was so grossly unreasonable as to warrant the inference that the court had failed to apply its mind to the matter. (See **Johannesburg Stock Exchange and Another V Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (AD) at 152 A-E**). Those grounds are, however not exhaustive. It may also be that an error of law may give rise to a good ground for review.”*

[14] **Ota J. A.** in **James Ncongwane v Swaziland Water Services Corporation (52/2012) [2013] SZSC 65** expounding on the common law ground for review tabulated as follows:

*“It is overwhelmingly evident from the foregoing, that the common law grounds for review permitted by section 19 (5) of the Act, falls within the purview of decisions arrived at in the following circumstances:*

- 1. arbitrarily or capriciously; or*
- 2. mala fide; or*
- 3. as a result of unwarranted adherence to a fixed principle; or*
- 4. the court misconceived its functions; or*
- 5. the court took into account irrelevant considerations or ignored relevant ones; or*
- 6. the decision was so grossly unreasonable as to warrant the inference that the court had failed to apply its mind to the matter;*  
*or*
- 7. An error of law may give rise to a good ground of review*  
*The list is not exhaustive. Each case must be dealt with accordingly to its particulars.”*

[15] Having highlighted the above principles, could it be said in *casu* that the grounds as laid down by applicant for review fall outside the ambit of common law grounds for review?

[16] It is very clear from the endless list of grounds for review and the fact that in both review and appeal the orders are usually the same *viz.* to set aside the decision of the court *a quo* that there is a thin line between grounds for review and appeal. Nevertheless the distinction still exists.

[17] I have already quoted the grounds for review by applicant. It appears from the totality of the grounds for review that the applicant is alleging that the

trier of fact was grossly unreasonable in arriving at the decision it did in that it failed to apply its mind into the matter and unwarrantedly adhered to a fixed principle. This has clearly been outlined by **Ota J.** in **James Ncongwane supra** as some of the grounds for review under number 3 and 6 of the tabulated catalogue.

[18] In this regard, the point in *limine* must fail.

#### Ad Merits

[19] The reason for applicant to apply for review is found at paragraphs 13, 13.1 to 13.3 where it avers:

*“13. The matter came before the 1<sup>st</sup> respondent who decided as follows:*

*13.1 The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were guilty of theft;*

*13.2 The applicant dismissed the 2<sup>nd</sup> and 3<sup>rd</sup> respondents without affording them a proper disciplinary hearing and an opportunity to be heard in mitigation, and, taking into consideration the circumstances of the matter, the dismissal was procedurally unfair due to the fact that the employer had no reason not to hold the disciplinary hearing and deprived the 2<sup>nd</sup> and 3<sup>rd</sup> respondents of an opportunity to make submissions in mitigation.*

13.3 *The honourable court found that the dismissal was further unreasonable because the dismissal was unduly severe in the circumstances. A copy of the judgment is attached marked “NG.1”*

[20] In essence, applicant states that it is grossly unreasonable for the Presiding Judge to rule that the applicants were unfairly dismissed even though they were found by the same Judge to have committed an act of misconduct in their employment.

[21] The relationship of trust between employer and employee is fundamental and should it be found wanting, the natural consequence is to terminate the contract between the two, so argues the applicant.

[22] In support of its submission Counsel for applicant cited **Pakle Le Roux and Van Niekerk** on “**The South African Law of Unfair dismissal**” page **131** where they wrote:

*“Any form of dishonest conduct compromises the necessary relationship of trust between employer and employee and will generally warrant dismissal.”*

[23] The applicant contends further that it was unreasonable for the court to rule that the items that were stolen were of insignificant value and therefore the decision by the applicant to dismiss the respondents was too harsh in the circumstances. This was more so when the evidence revealed that with regard to 2<sup>nd</sup> respondent, the goods found in her possession were from the shop and were never damaged. Further, both respondents failed to

demonstrate remorse in court but persistently denied ever stealing the items recovered from their possession.

[24] It is the totality of the above that the court ought to have found that the dismissal was fair, applicant contends.

[25] On the procedural aspect, the applicant submits that the court *a quo* unwarrantedly applied the wrong principle of the law and hence arrived at an unjustified decision. In support of this, the court should apply the *ratio decidendi* in **Central Bank of Swaziland v Memory Matiwane, High Court No, 11/1993** where it was held:

“35. *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. Even if the court were to find that the dismissal was unfair because of some technical defect in the application of procedures prescribed, before an award or compensation were to be made all the circumstances of the case are to be investigated. The misdirection of the court a quo has led to the anomalous situation that an employee who is proved to have been guilty of dishonesty is to be found to have been unfairly dismissed and compensated for his misdeeds, notwithstanding that there was evidence before the Industrial Court, if not the disciplinary enquiry that the Respondent was*

*guilty of dishonesty which was one of the grounds of his dismissal. This does not accord with any one's ideas of fairness and is not what was intended by the Act."*

[26] Applicant concludes:

*"It appears that the interpretation by the 1<sup>st</sup> respondent was that, unless there are exceptional circumstances, why a hearing had not been held, the termination is unfair and therefore compensation flows. This is our law."*

[27] I now turn to determine whether the trial judge was unreasonable in arriving at the impugned decision in that he failed to apply his mind on the matter before it and whether he unwarrantedly adhered to a fixed principle.

[28] **Ota J. A.** in **James Ncongwane** *op.cit* at page 29 adjudicating on issues of review from the court *a quo* eloquently articulated the duty of a trier of fact as:

*"...the court is required to first of all put the totality of the testimony adduced by both parties on an imaginary scale. It will put the evidence adduced by the plaintiff on the one side of the scale and that of the defendant on the other side and weigh them together. It will then see which is heavier not by the number of witnesses called by each party but the quality or the probative value of the testimony of those witnesses. In determining which is heavier, the Judge will naturally have regard to whether the evidence is admissible, relevant, conclusive and more probable than that given by the other*



*party. Evidence that was rejected by the trial judge should, therefore not be put in this imaginary scale.”*

[29] The learned Judge proceeds at page 29-30:

*“This is because although civil cases are on a preponderance of evidence, yet it has to be preponderance of admissibility, relevant and credible evidence that is conclusive, and that commands such probability that is in keeping with the surrounding circumstances of the particular case. The totality of the evidence before court however, must be considered to determine which has weight and which has no weight.”*

[30] Did the court *a quo* observe the above *dictum* on the facts presented before it?

[31] The evidence of the respondent is as highlighted in the summary. In cross-examination however, both respondents flatly denied ever stealing the goods retrieved from their homes. 2<sup>nd</sup> respondent’s evidence was that they retrieved the items from the dumpsite outside applicant’s premises while 3<sup>rd</sup> respondent stated that he purchased the said items from the applicant’s shop.

[32] The trier of fact on the determination as to whether respondents did commit theft against applicant carefully concluded at page 10 of the judgment.

*“32. On a consideration of all the evidence, including the written admissions of guilt, the apology of the 1<sup>st</sup> applicant, the letter and report of dispute written by Moses Dlamini on the*

*applicant's behalf, and the failure of the applicants to protest their innocence when reprimanded by "Gogo" Prettejohn or to demand return of the confiscated goods, it is our finding that the applicants did in fact steal property belonging to the respondent. They admitted their guilt in writing, and they continued to acknowledge their guilt until and after their dismissal."*

[33] He then concluded at page 11 as follows:

*"33. The 1<sup>st</sup> respondent, both in the court a quo and in his judgment in the **Dalcrue Agricultural Holdings v Alpheus Dlamini** matter flies in the face of the judgments of the Industrial Court of Appeal which will be referred to shortly."*

[34] Section 36 (b) of the Employment Act No.5 of 1980 as amended reads:

*"Fair reasons for the termination of an employee's services*

36. *It shall be fair for an employer to terminate the services of an employee for any of the following reasons:*

*(b)Because the employee is guilty of a dishonest act, violence, threats or ill treatment towards his employer, or towards any member of the employer's family or any other employee of the undertaking in which he is employed."*

[35] It is clear from the above conclusion by the trial judge that a careful analysis was undertaken and a reasoned conclusion was reached. He cannot be faulted in this regard as neither does applicant submit so.

[36] Having come to the conclusion that the respondents were guilty of misconduct, recognised by the Act as a fair reason for termination, the trier of fact embarked on a further enquiry as to whether it was reasonable in the circumstances to dismiss the applicant. The applicant's bone of contention is that based on the nature of the misconduct which borders on the relationship of trust between the parties, it was unreasonable for the court, to make a further enquiry as to whether in the circumstances the dismissal was fair. The presiding judge and his assessors "*unwarrantedly adhered to a fixed principle*" as it were.

[37] The applicant argues further that this is contrary to the spirit of the legislature that an employee who had breach the relationship of trust should continue working for its employer. The principle "*adhered*" to by the trier of fact is not part of our law. It is part of South Africa, applicant contends.

[38] It appears from the above submission that applicant does not attack the finding of the presiding judge that the *audi alteram partem* principle was not followed when the respondents were dismissed for their theft. This is correctly so because at page 158 of the record of pleadings one reads:

*"RC: Did the company summon the employees to a properly constituted disciplinary hearing before dismissing them?"*

*RW1: No.*

RC: *Was there any reason why that was not done?*

RW1: *From our point of view the reason was that they've all admitted that they've stolen this stuff from Ngwenya Glass."*

[39] My duty is therefore to ascertain whether the court *a quo* was unreasonable in having found that the respondents were guilty of a misconduct but for want of the *audi alteram partem* principle their dismissal was unfair.

[40] The reason advanced by the court *a quo* for this ruling is found at page 12 of the impugned judgment which reads:

*"36. The penalty of dismissal is not an automatic consequence of finding an employee guilty of theft. The question of the appropriate sanction must be given proper and separate consideration. Procedurally, this important part of the disciplinary process requires an enquiry at which the employee should be given a proper opportunity to make representations before an independent chairperson. The applicants were denied the opportunity to make representations to management, yet management allowed other staff members who had nothing to do with the matter to make representations. The 'staff committee did not represent the applicants. The respondent subjected the applicants, in their absence, to judgment by their by their colleagues. Determination of a disciplinary sanction on the basis of the opinions of fellow employees is a practice the court would discourage, since such opinions may be influenced by misunderstandings, vested interests, or petty motives and*

*prejudices unconnected with the actual offence committed. The risk of this occurring is even greater where the consultations take place in the absence of the offenders, without their colleagues hearing their point of view, as occurred in this case.”*

[41] The learned Judge proceeds at page 14 and 15:

“41. *In weighing up the appropriate sanction for a disciplinary offence, consideration must be given to the seriousness of the particular act of misconduct, the length of service and disciplinary history of the employee, whether the employee has shown remorse, the likelihood of the misconduct being repeated, and any other factors that might aggravate or diminish the seriousness of the misconduct.”*

42. *The code of good practice: Termination of employment issued under section 109 of the Industrial Relations Act 2000 (as amended) emphasizes that discipline should be corrective and dismissal should be reserved for cases of serious misconduct or repeated offences. The code states that dismissal may be justified if the misconduct is ‘of such gravity that it makes a continued employment relationship intolerable’ – see paragraphs 5 and 6 of the code.*

- *‘Intolerability is, of course a wide and flexible notion. Generally, the courts accept an employment relationship becomes intolerable when the relationship of trust*

*between employer and employee is irreparably destroyed’  
– per Grogan: Workplace Law (9<sup>th</sup> Ed) p167.*

43. *We agree with the views expressed in the case of **Ngwenya v Supreme Foods (Pty) Ltd [1994] 11 BLB 77 (IC)**, where the Industrial Court of South Africa stated at (84H) as follows:*

*“At the outset I wish to stress that I do not hold the view that theft in all cases will justify dismissal or that the inference can invariably be drawn that the relationship between the employer and the employee has irretrievably broken down as a result of the fact that the employee had stolen goods from the employer. One of the factors that, to my mind, should play an important part when considering whether the trust relationship had irretrievably broken down, is the nature of the employer’s business and the nature of the employee’s work. In situations where the scope for pilfering is small or easily avoidable, it could be argued that dismissal of an employee for stealing is too harsh a penalty, since the employer, by taking reasonable steps, can all but eliminate the chance of this occurring in future, so that the trust relationship can be mended over time and that it would not be unfair to expect of the employer to give the employee a second chance. After all, it is trite that the purpose of discipline in the employment context is rehabilitation and not retribution.”*

### Applicable legal principles

[42] It is common cause that the court a quo correctly found respondents to be guilty of dishonesty.

[43] **John Grogan** on “**Dismissal**”, 2002, states at page 116:

*“Dishonesty is a generic term embracing all forms of conduct involving deception on the part of the employees. ...in employment law, a premium is placed on honesty because conduct involving moral turpitude by employees damages the trust relationship on which the contract is founded.”*

[44] What the learned author seems to suggest is that where there is the breach of trust between the employer and employee, such breach goes to the root of the contract and the contract being vitiated it follows that termination should follow.

[45] On the other hand the principle of *audi alteram partem* is well engraved in our constitution and has been part of plethora decisions of our courts. Very recently **M. C. B. Maphalala J. A.** in **John Roland Rudd v Rex (26/12) [2012] SZSCA 44**, citing The Supreme Court of India case **Uma Nath Pondey v State of U. P. Air 2009 S. C. 2375** extracted:

*“The first and foremost principle is what is commonly known as audi alteram partem. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. In the absence of a notice of the kind and such*

*reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. .... “Even God did not pass a sentence upon Adam before he was called upon to make his defence” “Adam” says God, where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat.”*

*Since then the principle has been chiseled, honed and refined, enriching its content. Judicial treatment has added light and luminosity to the concept, like polishing a diamond.”*

[46] So fundamental is the principle that “*let the other party be heard*” (*audi alteram partem*) that the view that a decision by an administrative authority cannot be altered by its non-observance, is unmerited.

[47] Applicant further submitted that even the courts in South Africa have adopted a similar approach by upholding the relationship of trust as fundamental. In support hereof counsel cited the case of **Avril Elizabeth Home for the Mentally Handicapped v Commissioner for Conciliation, Mediation and Arbitration & Others (2006) 27 I.L.J.**

[48] Again I have read the said judgment. My considered view is that this case is authority to the effect that an employer, in applying the *audi alteram partem* principle is not expected to adopt the same standard applied by courts of law in cases nor are minor technical defects sufficient to have the decision of the employer to dismiss an employee set aside. This case



(Avril) does not abrogate the rule of natural justice. It further appreciates that there are those cases where the right to a fair hearing may be rendered impossible to observe and the court upon presentation of evidence will rule that decision of the employer is fair. Such instances where the employer has by a reasonable number of notices invited the employee to the hearing but the employee has failed to honour the invitation.

[49] Quoting **Swaziland United Bakeries v Amstrong Dlamini, Appeal Case No.117/1994**, the applicant proffered that this case is authority that once the employer is found to have committed the dishonest act the termination of the contract of employment must be declared fair as per section 36 (b) of the Employment Act.

[50] I have had a close reading of **the Swaziland United Bakeries** case *supra* and the following is my analysis of the case:

- It is correct that the court found to be a fair dismissal of the respondents on the basis that they had committed theft.
- However, as in *casu*, the court did not end the enquiry there. It continued to enquire whether under the circumstances the dismissal was unfair. This is borne by page 13 of that judgment as follows:

*“The next question is whether the appellant proved on a balance of probabilities that the dismissal was:*

1. *Fair*
2. *Reasonable in all the circumstances.”*

[51] On the first enquiry it held at the same page:

*“If proved that the respondent had stolen E40,000.00 then under section 36 of the Employment Act, the dismissal would be fair.”*

[52] On the second enquiry it stated at paragraph 15:

*“As to whether the decision was reasonable I am of the opinion that it was for the following reasons:*

- 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 and not to bank it.*
- 4. The amount stolen, i.e. E40,000.00 was a large sum of money.”*

[53] From the above one can clearly deduce as guidelines to the question as under the circumstances whether it was reasonable to impose a penalty for dismissal as:

- the position held by the employer. This is to ascertain the degree of trust held by the employer. The more closer the employer to management the greater that degree and the more expectation for the employee not to betray the trust.
- the value of the item stolen where theft is the subject matter and many more depending on the circumstances of the case.

[54] In *casu*, the trial judge held at pages 14 – 15 of the assailed judgment:

“41. *In weighing up the appropriate sanction for a disciplinary offence, consideration must be given to the seriousness of the particular act of misconduct, the length of service and disciplinary history of the employee, whether the employee has shown remorse, the likelihood of the misconduct being repeated, and any other factors that might aggravate or diminish the seriousness of the misconduct.*”

[55] The court a quo proceeded carefully to apply the relevant principles.

[56] It then wisely concluded at page 20:

“55. *The applicants are not entitled to payment of their severance allowances because they were dismissed for a reason provided in section 36 of the Employment Act 1980 (see section 34 (1) of the Act. They are entitled however to payment of statutory notice (including additional notice). With regard to compensation for unfair dismissal, after taking into account all the relevant personal circumstances of the applicants, their service record, and the manner in which they came to be dismissed, whilst at the same time keeping in mind that they committed a dishonest act by stealing from their employer, we consider that it is fair to award compensation of 6 months wages to the 1<sup>st</sup> applicant and 4 months wages to 2<sup>nd</sup> applicant.*”(my emphasis)

[57] From the above conclusion by the learned trial judge, it is clear that the judge did not make any award in respect of the dismissal for theft as he considered that to be fair as per the Act. In other words, the averment by applicant at its paragraph 16.6 that, “*the finding of unfair dismissal in the circumstances and coupled with an award of notice pay and compensation amounts with all due respect to awarding the 2<sup>nd</sup> and 3<sup>rd</sup> respondents for their dishonesty by way of theft ..*” does not find support in terms of the judgment of the court *a quo*.

[58] In the totality of the above, it cannot be held that the court *a quo* failed to apply its mind on the matter thereby arriving at an unreasonable decision.

[59] Before I enter the necessary orders, one notes *en passé* that the submission by applicant that the misconduct committed by respondent rendered the relationship of trust irreparable cannot sustain with due respect in the circumstances of the present case. This is because applicant having found that the respondents were guilty of theft proceeded to engage them in their employment. It is after a lapse of some time that the applicant slapped the respondents with letters of dismissal. Had the relationship broken down, the applicant would have demonstrated the same by suspending the respondents while an enquiry was being conducted. Failure to suspend them but continual engagement after discovery of the dishonest act is indicative of one factor *wit.* the relationship of trust was not irreparable.

[60] Applicant has further challenged the trial judge’s decision to order it to pay costs in the matter.

[61] It is trite law that the matter for costs lies in the discretion of the trial judge. Calling upon a review court to interfere with this discretion on the basis that

the *court a quo* failed to advance reasons for awarding the successful party costs, is with due respect to Counsel for applicant not a good ground for review especially in the absence of any pleaded *mala fide* on the part of the trial judge. The applicant could have approached the trial judge to advance its reasons for the award of costs and thereafter consider whether common law grounds exist for review. I am not inclined to refer the matter to the trial judge just for this instance as I do not want to burden the parties with further litigation costs.

[62] In the result, I make the following orders:

1. Applicant's application is dismissed.
2. Applicant is ordered to pay costs.

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**M. DLAMINI**  
**JUDGE**

**For Applicant** : **Mr. S. Sibandze**  
**For Respondents** : **Mr. N. G. Dlamini**