

**IN THE INDUSTRIAL COURT OF SWAZILAND**

CaseNo.166/20

HELD AT MBABANE

In the matter between:-

**CHARLES MAJAHODVWA JELE**

APPLICANT

And

**OK BAZAARS (PTY) LTD T/A**

**SHOPRITE CHECKERS**

RESPONDENT

**Neutral citation:** Charles Majahodwa Jele v OK Bazaars (Pty) Ltd t/a Shoprite  
Checkers (166/2020) [2021] SZIC 66 (13September 2021)

**Coram:**

**M. THWALA- JUDGE**

(Sitting with Ms N. Dlamini and Mr S. Mvubu  
Members of the Court)

**Date Heard:** 6 August 2021.

**Delivered:** 13 September 2021

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## JUDGEMENT

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### **Introduction**

1. This is a trial in which Applicant alleges that his contract of employment was unfairly terminated by the Respondent consequent to which he is now claiming for the following terminal benefits, **viz:**

- 1.1 Notice pay - E6, 500.00;
- 1.2 Additional Notice - E 9,000.00;
- 1.3 Severance Allowance - E22, 500.00;
- 1.4 12 Months Compensation -E78, 000.00.

2. A dispute having been repmied, the matter was then conciliated before the Conciliation, Mediation and Arbitration Commission (CMAC), where a Certificate of Unresolved Dispute was thereafter issued.

### **Applicant's Case**

3. In g1vmg a nanative of the genesis of the dispute between the parties, Applicant told the Court:

- 3.1 That, he was employed by the Respondent in October 2009, initially as a Grocery Shelf Packer and he rose through the racks to Trainee Manager posted at Respondent's branch which is situated at The Gables Ezulwini;

- 3.2 That, Friday the 29<sup>th</sup> October 2019, was a "**Black Friday**" for Shoprite Checkers - meaning that the shop was hosting promotion on a host of their merchandise.
- 3.3 This meant that the store was so busy and packed with customers to almost near stampede.
- 3.4 Applicant was on duty on the said day and whilst in the course of his employment he was called upon to do till packing for customers. And it was whilst packing a customer's groceries that he then found a cellphone which, presumably, had been forgotten by a customer at the till. Applicant told the Court that he took the cellphone and put it into his pocket with the view that later on he was going to find time to go and declare it to his supervisors as per the company rules. Unfortunately, it was not to be because the shop was so inundated with customers such that he could not find the time to go and declare the cellphone.
- 3.5 It was Applicant's further evidence that he totally forgot about the cellphone to the point that knock-off time came and he left his workplace with the cellphone still in his pocket, and only realized that he had left with the cellphone upon arrival at his flat later that evening.
- 3.6 Applicant told the Court that as fate would have it, he had a visitor who spent the night at his flat on this day and went on to leave very early, with the cellphone, on the next day. Efforts to get hold of the

visitor proved futile apparently because his cellphone was unreachable.

3.7 On the 17<sup>th</sup> December 2019, Applicant was again at his place of work when he was approached by the Lobamba Police who asked him to accompany them to the Station. The police made it clear to Applicant that this was in connection with the loss of the cellphone at The Gables Shoprite. And it was at the police station that Applicant met his visitor, who went on to tell the police that it was Applicant who had given him the cellphone.

3.8 It would appear that Applicant had nothing to say to what his visitor said to the police because what followed thereafter is that the police went on to release Applicant's visitor and then placed him (Applicant) under arrest for the theft of the cellphone on the 29<sup>th</sup> October 2019. The next day the police went on to present Applicant before the Magistrates Court where he was admitted to bail after which he proceeded to report for duty where he was ordered to write a formal statement concerning the incident.

3.9 On the 24<sup>th</sup> December 2019, Respondent preferred formal charges of misconduct against the Applicant, who went on to also place him under suspension. The disciplinary hearing was scheduled for the 30<sup>th</sup> December 2019, on which date Applicant showed up without his representative. The reason given by Applicant for this was that his nominated representative had withdrawn his availability, on the very morning, apparently because of fear of victimization from the Respondent.

3.10 Applicant further told the Court that he communicated his predicament to the Initiator, who, however, advised Applicant to proceed and choose his representative from a list of shop stewards who were known to the Initiator. Indeed, Applicant heeded the Initiator's advice and proceeded to the Bakery department where he engaged one Bongani Dlamini to come and represent him. Here we pause to place it on record that this action by Respondent's Initiator was later placed under contention as constitutive of an element of unfair procedure. Under this head of argument, Applicant contended that his rights were prejudiced because of the short and/or insufficient notice that he was afforded for the purposes of securing himself a representative.

3.11 Concerning the proceedings at the hearing, Applicant told the Court that he was never called upon to plead, instead the Initiator went on to question him about the circumstances surrounding his taking of the cellphone, including the reading of the statement which Applicant recorded for his employer when he was released on bail. In addition to the reading of Applicant's statement, the Initiator proceeded to call two (2) witnesses on behalf of the Respondent, being Tholakele, the Cashier and Mrs Dlodlu, the Branch Manager. From the totality of the above facts, Applicant was found guilty by the Chairperson, who went on to explain Applicant's right of appeal.

Applicant confirmed that he took up the opportunity and proceeded to file his appeal for the hearing of which he was called at the Bhunu Mall on the 24 January 2020. The appeal was chaired by Regional

Manager, who, having heard Applicant's

Respondent's  
representative then

reserved his ruling to the 27 January 2020. that the verdict of the appeal was delayed 2020, when it was then availed to him under circumstances. Applicant's complaint herein was to secure the verdict of his appeal after countless visits to Respondent's Personnel Officer as well as to the CMAC. The outcome of the verdict of the appeal referred to herein is "**Annexure CMJ 8**", a three (3) paragraphed undated piece of paper which bears no reference and/or connection to the Respondent.

- Applicant further testified till the end of February very strenuous
4. Having been furnished with the verdict of his appeal, which confirmed his dismissal, Applicant then proceeded to file a dispute for unfair dismissal with CMAC in which he claimed for the issues as already set out under Paragraph 1 above. In summing up his evidence, Applicant told the Court that he was 42 years old with 2 dependents, that his dismissal caused him immeasurable hardship especially in the area of his personal finances which he could no longer service.
  5. Under Cross - Examination by Mr Shabangu, Applicant conceded the substantive fairness of the termination of his services but contended that the whole process was procedurally flawed apparently on two (2) basis. The first basis for Applicant's procedural complaint emanated from the fact that the hearing was proceeded with, on the 30<sup>th</sup> December 2019, notwithstanding the fact that he had not had sufficient time to consult with his representative. Indeed, the question of Applicant's ability to secure a representative of his own choice was canvassed during the hearing hence it also warrants a brief recap from the Court. Its facts, which were common cause are that; on the 24<sup>th</sup> December 2019, Respondent served Applicant with a notice of

invitation to attend a disciplinary hearing on the 30<sup>th</sup> December 2019.



Within the said notice Applicant was advised about his right to secure and bring along a representative of his choice; Applicant was afforded six (6) days to prepare himself for the hearing; and that he did take time to secure one Mxolisi Zulu to come along to be his representative. However, the said Mxolisi Zulu withdrew his availability on the morning of the 30 December 2019, thereby leaving Applicant without representation. Notwithstanding the foregoing predicament Applicant proceeded to the venue of the hearing where he found the Initiator to whom he narrated his misfortunes.

6. What follows from the above facts forms a pivotal part of the conclusion of this case. As already stated under Paragraph 5 above, Applicant's contentions are that it was rather unprocedural for the Initiator to suggest that Applicant must proceed and choose his representative from a set of shop stewards which were known to her (the Initiator) one of whom was the Baker, Bongani Dlamini. Differently put, Applicant's submissions were that he was not afforded sufficient time to prepare himself for the hearing. This is because he had only met the said Bongani Dlamini on the very same day. Indeed, it is not in dispute that the Chairperson afforded Applicant just about enough time to go and fetch Dlamini from his post at the Baking Department. On the facts of this case therefore, the question for determination, on this issue, is whether there was a legal duty, on the part of the Chairperson, to have the matter postponed so as to enable Applicant to consult with his newly obtained representative. It follows therefore that in the event that our finding be in the positive then Applicant's claim for unfairness on procedural grounds must succeed. The determination of this issue shall, however stand over till later in this judgement.
7. The second procedural issue upon which Applicant sought to attribute fault to the Respondent's hearing was the allegation that, having caused the

charges to be put, the Chairperson then omitted to ask Applicant to plead to same.

8. For its part, Respondent called two (2) of its employees to the stand, viz; the Administration Manager, Doris Delisile Sikhondze, who served as the Initiator on behalf of the Respondent at the hearing and Innocent Bhembe, currently serving as the Sales Manager at The Gables Branch of Shoprite.

9. In her clear and concise narrative, Respondent's Witness #1 (RW1) testified to the Court about the events of the 29 November 2019, wherein a customer's cellphone got lost at the Gables Shoprite store. She told the Court that having searched for the cellphone without success, Management then resolved to enlist for the help of the Police. The Police conducted their own search, including the questioning of a Cashier, which, however yielded no positive results.

10. About two (2) weeks later, the customer came back to the store apparently to advise the Branch Manager that her cellphone had been recovered in an Indian shop in Manzini. The customer further sought to be afforded the opportunity to tender her personal apologies to the Cashier who had been implicated in the loss of the cellphone. It was RW1's evidence that thereafter the Branch Manager convened a staff meeting, starting with senior managers, the purpose of which was, firstly, to announce the good news from the customer, and secondly, to convey her joy that the customer's cellphone had not been found in the possession of Shoprite's employees. Herein, the witness emphasized that Applicant was also present.

11. RW1 testified further that about a week later, Police from the Lobamba Police Station, came over to the store where they arrested Applicant

apparently on suspicion of theft of the customer's cellphone. This was confirmed by the Police who came over to advise the Branch Manager of such fact, including the fact that Applicant was now due for arraignment before the Magistrate Court on the next day.

12. The next day Applicant reported for duty after lunch and proceeded to the Branch Manager's Office where he was asked to prepare a written statement regarding the loss of the cellphone. RW1 went on to refer the Court to a copy of such statement which was at Page 20-21 of Respondent's Documents. These documents were handed to the Court, by Mr Shabangu, with consent from Mr Vilakazi. The contents of Applicant's statement which was dated the 20 December 2019, is similar to the evidence that he gave to Court in-chief. And it is following from the said statement that the witness then proceeded to level charges of misconduct against Applicant.

13. This witness went on to tell the Court that service of the charges was effected upon Applicant by her on the 24 December 2019, whereat Applicant's rights were also fully explained. The charges themselves appear at Page 9 of the Book of Pleadings and were said to be "**Gross Misconduct**" in that:

*"On Friday 29 November 2019 a customer forgetfully left her cellphone at the till, after having found the cellphone you took it and put it in your pocket without declaring it with the Branch Manager as result the phone was reported stolen and the police had to be involved. Weeks later the phone was found to have left with you. Your actions brought the company's name into disrepute and is in breach of company rules".*

As already pointed out by the Applicant in his evidence, the notice also notified Applicant about the date of the hearing, i.e. the 30 December 2019; the venue of the hearing, viz; The Gables Shoprite, including its scheduled time of commencement, being 1100hrs.

14. The witness further confirmed that Applicant appeared before the hearing alone without his representative where-at he was reminded by Linda Zwane, the Chairperson of the hearing about his right to be represented/assisted during the hearing. Applicant is said to have confirmed his awareness of this right but went on to explain that he had been let down by Mxolisi Zulu, who had abruptly withdrew his availability apparently because of fear of intimidation. Respondent's witness went on to confirm that, indeed it was the Chairperson of the hearing who suggested the use of the 'local' shop stewards to Applicant, one of whom was Bongani Dlamini. Applicant approached Bongani and returned with him and the hearing then proceeded. We pause here to mention that the witness appeared to place much emphasis on the fact that no objection was raised, by the Applicant and/or his representative, to the matter being proceeded with at the time notwithstanding the fact that there had been no consultation between Applicant and his representative.

15. RWI told the Court that all preliminary issues of procedure were complied with by the Chairperson, including the reading of the charges and the explanation of Applicant's where after she (as the Initiator) proceeded to call Respondent's two (2) witnesses. These witnesses were Busi Dlodlu, the Respondent's Branch Manager as well as the Cashier, Tholakele Nhlabatsi. The Court was then referred to Page 23 of the Book of Pleadings, being the Minutes of the Disciplinary Hearing, which contained Applicant's case wherein Applicant not only referred to his statement of the 20 December

2019, but went on to attribute the incident to a bad omen. Thereafter, Applicant closed his case without calling any further witnesses, after which the Chairperson granted the parties time-out to prepare their written submissions which were read into the record. The matter was then postponed to the 6 January 2020 for the delivery of the Chairperson's verdict.

16. RWI further told the Court that on the 6 January 2020, the matter did return and Applicant was found guilty of misconduct after which the parties were granted the opportunity to make their submissions in mitigation. Again, the matter was postponed, this time to the 13 January 2020, wherein the Chairperson returned with his ruling which was Applicant's summary dismissal. Applicant was further advised about his right to file an appeal with the Regional Manager.

17. Under cross-examination from Mr Vilakazi, RWI confirmed that the Chairperson never called upon Applicant to plead to the charges and that the question of the sufficiency of time to prepare for the hearing was never made an issue principally because no application for a postponement was made by either the Applicant and/or his representative. On re-direct, Mr Shabangu paid much attention in trying to show that such omission, i.e. that of asking the Applicant to plead to the charge, did not occasion much prejudice to the Applicant especially because Applicant was, in fact, conversant with the charge that had been levelled against him.

18. Respondent's second witness was the Sales Manager Innocent Bhembe, (RW2), who himself was also based at The Gables. RW2 told the Comi that he was at the Store on the '**Black Friday**' of the 29 November 2019. He said the time was around 11a.m when he came to a till where he found a customer packing her purchased groceries for herself whereupon he took

over and did the packing for the customer who then left the shop. A short while later, the customer returned and reported that she was missing her cellphone. A search was then conducted in and around the till, including a search on the person of the Cashier, Tholakele Nhlabatsi. The said Tholakele is said to have advised that Applicant had also assisted in packing this particular customer's groceries prior to the arrival of RW2. That Applicant was not present during this time is not under contention. Also not in contention is the fact that the search for the cellphone failed to yield any positive outcome.

19. Just as RW1 had testified, RW2 also confirmed the meeting of the Saturday following the loss of the cellphone wherein Mrs Dlodlu, the Store Manager convened a staff meeting where she advised all about the loss of the cell phone. This witness made it clear that Applicant was in fact present during the said meeting and that he (Applicant) made no confession about the phone. RW2 went on to clarify that there were, in fact two (2) meetings that were convened by the Store Manager in connection with the loss of the customer's cellphone, to wit: firstly, the one of Saturday the 21 November 2019. Herein, the Store Manager had convened the meeting for the purpose of alerting Shoprite's staff about the loss of the customer's cellphone. Whilst, the second meeting was convened for the purpose of informing staff about the cellphone's recovery. The foregoing account constituted Respondent's second witness' evidence which was not controverted.

20. In his submissions on behalf of his client, Mr Vilakazi again reiterated the Applicant's position to the effect that their only issue was with the procedure that was followed during the hearing. Specifically, Counsel for the Applicant argued that the procedure that was followed at the hearing was flawed for the following reasons:

20.1 Firstly, the fact that the Chairperson of the hearing failed and/or omitted to ask Applicant to plead to the charge after it was read out.

20.2 Secondly, the fact that the Chairperson failed and/or omitted to postpone the hearing of the matter in order to afford Applicant the opportunity to consult with his representative.

20.3 Thirdly, the fact that Applicant's hearing lacked independence because its Chairperson knew Applicant. Herein, Applicant's Counsel appeared to be suggesting that it was procedurally not proper for the Respondent to have the hearing chaired by a manager from within the Respondent's establishment.

21. In refuting Mr Vilakazi's submissions, Mr Shabangu also conceded the Chairperson's error of omitting to allow and/or call upon Applicant to plead to the charge. Mr Shabangu was, however very quick to point out that Applicant was occasioned no prejudice as a result of this technical omission, principally because Respondent conducted its case as if Applicant had, in fact tendered a plea of "Not Guilty". The basis of this argument is the fact that, for its part, the Initiator did everything that was expected of her to establish Applicant's guilt. As to the issue of bias, Mr Shabangu pointed out that Applicant had a duty to raise this at the hearing, not *est post facto*.

22. Our Courts have time and again pronounced the test for disqualifying bias in employment disciplinary hearings. Thus in the case of **Lynette Groening v**

Standard Bank Swaziland Limited IC Case No. 222/08. Dunseith JP, said:

"The notion of "institutional bias" allows a person to chair a hearing even where his connection with the institution concerned might arouse a suspicion of inevitable bias, provided there is no probability that he is actually biased. This kind of bias is accepted as necessarily built into the employment internal disciplinary process, wherein the presiding officer is a representative of the employer". At paragraph 7.

The above legal proposition covers, rather squarely, the facts of this case and for that reason Applicant's claim of bias and/or lack of independence must, *ipso iure* fail.

23. Applicant's second attack on the procedure that was followed by the Respondent during his disciplinary hearing relates to the failure, on the part of the Chairperson, to cause the postponement of the matter so as to allow Applicant time to consult with his representative. It is not in dispute that Respondent did advise Applicant in advance of the charge he was to meet on the 30 December 2019. What precipitates the legal dispute is what then transpired, on the day of the hearing, when Applicant advised the Chairperson about the withdrawal of his representative on the very morning of the hearing.

24. Whilst there may be a variation on the evidence tendered by the parties in regard as to who between the Chairperson advised Applicant to go and solicit for a representative from the 'poll' of shop stewards who were based at The Gables Shoprite. It is, however confirmed, by both parties, that



indeed Applicant took the advice and proceeded to the Bakery department where he secured the baker, Bongani with whom he returned to the hearing. One cannot but notice, not only the fact that the representative was junior to Applicant, but also that he had also been hastily appointed. Yet despite all of the foregoing, the Chairperson failed to afford Applicant a postponement so as to afford Applicant the opportunity to consult with his representative. This he did apparently on the strength that no formal application for same was made before him.

25. In the case of **Swaziland Airlink (PTY) LTD v Nonhlanhla Shongwe N.O And Two Others (29/2020) [2020] SZSC 26 (19/08/2020)**, the Supreme Court had the occasion to deal with an appeal which was on all fours with the matter before us and His Lordship Cloete JA (with Annandale JA and Currie AJA concurring) said:

**"Surely representation means that the person should have knowledge of the dispute, is given time to consider the matters at hand, is qualified to give sound advice and is able to be of assistance to the accused person!"** (At paragraph 35).

The Court then proceeded to repeat and concur with the words of Maseko J, in the Comt *a quo*, that:

**"It is common cause that the colleague was a spectator as she honestly could not defend someone senior to her in these proceedings. The time allocated for 2m<sup>1</sup> Respondent to organize his representation was too short in the circumstances. No matter what the situation maybe or how strong the facts and merits against an accused employee may be, 20 minutes is too little for an accused to**

**arrange for representation before an)I disciplinar)I proceedings".**

*(In the same paragraph).*

26. From the contents of the **Swaziland Airlink case** cited above, it is clear that Respondent's Chairperson had a legal duty to afford Applicant sufficient time to consult with his representative before proceeding with the hearing. Having been able to advise Applicant to go and solicit for representation from the shop stewards that were then available, he also had the duty, for purposes of fairness, to enquire as to whether the said representative was comfortable with the hearing proceeding without him having been afforded time to familiarize himself with the facts of the case. As it is now, there is no indication, in the minutes of the hearing that he did anything to ensure that Applicant was afforded a fair hearing. It is therefore no surprise that the minutes only reflect Applicant's submissions meaning that Mr Dlamini was nothing but a spectator.

27. At Paragraph 39 of the same **Swaziland Airlink** judgement, Cloete JA cites with approval the following except from the South African Labour Appeal Court case of **Highveld District Council v CCMA & Others [2002] 12 BLLO 1158:**

*"When judging whether a particular procedure was fair, the tribunal Judging the fairness must scrutinize the procedure actually followed. It must decide whether the procedure was fair".*

From the above statement of the law, it is therefore the duty of this Court to decide whether it was fair for the Chairperson to cause the disciplinary hearing to proceed notwithstanding the fact that Applicant had not been afforded sufficient time to consult with his representative. And in the

circumstances of this case, we are more than convinced that the Chairperson failed to afford Applicant a procedurally fair hearing. For the foregoing reasons therefore, it is our judgement that Respondent failed to satisfy the procedural fairness requirement which is spelt out under **Section 42 (2) (b) of the Employment Act.**

28. Having found that Applicant's dismissal was procedurally unfair, we now proceed to invoke the provisions of **Section 16 (4) of the Industrial Relations Act 2000** (as amended) which provides that:

*"If a dismissal is unfair only because the employer did not follow a fair procedure, compensation payable may be varied as the Court deems just and equitable and calculated at the employee's rate of remuneration on the date of dismissal".*

29. And having considered the extent of the procedural unfairness, including Applicant's confession to the charges which would, in all likelihood might have played a big role to his summary dismissal, we award three (3) months wages as compensation to the Applicant.

There will be no order as to costs.

The Members Agree.



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**M.M. THWALA**

**JUDGE OF THE INDUSTRIAL COURT OF ESWATINI**

For Applicant : Mr F. Vilakazi.

For Respondent : Mr Z. Shabangu.

*(General Manager)"*

### **Analysis of Evidence and Applicable Law**

[12] The evidence presented at the hearing, and which was deposed to by way of affidavit to the Court clearly demonstrates that the Applicant was at all material times, an employee to whom the protection offered by **Section 35 of the Employment Act, No. 5 of 1980 (as amended)** applied.

[13] It is further the case that the Applicant has satisfactorily discharged the onus resting on him to prove his claim against the Respondent. It is also clear that the Respondent herein was at all material times aware of the Court proceedings, and opted not to appear in Court to state its own case. This is further evidenced by the contents of the letter of termination handed in by the Applicant as part of his evidence. The evidence as presented by the Applicant herein went uncontroverted, and he was able to show that the Respondent failed to pay him his salary in terms of the Contract of Employment. In the premises the Court has reached the conclusion that he is entitled to the relief sought in terms of the Notice of Motion, as well as his own oral testimony in Court.

### **ORDER OF THE COURT**

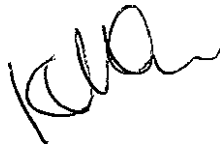
[14] The Court therefore makes an order in the following terms:-

- (i) The Respondent is ordered to pay the Applicant all arrear wages from the date of the commencement of the contract of Employment being; 17<sup>th</sup>

November, 2020, up to the end of the said contract.

(ii) The Respondent is further ordered to pay to the Applicant wages when they are due.

The members agree:



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**K.MANZINI**

**ACTING JUDGE INDUSTRIAL COURT**

*FOR APPLICANT:* Mr. M. Tsabedze  
(V.Z. Dlamini Attorneys)

*FOR RESPONDENT:* No Appearance