



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 504/2011

In the matter between:

**SWAZILAND WATER SERVICES
CORPORATION**

Applicant

And

**THE PRESIDING JUDGE OF THE
INDUSTRIAL COURT**

1st Respondent

JAMES NCONGWANE

2nd Respondent

Neutral Citation: Swaziland Water Services Corporation v The Presiding Judge of the Industrial Court & Another (504/2011) [2012] SZSC 151 (17th July 2012)

Coram: Dlamini J.

Heard: 29th May 2012

Delivered: 17th July 2012

Review proceedings - failure to consider material evidence ground for review

Summary: 2nd respondent instituted proceedings against the applicant at the Industrial Court for an unfair dismissal. The court *a quo*

found in his favour. Applicant has filed a review application on the basis that the 1st respondent failed to consider material evidence adduced in his findings.

[1] The events that led to the applicant to dismiss the 2nd respondent are briefly that on 24th August 2005, the 2nd respondent received a call from headquarters that the following day he should join the Managing Director, Financial and Operations Directors together with the caller who was 2nd respondent's immediate supervisor for a trip to Tikhuba, apparently one of the work stations for the applicant. On the following day, the delegation from headquarters arrived and 2nd respondent's supervisor ordered him to board the motor vehicle they were travelling in as there was space to accommodate applicant. It was 2nd respondent's evidence in the court *a quo* that by the time his supervisor advised him to board the motor vehicle from the headquarters he had already made an entry into the log book indicating that he was proceeding to Tikhuba. This entry in the log book, together with other claims were submitted by 2nd respondent as claim for travelling in excess of the limit of 2500 km. I must hasten to point out that procedurally employees of applicant who occupied managerial positions were entitled to claim for travelling that was beyond 2500 km. When 2nd respondent presented the claim, his supervisor recalled that on the 25th August 2005 the 2nd respondent did not use his motor vehicle to travel to Tikhuba. This prompted an enquiry into 2nd respondent's claim by applicant. An internal auditor was roped and she subsequently filed a report which reflected a number of false claims in terms of the distance alleged to have been travelled. It is upon the basis of the internal audit report that the 2nd respondent was

invited to a disciplinary hearing whose end results were his dismissal.

- [2] The 2nd respondent challenged his dismissal as unfair. The matter went through CMAC and subsequently to the court *a quo* where the learned trial judge held that the 2nd respondent was unfairly dismissed and entered an award of E574,167.53 plus costs of suit against the applicant.
- [3] Before I adjudicate on the merits and otherwise of applicant's application, it is safe to enquire firstly whether the reasons as advanced by the applicant for the review accords well in our jurisdiction. I should mention from the onset that the learned Judge in the court *a quo* found that the dismissal of 2nd respondent was procedurally fair.
- [4] He however held that substantially the dismissal was unfair for reasons I shall traverse later in this judgment.
- [5] It is common cause among the parties that when the matter was taken to the Industrial Court, it was not on the basis of whether the decision of applicant or chairman of the disciplinary hearing as it were, was wrong but to ascertain whether the 2nd respondent could on the evidence that was presented before the court *a quo* and again not before the chairperson of the disciplinary hearing be said to have lodged false travelling claims and therefore dishonest in the conduct of his work. This is in line with the view taken in **Wayland v Cawood NO and Another 1980 (1) SA 738** at 742.

[6] **Innes C. J. in Johannesburg Consolidated Investment Co. v Johannesburg Town Council 1930 (1) T. S. - TH 111 at 114-5** identified three areas under which review proceedings apply. Firstly, where proceedings of subordinate courts are considered on the ground of grave irregularities or illegalities. Secondly, where a public body or statutory body has conducted or taken a decision which is grossly irregular or clearly illegal and thirdly, superior courts may review matters conferred by legislative enactments.

[7] Rule 53 of the High Court Rules reads:

“(i) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi judicial or administrative functions shall be by way of notice of motion.....”

[8] Section 19 (5) Industrial Relations 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.”

[9] It is clear from the reading of the above rule that review application apply in both the proceedings and decision of a court a quo or tribunal, board etc.

[10] **Herbstein and Winsen, “The Civil Practice of the Supreme Court of South Africa” 4th Ed at page 929** set out

common law grounds upon which an application for review may be entertained, viz:

- a) *absence of jurisdiction on the part of the court;*
- b) *interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;*
- c) *gross irregularity in the proceedings; and*
- d) *the admission of inadmissible or incompetent evidence, or the rejection of admissible or competent evidence."*

[11] In **Takhona v President of the Industrial Court and Another Case No.23/1997**, their Lordship eloquently outlined as common law ground for review the following at page 11.

"...and specifically retained by section 11(5) under repealed Industrial Relations Act (which is pari materia with Section 19 (5) of the current Relations Act) the jurisdiction of the High Court to review decisions 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 functions or took into account irrelevant considerations 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." (words in brackets are mine).

[12] Citing **Holmes J. A. in Local Board Transportation Board and Another v Durban City Council and Another 1965 (1) S.A. 586 (AD)** their Lordship in **Takhona** *supra* continue to propound:

“A mistake of laws per se is not an irregularity but its consequence amount to a gross irregularity where a judicial officer, although perfectly well-intentioned and bona fide does not direct his mind to the issue before him and so prevents the aggrieved party from having his case fully and fairly determined”.

[13] What stands to be determined in this case therefore, is whether the learned Judge in the court *a quo* committed a mistake of law as per **Holmes J. A.**'s observation. This calls for me to turn to the evidence as presented before court by both parties and the judgment and ascertain whether the conclusion or findings of the learned Judge is as a result of considering the totality of the evidence presented. I am very much alive that my duty is not (my emphasis) to reassess the evidence and say this court or another sitting would have come to a different conclusion. That is a purview for the court of appeal which I dread to tread.

[14] 2nd respondent gave evidence in his own case. His evidence-in-chief was briefly that following his promotion in October 2003, he became the regional manager of applicant for the east part of Swaziland, viz. Lubombo region. His place of residence during the working days was Siteki. He would come to Mbabane, presumably his marital home, on week-ends. On the 8th September 2005 he received a query by correspondence of

his travelling claim which also invited him to state reasons as to why disciplinary actions should not be taken against him from his supervisor, one Ike Hebst.

[15] In response, he stated:

“My Lord I did explain that I didn’t intend to dodge the company by filing a log book.”

[16] It would appear that this response was directed to count 2 of the charge which reads that the 2nd respondent *“entered into his logbook that he made a trip to Tikhuba and yet he did not use his vehicle.”*

[17] It was 2nd respondent’s evidence-in-chief that on the 23rd August 2005, he received a call from his supervisor who was based at Ezulwini that he should prepare a motor-vehicle in order to travel to Tikhuba Clinic, an area under 2nd respondent’s supervision. In that trip he would be joined by the applicant’s managing director, financial and his supervisor who was the operations director. The following day, around 7.00 a.m, 2nd respondent made an entry into the log book indicating a trip to Tikhuba. At around 10.00 a.m, his immediate supervisor arrived in the company of the other directors and instructed him to board their motor vehicle as there was space to accommodate him. The quartet left for Tikhuba using 2nd respondent supervisor’s motor vehicle. He came back around 1.00 p.m. He then travelled to Manzini but did not make such an entry. When the month of August ended, he prepared and filed for a claim including one for travelling to Tikhuba. Having signed for the same as correct, he submitted it to his

immediate supervisor for approval who, however, spotted the false claim and ordered the 2nd respondent to explain. There were other four charges all related to a false claim for travelling. In answer to the charge to Tikhuba at page 41 of the book of pleadings he responds:

“My Lord I did explain that it was an oversight with me not to cancel Tikhuba from the log book when we were from Tikhuba because I have to proceed to Manzini.”

[18] 2nd respondent was cross-examined at length on his claims as from March 2005. The first charge referred to excessive claim travelling from March to August 2005. The second charge was specific to the travel to Tikhuba while third refers to travelling to Tikhuba without authority. Charge 4 reflected travelling claim for Saturday and Sunday outside his work stations which was viewed as dishonest claims. He was acquitted on the last charge.

[19] The cross examination was mainly focused on the excessive claim by 2nd respondent. A report that was compiled by an internal auditor was used during cross examination to demonstrate how 2nd respondent entered mileage in the log book which were excessive. The 2nd respondent was also referred to a map in demonstrating that the distance travelled could not fall within Swaziland.

[20] Having ascertained that the 2nd respondent always appended his signature to every claim indicating that it was correct, Counsel for applicant referred to a number of instances showing not only excessive claim but a disparity in the distance claimed.

For instance on 15th May, 2005, 2nd respondent claimed having travelled 330 km to Manzini for a return trip of 68 km. Between 25 and 26 August 2005 the distance travelled was 830 km which was estimated to be from Swaziland to halfway Cape Town.

[21] The explanation is not clear except to say that sometime 2nd respondent would travel for three days before making entries into the log book. However, this explanation was defeated by the evidence that the log book had a column for dates. For the distance of 830 km, 2nd respondent had reflected the dates to be 25 to 26 August 2005. This distance travelled indicated that 2nd respondent would have travelled for a period of 8.3 hours on the road on that day. Another excessive distance is reflected from page 89. At page 93 it shows that 2nd respondent on 30th April 2005 travelled from Siteki to Mbabane a distance of 402 km.

[22] Further on 11th and 12th March no destination was recorded yet a mileage was entered as reflected at page 95 of transcript.

“RC: I am asking you that 11 and 12 March there is nothing that has been entered in respect of the kilometers.

AW: Yes my Lord I did not record anything between the 11 and 12 March and with all the log books where there are kilometers per hour I did not record anything.

RC: You just recorded the speedo reading?

AW: Yes it was required by the Car Scheme.

“RC: Have a look at the column for the log book for May. On the 25th of May the speedo reading according to you entered 23422.

AW: Yes my Lord.”

[23] On 25th May 2005 a distance of 533 km to headquarters was claimed. This, according to Counsel for applicant was travelling on the road for 5½ hours whereas if one could assume he travelled to his outer stations then he would spend on the road about two hours.

[24] On 24th August a distance travelled was 187 km, and this was the date in which he was ferried to Tikhuba by his immediate supervisor.

“On the 24th August you have gone in someone else’s transport you still managed in that day to do 187 km, it is quite a lot of travelling in itself.”

[25] It was further revealed through cross examination that although the 2nd respondent had indicated that he would travel to Lavumisa, Nhlambeni he never reflected this in the log book as a destination he travelled to. I guess correctly so because Lavumisa fell outside his jurisdiction and could not have gone there.

[26] The applicant called two witnesses after an application for absolution from the instance was dismissed.

[27] The first witness was its treasury accountant. Her evidence was mainly on what information was to be entered into the log book. It was her evidence that if one were to travel via certain place, the log book should reflect so. This was in order to be able to ascertain the exact kilometers travelled.

[28] The second witness was the internal auditor of applicant. She was assigned to investigate 2nd respondent's travelling claim. She decided to randomly select January to August 2005. She used the vouchers and the log book to do her analysis. Part of her findings was revealed by counsel during cross examination of 2nd respondent which is highlighted *supra*. She reiterated the evidence by the treasury accountant that all by-pass trips ought to be reflected. She also attached a road map to indicate distances in kilometers from one area to another.

[29] The learned Judge, seized with the above evidence concluded:

"9. As already pointed out in paragraph 7 supra, there was no evidence placed before the court that the applicant made any false statement or misrepresentation. He simply recorded the distance that he travelled. As to where he was going to is not an issue as he had unlimited use of the motor vehicle. Further, as already pointed out, there was no evidence led to show that the applicant did not in fact, go to the places that he said he went to in the course of executing his duties. A misconduct or dishonesty would in the circumstances of this case have

occurred if the applicant was found to have falsified the figures and also shown that he never in fact went to the respondent's substations that he said he went to."

[30] The court then found in favour of 2nd respondent and held that his dismissal was unfair.

[31] I agree with the trial judge as reflected at page 7 of the judgment that:

"8. On behalf of the respondent it was also argued that the dishonesty consisted in the applicant claiming or receiving money that was not due to him."

[34] The learned Judge however, stated the issues before him:

"6. The main argument by the respondent that the applicant committed gross misconduct or dishonesty was that he inflated the mileage because he wanted to exceed the allowed or free mileage of 2,500 km so that he could file a claim with the respondent."

[35] Did the honourable trial Judge understand the issues at hand? This is what I am called to ascertain. If he did, then there is no mistake of law.

[36] Issues in any matter, be it civil or criminal, usually come out clearly under cross-examination of witnesses especially those called upon to establish the cause of action in the absence of pre-trial conference where issues are ventilated.

[37]

For purposes of clarity, it is worth repeating the questions posed by Applicant to 2nd respondent. From page 82 it reads:

"R C: On 16th May 2005 there is a trip from Manzini to Siteki 330 km the distance being alleged is 68km return trip will 136 referred to the map. It is correct that in fact the log sheets do not tell normal distances between town?"

AW: My Lord I did explain before court that I wouldn't go straight because there were places substations where I had to attend to a long distances I was attending.

RC: I will demonstrate just how absurd that is because you see if take 330km and a distance between Manzini and Siteki, then you took diversion of 250km out of your way, is that what you are saying?

AW: It would happen

RC: It will happen in travel of 68km are you really being serious with this court.

R C: I see the Internal Audit notes that once Siteki have different entries and little as 67 and as much as 830km.

AW: Yes my Lord

RC: How can you explain 830km this is halfway to Cape Town, how can you explain that?

[38] The line of question proceeded in similar way in respect of all the distances claimed that were in issue. From this manner of questioning it became clear that the applicant's case from the onset was not that the applicant did not travel to the area reflected in the log book but rather that if he did travel, it was practically inconceivable under any circumstances that a person travelling within Swaziland around the destination reflected in the log book would travel for such kilometers.

[39] Put differently, the issue was not whether or not 2nd respondent travelled to the areas reflected in the log book. The issue as raised by the applicant was: even if one was to assume for a second that 2nd respondent did travel to the areas under scrutiny as per the log book and his evidence under cross examination (because he mentioned Nhlambeni and Lavumisa which were not reflected in the log book) it was practically impossible to travel the distance claimed. The distances in kilometers claimed far exceeded not the allowed 2500 km but the actual physical location of these areas in reality.

[40] This position taken by the applicant is explicitly stated at page 34 part 2 of the transcript where counsel for applicant states:

“Unfortunately my Lord the policy is not an issue which is before this Court. What is before this Court is the allegations made with regard to counts 1 to 4 and in particular if one looks at count 1 of those charges one sees that what is in fact in issue is that he raised the excessive mileage in some instances not corresponding with the radius of distances between towns thus

intending to gain at the Corporation's expense and there has been plenty of cross-examination in respect to that aspect of the matter." (my emphasis)

[41] However, it is clear that the learned Judge misdirected himself on the issue and this can be deduced at page 36 part 2 of the transcript:

"Judge: I agree with you there but at the same time I think the defence is brought that it may be that he is saying that there was nothing wrong, he did not exceed mileage. At the same time there is no policy against this issue. Why do you say they shouldn't raise a double barrel defence? It may be that he is going to say "I did not exceed the mileage here and in any event there was no infraction of the company of the company policy."

[42] Again at page 39 the Honourable Judge demonstrates further that he did not comprehend the issues at hand:

"Judge: If you look at the charges there that he exceeded the mileage. The question is what was the policy relating to mileage. For example in charge 1 that he exceeded the excessive mileage. So the enquiry must be any event what was the allowed official mileage. So that must come from the policy document of the company. If you look at 3 it says that he had no authority to travel so the court must enquire, where did this authority

come from? So I think broadly we must know what the company policy was in respect of the charges."

[43] The learned Judge seemed to understand the word "excessive" to be referring to the laid down 2500km whereas applicant raised this word in reference to the actual physical location of the places with regards to the dates or times claimed to have been travelled.

[44] Under no circumstances would applicant have associated the word "excessive" to the 2500km because that was the very purpose of the policy that whoever travels in excess of 2500km should lodge a claim by producing proof of the kilometers in excess of 2500km in a form of log book entries.

[45] It is for this reason by misunderstanding the issue at hand that the learned trial Judge rules as follows:

"7. Before the court the evidence revealed the following:

7.1 The respondent's policy regarding travel claims by Regional Managers was open ended. The applicant had unlimited use of the motor vehicle. The applicant had unlimited use of the motor vehicle for both official and private use.

7.2 The evidence that the applicant worked on weekends was not disputed.

- 7.3 *The evidence by the applicant that he did not have a specific knock-off time was not disputed.*
- 7.4 *During August 2005 he was also Acting Regional Manager for Manzini.*
- 7.5 *The claims were approved by his superior before being presented for payment.*
- 7.6 *The applicant explained how he made an entry that he had travelled to Tikhuba on 24th August 2005. He said he received a call from his superior at the headquarters at Ezulwini on 23rd August 2005 that the applicant should prepare to travel to Tikhuba on 24th August 2005 together with the Financial Manager. The applicant said in the morning of 24th August 2005 at about 07.00 am he accordingly filed the log sheet. He said the superiors from the headquarters, being Ike Herbst, the Managing Director Peter Bhembe and the Financial Manager Mary Vilakati arrived at Siteki at about 10.00 a.m. They were travelling in a twin cab, and they instructed applicant to travel together with them and leave his motor vehicle. On their return from Tikhuba the applicant said he forgot to make an alteration on the log sheet and proceeded to drive to Manzini on official*

duties as he was also the Acting Regional Manager for Manzini. It was not shown during cross examination that this explanation was false or incredible.

7.7 The applicant told the court that he did not travel on a straight course, but made detours to attend to other substations of the respondent. For example, he said he would enter in the log sheet that he was traveling to Manzini but would find along the way duty would require that he should also go to Nhlambeni. He also said he had to cover far flung places like Lavumisa. The respondent failed to bring evidence to disprove the applicant's claims that he visited those substations. The respondent could disprove that evidence by simply calling the officers who were based at the substations to come to court and say that the applicant never came to the substations. The respondent failed to do that. The evidence of the applicant therefore remains unchallenged in that respect.

7.8 Although the applicant's log sheets sometimes showed very high mileage, there was no evidence that the speedometer was interfered with. So whether the mileage was "unreasonably high" as the respondent claimed, there was no evidence that the

speedometer readings were false. The applicant did travel the distance recorded in the log sheets.”

[46] Had the Honourable Judge understood the issue before him, he would have considered the evidence of applicant more particularly the roadmap filed by the applicant together with applicant's internal auditor's report and realized that the distances claimed to have been travelled was inconceivable in reality. He would have appreciated that no man could have travelled a distance of 830km between 25 and 26th August 2005 within the borders of Swaziland, let alone the destinations reflected in 2nd respondent's log book. He would have noticed that even if he were to accept the evidence by the respondent that he did not travel straight, he had to divert to other destinations, such diversion within the radius of Swaziland would not under any circumstances yield to such distances as 830, 402 or 330, 187 km per day. The road map as filed by applicant and the log book would have assisted him in this regard.

[47] He would have further appreciated that applicant need not have brought proof of the speedometer reading not only because at that time it was impossible to obtain same but that it was unnecessary at all under the circumstances as all the evidence relied upon by applicant was submitted by 2nd respondent after certifying the same as correct in a form of the log book and claim vouchers. The learned Judge would have also noted that a distance from Siteki to Zulwini was 68km and could not be 67km or 330 km. He would also realize that the entry of 24th August 2005 to Tikhuba was fraudulent because

one needs to also enter the speedometer before and after completing the journey. He would have realized that respondent must have guessed the speedometer entered on this particular day. He would have directed his mind to the response by the 2nd respondent of the Tikhuba trip and realize that the 2nd respondent did not dispute this entry but informed court that it was an error on his part. He would have realized that the response was tantamount to an apology which applicant was at liberty to accept or reject. The court was certainly not in a position to compel applicant to accept it. He would have taken judicial notice that a person in the position of the respondent was expected to be honest in his dealing and the claim for the trip to Tikhuba which was never was, was a clear demonstration that the respondent was dishonest and therefore the relationship that was held of trust between the respondent and the applicant could no longer be sustainable under such circumstances. He would have further realized that assuming for a second that 2nd respondent erroneously forgot to cancel the word Tikhuba and replace it with Manzini as he claimed to have travelled there, he could not have travelled the distance of 187km as a return trip from Siteki to Zulwini, past Manzini was 68km. That on its own was false claim.

[48] Further and with due respect to the learned judge, he would have realized that the policy of applicant was never in issue as pointed out that applicant designed the policy for management to be able to claim for any travel that was in excess of 2500km and therefore the working hours of the 2nd respondent were immaterial. He would have realized that in the work environment, the 2nd respondent had a duty to be honest and not that his immediate supervisors were to police him. That

they approved the claims did not burden them with a duty to scrutinize every claim and therefore exonerate 2nd respondent from his duty to exercise due care in filling for the claim. They were perfectly well entitled to assume that from his position, the 2nd respondent was honest in his claim and not visa versa.

[49] In the result, with the *dictum* in **Takhona's** case, *supra*, that the Honourable judge "*took account of irrelevant considerations and ignored relevant ones,*" the application for review is allowed and the following orders are entered:

- i) The award by the court *a quo* to 2nd respondent is set aside.
- ii) Costs to follow the event.

**DLAMINI
JUDGE**

For Applicant: Advocate P. Flynn instructed by Sibusiso B. Shongwe & Associates

For Respondents: A. Lukhele of Dunseith Attorneys