



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 4028/2004

In the matter between:

MASOTJA PETER DLAMINI

Applicant

And

THE ATTORNEY GENERAL

1st Respondent

**THE ARMY COMMANDER – UMBUTFO
SWAZILAND DEFENCE FORCE**

2nd Respondent

Neutral Citation: *Masotja Peter Dlamini v The Attorney General & Another*
4028/04 [2013] SZHC 102 (3rd May, 2013)

Coram: **Dlamini J.**

Heard: **15th November 2012**

Delivered: **3rd May, 2013**

*Application for review of court marshal's decision – whether marshal court
failed to observe audi alteram partem principle – court is guided by record.*

Enquiry as to facts – court weighs relevant, material and admissible evidence

Summary: The applicant was given a sentence of six months incarceration with two months suspended for failure to carry out instructions from his superior and for deserting his duty station. He instituted motion proceedings under a certificate of urgency calling upon this court to review and set aside the decision of the Court Marshal on the basis that it failed to observe the dictates of natural justice and that he should be paid arrear salaries.

Background

[1] When the matter first came before me, Counsel for applicant voceferously argued that the matter was *res judicata*. The basis for such argument was that the applicant filed the present application and was granted *rule nisi* returnable on a specified date. Respondent instead of filing an answer and appearing on the return date, filed an appeal to the appellate court. On the set down date of the appeal hearing, respondent abandoned the appeal. The Appeal Court duly entered that appeal was abandoned and ordered respondent to pay cost.

[2] It was applicant's submission that following respondent's abandoning the appeal, all that remained for the court was to confirm the *rule nisi*. Respondent was barred from filing an answering affidavit and pursuing the same because it failed to pursue the matter on appeal and further that the time for respondent to file its opposing pleadings had long lapsed.

[3] Adjudicating on *res judicata*, **De Villiers J. A.** in **Schierhout v Union Government 1927 AD 94** at 98 stated:

“Now a final judgment of a court of law being res judicata is not to be lightly set aside.”

[4] The question therefore in *casu* is whether the appeal by respondent was noted on a final judgment.

[5] From the judgment, the respondent, raised a *point in limine viz.* as per page 3 of the learned **Judge Nkambule J.**'s judgment was that:

“The respondent alleges that in terms of the second schedule to the Ubutfo Swaziland Defence Force Order 10/1997, paragraph 104 and 113, the review being sought by the applicant lies with the board or Council of review established in terms of paragraphs 146 and 147. Respondent states that the intention of the legislature was to oust any other review authority at this stage of the proceedings.”

[6] On this, the honourable Judge concluded at page 6:

“As the brief history of this matter has been stated it is clear that if this court would decline to hear the review it would be assenting to the respondent's violation of the rule of natural justice and rendering the maxim audi alteram partem rule useless. This court must investigate injustice and illegality no matter where it is found.”

[7] It is undisputed that the court then granted respondent leave to file answering affidavit on the merits.

[8] Instead of respondent filing its answering affidavit, respondent opted to appeal the ruling on points of law. It is not for me to say whether it had a

final effect. However, it was still open for the parties to have that decision confirmed or discharged as the case may be. I note that the matter could not be said to have been decided on the merits and demerits. There were no affidavits filed on behalf of respondent nor was the court marshal record before his Lordship Nkambule J. when he made the ruling. The matter was therefore not *res judicata*.

[9] I now turn to the second point raised by applicant that the respondent is barred from opposing the applicant because the time for filing of its answering had lapsed.

[10] I must point out that on the 13 July 2012 the applicant represented by Mr. C. Motsa and respondent by Mr. P. Dlamini approached the court and took a consent order to have the matter set down for hearing and respondent to file its answering affidavit and record of proceedings. It was by consent of both parties that pleadings should be closed by 24 October 2012. This is tantamount to a waiver by applicant of his rights to raise the point on bar. This court cannot encourage applicant to approbate and reprobate at the same time.

Ad Merits

[11] His Lordship **Ramodibedi J. A.** as he then was, in **Swaziland Breweries Limited and Another v Constantine Ginindza Civil Appeal No.33/06** dealing with the powers of this court on review, *en passé* at page 10 cites the Section 15 (1) and (3) of the Constitution as follows:

“15. (1) *The High Court has – (b) has no original but review and appellant jurisdiction in matters in which Swazi Court or*

Court Marshal has jurisdiction under any law for the time being in force.”

[12] The applicant has raised two main grounds to be adjudicated upon by this court on review. Firstly, whether the respondent did observe the principles of natural justice when adjudicating upon his matter that led to the sentence for incarceration? Secondly, whether applicant did absent himself from work in order to warrant respondent to stop his salary summarily?

[13] I deal with the first ground of review of respondent’s proceedings.

Review of respondent Proceedings

[14] The applicant, in support of his application for review averred in his founding affidavit:

“6.

On the 1st November 2004 whilst at Mbuluzi Army Barracks I received a call from Phocweni Army Barracks requiring me to attend at the Umbutfo Swaziland Defence Force Headquarters before the Court Martial at 9.00 a.m. on 2nd November 2004. The phone call had been made by Regimental Sergeant Major Fana Dlamini.

7.

Having received this call I duly obliged and proceeded to the Army Headquarters in Bethany and reported on time.

8.

Upon the Martial Court constituting chaired by Luitenant Colonel Mashikilisana Fakudze charges were read to me wherein. I stood charged

with two counts that of failing to comply with an instruction of a senior officer and/or insubordination, and that of having deserted my work station being Phocweni Army Barracks.

9.

9.1 *Upon being asked to plead I raised objection informing the Court that I was not ready to proceed with the hearing as the notice that was given to me was too short and I had also need representation.*

9.2 *I further informed the court that there was no way I could proceed to have the matter heard as I could not in any way prepare myself nor could I arrange for my witnesses.*

10.

Despite my pleas for being ill-prepared, these fell on deaf ears and the Chairman instructed that the matter shall proceed without my witnesses and my ill-preparedness.

11.1 *The chairman then proceeded to call witnesses wherein one Sengwayo was called who in his testimony testified in my favour indicating that he had not communicated any instruction to me regarding my return from Mbuluzi to Phocweni Army Barracks.*

11.2 *In as much as Sengwayo testified in my favour I would have liked the opportunity to put questions to him to clarify issues about my alleged failure to comply with an instruction and/or order, but was never given that opportunity.*

11.3 *After this witness was led the matter was adjourned for Thursday the 4th November 2004.*

12.

12.1 *On resumption of the matter on 4th November 2004 whilst sitting in the gallery Sergeant Sengwayo was called wherein he again testified (not under oath) and this time he changed his story saying that he had given me an instruction to return to Phocweni Army Barracks. Again I was never given the opportunity to cross-examine him.*

12.2 *On this day I expected that the alleged complainants be called which included Lieutenant Anthony Sibandze to which witnesses I would also put questions. This did not materialise.*

12.3 *I was thereafter convicted and sentenced to six months imprisonment 2 months of the sentence suspended, which sentence was to be served at Mbuluzi Army Barracks.”*

[15] To summarise the grounds for the review, applicant submits that he was not given sufficient time to prepare for his case. He was not afforded opportunity to cross examine respondent witnesses. Further, crucial witnesses such as the complainant were not called. The evidence of the witness called was contradictory in material terms.

[16] The record of proceedings was filed by respondent following the consent order of 13th July 2012.

[17] I have perused the record and scrutinized it for purposes of ascertaining whether applicant was dealt with according to law.

[18] At page 94 of the book of pleadings the record reads:

“Chairman: Are you ready to proceed with the trial today?”

Accused: No, Your Honour”

[19] The Chairman proceeds:

“Chairman: When do you think you will be ready?”

Accused: On the 9th November 2004.

Chairman: You are advised that your trial will begin on 9th November 2004. You shall remain out of custody. You should not harass the witness to be called against you.”

[20] Nothing can gainsay the above astute observation of natural justice by the Chair.

[21] The applicant further states that he was denied the right to cross-examine Sgt. Philemon Sengwayo.

[22] Page 97 reflects that Sgt. Sengwayo having completed his evidence in-chief as led by the Prosecutor, the Chair enquired as follows:

“Chairman: Private Masotja you can now cross-examine the witness who has just testified against you. You can ask him questions.”

[23] Page 98 to page 99 reflects a plethora of questions posed by applicant to Sgt. Sengwayo and at the end applicant stated:

“Accused: I have no further questions your Honour.”

[24] In fact, the record reflects that applicant cross-examine all (i.e. two witnesses) called against him.

[25] The applicant has also alleged that the complainant, one Anthony Sibandze was not called so as to enable him to cross-examine him.

[26] It is worth noting that from the onset, respondent explained to the applicant witnesses that will be called to give evidence in support of the two counts he was facing. These were Sgt. Sengwayo and Major Zwane. Lt. Anthony Sibandze was never mentioned as one of the witnesses nor was he mentioned by any of the witnesses throughout their evidence. When applicant took the witness stand, he too did not mention Lt. Sibandze. In fact the complainant herein was Sgt. Sengwayo. Applicant has not in his founding affidavit alleged what this witness would have said or what he would have cross-examined him on. Applicant did not apply before the respondent to have Lt. Anthony Sibandze called.

[27] For the totality of the above, this ground stands to fail.

[28] Applicant has alleged further that the evidence of Sgt. Sengwayo was contradictory.

[29] I have perused the evidence-in-chief and under cross-examination of Sgt. Sengwayo. He was consistent throughout. His evidence cannot be faulted in any way from the record of proceedings. This ground stands to fail.

[30] I must mention that the Chair was vigilant on the rights of the applicant. Not only did he postpone the matter at the instance of applicant after enquiring whether he was ready, on the trial date he actually asked the

applicant whether he had any objection to the constitution of the court that was to try him after reading out the names of the members. He also advised applicant of his right to legal representation. This is commendable of the Chair.

[31] The second lap of the enquiry pertains to respondent action of stopping applicant's salary. The question is whether applicant did absent himself from work in order to justify respondent to invoke the "no work no pay" rule.

Applicant absent from work?

[32] Applicant avers at paragraph 13.1 page 20:

"13.1 After my conviction my salary was also stopped hence was never paid for the month of November, and most likely December 2004.

[33] The respondent does not dispute that it did stop applicant's salary. Respondent justifies its conduct on basis that the applicant absented himself from work.

[34] The applicant gave evidence in support of his application as follows:

"He, having been convicted by the Court Marshal and incarcerated, he left the cell while military force officers were opening the cell to give him food. He told them that he was proceeding home and would institute the

present proceedings in court. He left the cells before November 15, 2004. He did not receive his salary in October.”

[35] The court called for *viva voce* evidence in order to ascertain whether applicant did absent himself from work. Applicant gave evidence as follows:

[36] On the 20th November 2004 he instituted the present proceedings. He was granted an interim order returnable on 21st January 2005. He attempted going back to work. He went to Mbuluzi barrack as his work station. He was told to serve his sentence and complain later. He then went to Phocweni as his permanent base where he was told the same. He proceeded home.

[37] While at home, some five days later officers from the respondent's headquarters arrived and informed him that they were instructed to fetch him so that he could go back into respondent's cell to continue serving his sentence. He refused, showing them a copy of the interim order. They left without him.

[38] Sometime ago, early January 2005 while in Manzini City, military officers approached him telling him that they were taking him to the cells at respondent's headquarters. These were five in number. He spent a night in the military cell. The following day, as he was given food, he left.

[39] In the same month, he went to respondent headquarters after having secured an appointment with one Mr. Gwalagwala Dlamini, Chief of Personnel Officer. This officer could not assist. As he was leaving, he met the head of military department who too declined to come to his assistance stating

that he feared losing his rank should he allow applicant to resume work without him first serving his sentence. He insisted that applicant serve his sentence. It was his evidence that he left the meeting unceremoniously, running away. He continued to pursue the matter in court.

[40] Two months or so, he received a call from the Information Commander who told him that the Army Commander wanted to meet him and discuss the matter. He told this caller that he was afraid to come to the headquarters as military officers would arrest him, contrary to the court order he was armed with. This officer assured him that he will arrange officers to meet him. He duly obliged and was escorted by the officers to the Information Commander's offices. He was informed by this Commander that the Army Commander, together with the top brass have instructed that he should serve the sentence and then go back to work. He should also remove the matter from the civilian court. He declined and left.

[41] Again around June 2005, he secured an appointment with one of the top brass of respondent, Sgt. Major Vernon Dlamini. He told Sgt Major that he was willing to report to work pending finalization of the present application in court. This officer informed applicant that he could only advise the Army Commander but could not take a decision on his matter. He promised to revert to him later.

[42] He duly did and advised applicant that the Army Commander declined his request on the basis that he did not want to set a precedent. This was his last attempt.

[43] The applicant was cross-examined at length. It was indicated to him that he was paid for October, November, December, January and February. The

reason he received a zero balance is because he had a loan which impacted on the balance. It did turn out that applicant was not sure of the period upon which his salary was stopped.

[44] It was further pointed out that the interim order did not grant the prayer on salary. Applicant conceded to this as well.

[45] He was further quizzed on the fact that he could not belong to two units at the same time i.e. Mbuluzi and Phocweni. He stated that it was Phocweni. He indicated that he did go to Phocweni. It was put to him that when he went to Phocweni, he met Mr. Zenzele Dlamini at the reception who, when he called him to the office, he skipped the fence and ran away. He refuted this. It was pointed out that as he ran away from the holding cells, he ran away from this officer.

[46] It was disputed that this officer went to Mbuluzi for purposes of reporting but to recharge his cell phone. He denied this.

[47] The applicant closed its case.

[48] The respondent arraigned the following witnesses:

[49] **Daniel Dumisani Masuku**, who identified himself as the Station Commander at the relevant time. He knew the applicant who was part of a group that joined another on training for recruits at Mbuluzi Army barrack where he was stationed. He saw the applicant when the trainees were sent back to their respective units. He also saw applicant approaching from Ngalawini, an area adjacent to Mbuluzi barrack. He went to the clinic at his base. He enquired what the applicant wanted from Sgt. Shabangu who

was in charge of the clinic. He was informed that the applicant had come to recharge his cell phone.

[50] He told the officer to inform applicant that he should not be in that area as it was not his base. He approached the applicant directly and reminded him that he had instructed Sgt. Shabangu to inform him that he should not be at the Mbuluzi barrack. The applicant refused to leave. He instructed Sgt. Msebenzi Zwane who is since deceased to chase the applicant away. That was the last time he saw applicant.

[51] He further informed court that applicant never reported for duty at Mbuluzi as the head of that base, he would have received such report. He disputed applicant's evidence in-chief that he reported to him.

[52] During cross-examination Counsel for applicant informed this witness that his client wishes to convey that he had been honest in his evidence except to clarify a certain point. He was asked as to the reason for his failure to apprehend and arrest the applicant following his escape from the Army cell. The witness replied that he did not want to be part of the issue between applicant and the Court Marshall although he knew that applicant had escaped. It was put to this witness that when applicant went to Mbuluzi, he was ignored by the superior, including this witness. The witness disputed that and pointed out that applicant's assignment at Mbuluzi had been completed.

[53] Counsel ended by pointing out again that this witness testified very well.

[54] **Zenzele Mehluli Dlamini.** He was based at respondent's headquarters as Commander of Military Police. He knew applicant as a person who came

to meet him pertaining work issues. On the 9th December 2004, he received applicant who had been sentenced to goal. He was put into the holding cell. While they were preparing to transfer him to the respondent jail at Mbuluzi applicant escaped from the holding cell the very same day.

[55] He began to search for him as escaping was a crime. Applicant was spotted at Luve on 4th January, 2005. They instructed those officers who saw him to apprehend him. This failed.

[56] He was however arrested on 14th January 2005 at Manzini park. He was taken to respondent headquarters where he was locked up. On the following day he was conveyed to Mbuluzi goal. He received a report that in the night of the 15th January he destroyed the roof of the goal and escaped. Days went by and on 29th January, 2005, this witness found applicant at the reception at respondent's headquarters. He instructed applicant to follow him to his office. Applicant informed him that he had not come to him but came to Sikhondze. He informed him that they have been looking for him. He then followed him. When he called the Military officers by the gate to come to his office, he dashed away at a high speed. He used the back door and through the fence, into the nearby bush.

[57] This witness refuted the applicant's allegation that he informed him to serve his sentence as he could lose his rank. This witness further told the court that the purpose of summoning applicant to his office was to take him back into custody. He maintained this even under cross examination.

[58] Under cross-examination Commander Dlamini informed the court that he was not aware of the court order in favour of applicant otherwise he would

have respected it. He would not have persisted in arresting applicant in the light of the court order.

[59] **Mfanawenkhosi Valentine Khumalo**, the next witness, was based at Phocweni as Captain in the Royal Guard at the material time. The applicant was working at Phocweni as well. He was assistant to the Head of Phocweni Mr. Anthony Sibandze who is since deceased. He was attached for sometime at Mbuluzi when applicant's group returned to Phocweni. Applicant did not do so. The officer who was assigned to collect the group from Mbuluzi back to Phocweni reported to him that applicant refused to board the motor vehicle. He enquired from Mbuluzi as to whether applicant was seen. He was informed that applicant was occasionally seen around Mbuluzi. He reported this to his superior Mr. Sibandze who ordered him to stop his salary for being absent from work. He duly complied and this was on 3rd November 2004. He further formulated charges against applicant. He never saw applicant then although he gathered that applicant did come to see Mr. Sibandze at Phocweni. He could not state under cross examination as to whether applicant came before respondent's guilty verdict or before. However, he was informed by Mr. Sibandze that applicant came to see him.

[60] The last witness on behalf of respondent was **Mkhosi Goodman Dlamini** who is attached to respondent personnel department dealing with payment of salaries. He is the officer who wrote a correspondence exhibit "B" stopping applicant salary. I shall revert to his evidence later in this judgment.

[61]

My duty under this enquiry is well defined by her **Ladyship Ota J.A.** in **James Ncongwane v Swaziland Water Services Corporation (52/2012) [2012] SZSC 65** at page 29 as follows:

- “32. *In this venture, 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 probative value of the testimony of those witnesses.*
33. *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.*
34. *This is because although civil cases are won on a preponderance of evidence, yet it has to be preponderance of admissible, 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 the Court however must be considered to determine which has weight and which has no weight.*
35. *It is after the weighing of the evidence adduced on an imaginary scale, that the Court decides whether a certain set of facts given in evidence by one party in a civil case in which both parties appeared and testified, weighs more than another set of facts. The Court then accepts the evidence that weighs more in preference to*

the other and then applies the appropriate law to it, before drawing its conclusions.”

[62] I now seek to embark on this exercise.

[63] The totality of applicant’s case is that:

- he escaped from custody upon incarceration by the respondent following his conviction;
- he instituted the present application where he received an interim order setting aside his conviction and sentence pending finalization of his application in court;
- he thereafter embarked on a number of fruitless effort to resume his work;
- his salary was stopped by respondent for absenteeism at work;
- he was never absent from work at any given time;

[64] Respondent on the other hand has adduced evidence showing that:

- applicant never presented himself to work;
- applicant has absented himself from work;
- applicant has run away from work;

[65] From the totality of the evidence presented by the applicant and respondent it is common cause between the parties that the applicant did not report

back to Phocweni after the training of trainers at Mbuluzi, applicant advances reasons for the same:

- Consequently, charges were formulated against applicant;
- He was arraigned before respondent court marshal where he was convicted and given a custodial sentence.
- While incarcerated at respondent's headquarters, he escaped from custody;
- He later filed the present application where he was granted an interim order;
- This temporal order set aside the decision of respondent court marshal.

[66] What I am called upon to put in the imaginary scale is the evidence adduced on behalf of applicant and respondent on whether applicant did or did not absent himself from work.

[67] I revert to the evidence of respondent's witness, **Mfanawenkhosi Khumalo**, who informed the court that applicant did not return to Phocweni with his group. As an officer responsible for administration, he embarked on enquiry as to the whereabouts of applicant. He searched for applicant at Mbuluzi. However, he was informed that applicant was not at Mbuluzi although he was occasionally seen there.

[68] This evidence corroborates the evidence which was described by applicant himself as honest and candid by **Station Commander Daniel Masuku**. His evidence was not challenged nor was that of **Mr. Mfanawenkhosi**

Khumalo. The Station Commander's evidence was that applicant was not under duty at Mbuluzi. He was occasionally seen when he came by to recharge his cell phone.

[69] It appears that it is upon this basis that Mr. Khumalo of Phocweni decided to instruct Mr. Mkhosi Goodman Dlamini at respondent's headquarters to stop applicant's salary.

[70] It is appropriate at this juncture to quote from exhibit "B":

"01. This letter serves to request the pay office to stop the payment for the above mentioned soldier.

02. Pte Masotja Dlamini was attached to Mbuluzi to join the demo platoon, when the demo platoons was released to rejoin their mother units on the 5/10/04 Masotja remained behind actually he refused to rejoin his mother Battalion until to date.

03. Pte Masotja Dlamini lied to the pay staff, that he has been transferred to trg Bn, which was not true. Thus they gave him his salary advice without confirming to unit adjutant.

04. It is for that reason therefore that I recommend for the stop of his payment."

[71] Having received exhibit "B" it was Mkhosi Goodman Dlamini's evidence that he calculated the number of days for which applicant was absent from work. This summed up to E2,641.60. He decided to stagger the deduction of this amount. He did this in order not to disturb applicant loan payments. In January he deducted the sum of E736.90 to complete the number of days applicant was absent. In brief, he deducted the amounts commensurate to

the number of days applicant was absent from work over two months according to his evidence. The salary deducted was for November in respect of days absent in October.

[72] Thereafter according to Mr. Mkhosi Dlamini's records the applicant was paid until later when his salary was completely stopped.

[73] When quizzed as to whether he did receive another instruction to reinstate applicant's salary as from his evidence it appears so, he responded in the negative. It was further his evidence under oath that he received a correspondence from his superior at the headquarters that he should deduct a one month's salary. When asked on the rationale for a one month's salary he stated that it could be that the Army Commander decided to have his salary stopped for the period he was absent as an endeavour for the applicant to come back to work.

[74] It appears to me that the strategy to deduct his one month's salary did work. The evidence by **Mfanawenkhosi Khumalo** is that they searched for applicant in vain. They decided to deduct his salary. It would seem that applicant resurfaced and thus respondent was able to summon him to its marshal court.

[75] For the above evidence, I accept that applicant, having been ordered to board the motor vehicle arranged by respondent to go back to Phocweni failed to do so. He did not remain at Mbuluzi barracks but was on very few occasions seen coming from the surrounding area as stated by the Station Commander of Mbuluzi. At any rate applicant himself recommended this witness over and over for his truthful evidence. He was in the totality

absent from work for the period leading to his arraignment before the Marshal Court. His salary was lawfully deducted.

[76] The second enquiry is what about the period when he first escaped from respondent's custody?

[77] It is my considered view that from the evidence of **Mr. Mkhosi Dlamini** that he was instructed on the 3rd November 2004 to effect deductions for the month of October from applicant's salary by his superior, that is Mr. Mkhosi's superiors at headquarters must have realized that since applicant was present, in November, 2004 as that is the period he was summoned to appear that he was no longer absent from work in November.

[78] As applicant pointed out in chief, he escaped from custody. According to the uncontradicted evidence of Commander Zenzele Dlamini applicant escaped on 9th December 2004. Mr. Zenzele Dlamini testified that this is a crime on its own.

[79] According to the Notice of Motion for review of respondent's decision, applicant instituted proceedings on 21st December 2004. On 10th February 2005 respondent's decision was set aside on interim basis.

[80] Applicant informed the court that he reported at Nokwane, respondent headquarters for purposes of resuming work after the court order. **Commander Zenzele Dlamini** confirmed having seen applicant at Nokwane. He informed the court that he instructed applicant to follow him. He duly complied. While they were both in his office, he called the security at the gate. His purpose was to have applicant re-arrested in order for applicant to serve his custodial sentence. It was his evidence under

cross-examination that had he been aware that there was a court order setting aside the court marshal's decision, he would not have ordered for applicant's re-arrest.

[81] Further applicant has stated in chief that he also went to Phocweni to report. **Mr Mfanawenkhosi Khumalo** informed the court that his immediate supervisor Sgt. Khumalo informed him that applicant did come at Phocweni.

[82] I accept the evidence of applicant that whenever he attempted to report, he was threatened with arrest on the the court marshal's decision.

[83] In the above analysis it is my considered view that the applicant cannot be properly held to have been absent from work from the period of **Nkambule J.**'s ruling.

[84] For the reason that applicant failed on the review and succeeded on arear rentals, I shall not make an order as to costs.

[85] Applicant was paid however for an extended period. According to **Mr. Khosi Dlamini** he only investigated up to the period of February 2005 and not beyond, this court directs:

1. 1.1 1st respondent to ascertain as to which month beyond February that applicant's salary was stopped.

1.2 Respondent is ordered to pay as salary applicant from that month;

2. Applicant's review application is dismissed.

2.2 The *rule nisi* granted on 10th February 2005 is hereby discharged.

3. No order as to costs.

**M. DLAMINI
JUDGE**

For Applicant : Mr. P. Simelane

For Respondents : Mr. T. Dlamini