IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE CIVIL CASE NO. 1443/2019

In the matter between

Royal Swaziland Sugar Corporation Applicant

V

Super Mabuza 1st Respondent

The Presiding Judge of the Industrial Court 2nd Respondent

The Attorney General 3rd Respondent

Neutral citation: *Royal Swaziland Sugar Corporation v Super Mabuza and 2 Others (1443/19) [2025] SZHC 36 [2025] (5th March 2025).*

Coram : Tshabalala J

Heard : 21/03/2024

Delivered : 05/03/2025

Summary: *Application for review and setting aside of Industrial Court decision that dismissal of the employee was substantively unfair, and awarding monetary compensation. Grounds for review under common law considered.*

Further under scrutiny and consideration is whether certain statements made by the Judge a quo are obiter dicta or formed part of ratio decidendi. Legal rules governing these principles analysed and considered.

Held: No valid grounds for review were established.
Held: The court a quo's remarks were made orbiter, they were not part of ratio decidendi of the judgement, therefore irrelevant for the purpose of common law review.
Held: No valid grounds of review established, therefore the application dismissed with costs.

JUDGMENT

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[1] The Applicant is the Royal Swaziland Sugar Corporation, a sugar producing company incorporated in terms of the laws of this country. The Applicant, Super Mabuza is former employee of the 1st Respondent who was dismissed after a disciplinary hearing. The second Respondent is the Judge of the Industrial Court, cited in that capacity. The 3rd Respondent is cited as the legal representative of the 2nd Respondent.

[2] The Applicant seeks review, and setting aside of judgment and orders of the Industrial Court issued by the 2nd Respondent on the 27 March 2019, under Case No. 440/2013, in favour of the Respondent.

[3] The financial orders made in terms of the judgment that is sought to be reviewed and set aside are as follows:

> *1. Payment of total compensation package of E752, 367.00 broken down as follows:*
> *i) Notice pay E32, 459.00*
> *ii) Additional Notice Pay E94, 400.00*
> *iii) Severance allowance E236, 000.00*
> *iv) 12 months compensation E389, 508.00*
>
> *2. Costs of suit.*

[4] The impugned judgment and order were issued following a successful application by the 1st Respondent against the Applicant, before the Industrial Court for compensation for unfair dismissal. The 1st Respondent's contention was that his dismissal was procedurally and substantively unfair. He alleged in respect of procedural unfairness that he was not given sufficient time to prepare for his disciplinary hearing. He alleged in respect of substantive unfairness that, the Applicant failed to prove allegations of misconduct levelled against him. The Applicant, on the other hand maintained that the dismissal followed due process and that the misconduct was proved.

Background

[5] The 1st Respondent was charged with several counts of misconduct. This was in the wake of mysterious disappearance of his subordinate while on duty, and subsequent discovery of flesh tissue in one part of the sugar mill. DNA sampling and test of the flesh was shown to be that of the missing employee, Lucky Sifundza.

[6] Following a drawn-out search for the employee, and subsequently an investigation, the 1st Respondent, who was shift supervisor on the fateful night, was hauled before a disciplinary hearing. He faced five counts of misconduct under two main categories of cross negligence and dishonesty respectively. Below is a summarized version of the charges:

Gross negligence

Count 1 - On the 23/05/2012 during the search of Lucky Sifundza, you refused and failed to heed request by operators to stop the mill to enable a search in the inter-carriers of the mill.

Count 2 – On the 23/05/2012 you failed as shifts Supervisor to ensure adherence to correct normal procedure for starting the Plant. A repeated breach of procedure occurred under your watch when one of the operators left his position and went to assist another employee.

Dishonesty

Count 3 - Claiming ignorance of where the missing employee was despite discovery of flesh in the machinery, in circumstances that point you ought to have been aware at the time.

Count 4 – Dishonesty in that you refuted in your report to senior managers after the 23/05/2012, the possibility that Sifundza was killed inside the inter carriers, thus hindering management from making correct decision on time...

Count 5 – Dishonesty, alternatively dereliction of duty in that you failed to disclose events leading to the death of Sifundza...indications of existence of a cover-up...

[7] The outcome of the hearing was a guilty verdict and dismissal.

[8] The verdict followed evidence that was led through witnesses. The 1st Respondent was found guilty in respect of three out of the five charges - guilty of gross negligence, wherein it was alleged that he refused to oblige employees' request to stop the mill in order to search in the inter-carriers parts of the mill. He was also found guilty of dishonesty on the allegation, firstly, that he claimed no knowledge of what happened to Sifundza, and secondly, that he refuted in his report to senior management the possibility that Sifundza could have been killed in the inter-carriers. His internal appeal was unsuccessful.

[9] The 1st Respondent then approached the Industrial Court and challenged his dismissal as aforesaid at paragraph [4].

[10] The parties led evidence before the court *a quo*, after which the court issued a detailed judgment and made orders in favour of the Respondent. see paragraph [3] above.

Review application

[11] Prior to the current application, the Applicant lodged an appeal with the Industrial Court of Appeal (ICA), which it withdrew in the eleventh hour.

[12] When the review application came for hearing before this court, the Applicant objected to the matter proceeding in the absence of *viva voche* record of proceedings of the court *a quo*. The Applicant wanted the court to remit the matter to the Industrial Court to be heard *denovo*. This court issued an interlocutory judgment dated 12 March 2021, dismissing the objections raised by the Applicant, and required that the review matter be set for hearing.

[13] Thereafter, Applicant moved an application for the matter to be heard by a constitutional panel. The High Court sitting as a Constitutional Court dismissed the matter for want of a constitutional element. The matter reverted to this court, and it took quite some time before the parties set it down for hearing. The above account explains the long and winding journey from inception of the application, to finality.

[14] Grounds for review per the Applicant's voluminous founding affidavit, can be summarized as follows:

1. *Unfair hearing in that the Court a quo made an adverse finding against the Applicant on issues that were not canvassed by the parties, and the Applicant was never given opportunity to address the Court or defend itself*[1]

2. *The Court a quo arrived at a decision that was not supported by evidence presented before it.*[2]

    2.1 Failure to take into account relevant considerations, and taking into account irrelevant considerations[3]

[15] It is common cause that the issues for determination by the Industrial Court were to fold - whether the 1st Respondent's dismissal was procedurally fair or unfair; and whether the dismissal was substantively fair or not. The Applicant avers that the court *a quo* failed to restrict itself to the said parameters. The Applicant alleges that, instead the court went beyond this scope of inquiry to determine safety standards of the Applicant's factory mill.

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[1] Paragraph 11 of the Founding affidavit
[2] Para 12 Founding affidavit
[3] Para 13 Founding affidavit

Unfair hearing

[16] The Applicant alleges that the court made findings of fact that safety standards at Applicant's establishment were lacking *"thereby attributing the death of lucky Sifundza to low or inadequate safety standards."*[4]

[17] The Applicant avers that prior to its findings, the court *a quo* never called upon the Applicant to address it on the issue of safety standards. The Applicant states that had the court invited the Applicant to state its side prior to making such adverse findings, the Applicant would have led evidence showing that its safety measures were in line with, and comply with international safety requirements for a factory of its magnitude. The Applicant asserts that it is certified and holds relevant certification from 2012 and beyond for having implemented necessary safety measures against incidents of injury or calamities.

[18] The Applicant laments that the court *a quo's* judgment *"has the effect of informing the international market that there are no reasonable safety measures at Applicant's establishment, or that it has failed to put in place or to implement reasonable safety measures."*[5]

[19] The Applicant further fears that the court *a quo's* findings *"not only affect Applicant's international market but also expose the Applicant to numerous law suits from people who may act upon the erroneous findings..."*[6]

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[4] Paras 28-29 Founding affidavit
[5] Para 33 Founding affidavit
[6] Para 34 Founding affidavit

[20] The Applicant affirms that *"Such findings were made on issues that were not before court for determination and were not addressed by any of the parties."*[7]

[21] According to the Applicant in so doing the court acted irregularly and/or improperly exercised its discretion and on that ground its findings and/or decisions in that regard out to be set aside as irregular.

Relevant and Irrelevant Considerations

[22] The Applicant asserts that factual findings of the court *a quo* on which its decision is based are not supported by the evidence led. An example is made that the court *a quo* based its decision *inter alia,* on the reasoning that the Respondent had not refused to stop the mill when requested to do so because he did not respond to Dumisani Maseko's request to stop the mill. The Applicant challenges the court's finding that there was no evidence pointing to the refusal of the Applicant to stop the mill, and asserts that the court failed to take into account relevant considerations.[8] From the evidence the court *a quo's* finding should have been that the 1st Respondent actually refused to stop the mill, the Applicant asserts. The Applicant avers that the court failed to exercise its discretion properly, giving rise to an unreasonable decision. Further that the court failed to properly apply its mind to the facts

[23] Deponent to the Applicant's founding affidavit went on to state that supplementary affidavit would be filed in respect of this ground of review after verbatim record of proceedings of the court *a quo* had been availed. This anticipation for a verbatim court record of proceedings of the court *a*

[7] ibid
[8] Paras 37-38 of the Founding affidavit

quo, is at odds with Applicant's earlier acknowledgment of the fact that such live record of the proceedings was said to be irretrievable or erased, and basically non-existent. The Applicant stated this in its correspondence during the course of preparations for its aborted appeal to the ICA.

First Respondent's answering affidavit

[24] The 1st Respondent raised points of law, based on:

1) *Failure to attach Industrial Court's judgment to Applicant's founding affidavit;*

2) Review application filed out of time;

3) Absence / non-existence of voice recording of Industrial Court proceedings / evidence;

4) Grounds of appeal not in terms of the common law.

[25] The 1st Respondent also pleaded over on the merits.

[26] The 1st Respondent denies that the High Court has jurisdiction to hear the application, contending that there are no valid grounds of review advanced to found jurisdiction.

[27] The 1st Respondent contends that the Applicant's complaint relating to the court *a quo's* observations made at *loco inspection* concerning safety measures were *orbiter dicta* and as such did not relate to substantive issues of unfair dismissal with which the court *a quo* was seized.

[28] The 1st Respondent disputes the assertion that the court *a quo's* decision overlooked the evidence adduced. He asserts that the evidence led by the

Applicant failed to prove that dismissal was reasonable. He denies that the court *a quo* committed and irregularity in its findings.

[29] The 1st Respondent denies the allegation that he failed or refused to stop the mill when requested to do so. He asserts that two senior Managers subsequently came to the scene and did not see the need to stop the mill. The 1st Respondent disputes that he misled management in his report wherein he opined that the missing employee might have disserted.

[30] The 1st Respondent disputes allegations that the court *a quo* went beyond its scope of determining procedural and substantive aspects of his dismissal and unilaterally without Applicant's input determined safety standards of the Applicant's factory. He reiterated that the court *a quo's* comments on safety standards were merely *orbiter*, and were made after it had reached its decision that the dismissal was substantively unfair. The 1st Respondent characterized the court's comments as by the way, offering sound advice and guidance.

Arguments

[31] In its closing submissions the Applicant narrowed down the points as follows:

1. Whether in making its decision the court a quo:

1.1 heard the Applicant before making the adverse findings on safety and security standards at the Applicant's mill;

1.2 Canvassed the totality of the evidence tendered;

1.3 Considered relevant evidence and issues, and or irrelevant evidence and issues.

[32] On the first ground of review, on lack of fair hearing, the Applicant quotes Section 21 (1) of Eswatini Constitution of 2005, which guarantees a right of a fair hearing. Absent the fair hearing, the Industrial Court's decision should be reviewed and set aside, the Applicant argued.

[33] The Applicant submitted that the court *a quo's* act and or omission constituted an irregularity which tainted its decision and rendered it reviewable and liable to be set aside. To buttress its point the Applicant cited **De Lange v Smuts NO**[9] wherein the court stated the right to be heard in the following terms:

> *"Everyone has a right to state his or her own case, not because his or her version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance."*

[34] On the failure to canvass totality of presented evidence, the Applicant submits that the court *a quo* failed to consider relevant evidence that formed crux of the Applicant's case; misdirected itself and misconstrued the issues pending before it; and took into account irrelevant considerations and ignored relevant ones.

[9] 1998 (3) 785

[35] The Applicant submits that the court *a quo* ignored the evidence of its witness, Dumisani Maseko, one of the operators of the mill, that he requested the 1st Respondent to stop the mill so that a search could be conducted in the inter-carriers, a request which was made two or three times, according to the Applicant.

[36] The Applicant submits that the court *a quo* ignored the facts and instead held that the 1st Respondent was requested to stop the mill once, and held that there was no evidence that the 1st Respondent refused to stop the mill.

The 1st Respondent's points raised in limine

[37] The Applicant submitted that the points were nothing but technicalities. All but one point had been over taken by events rendering them academic. The Applicant considered that only the point on undue delay was worthy of debate.

[38] The Applicant contends that it did not unduly delay to launch the review application, alternatively, the delay was not unreasonable in the circumstances faced by the Applicant.

[39] On his part, the 1st Respondent submits that the alleged lack of fair hearing on safety measures, is not a valid common law ground for review. The 1st Respondent's contention is that the court *a quo's* finding on safety standards was made *obiter* and was not a *ratio decidendi,* therefore falls short as a review ground.

[40] The 1st Respondent submits that all in all the Applicant has failed in its founding affidavit to allege valid grounds for review under common law.

The Court's Analysis and Findings

1st Respondent's Point in limine

[41] At this point the court deals with the 1st respondent's points in *limine.*

[42] The points raised *in limine*, with the exception of the undue delay to lodge review application, have been over taken by events.

[43] The court upholds the Applicant's submission that its failure to attach copy of the impugned judgment of the court *a quo* to its application should not be held to be fatal. No prejudice was visited to the 1st Respondent by this omission. It was sufficient for the review purpose that the 1st Respondent attached a copy to his answering affidavit. This is not to say that court rules on such matters are in vain, or will always be ignored without consequences.

[44] Absence of live recording of the proceedings of the court *a quo:* The interlocutory ruling issued by this court, sufficiently disposed of that issue. The court having been informed that the said recording was irretrievable, and taking into account the reconstructed record comprising *inter alia,* detailed Judge's Notes, pleadings and annexures, ruled that the reconstructed record was sufficient *in lieu* of the absent record transcription.

[45] Review application time barred: The rules of this court do not prescribe a period within which to file such a review application. The guiding principle and yard stick should in the circumstances be the concept of "reasonable or unreasonable" length of time, and of course valid reasons advanced for the delay.

[46] The time lapse from the 19 March 2019 when the judgment *a quo* was issued, to the 16 September 2019, when this review application was launched, was six months. The Applicant argued that the length of time was not unreasonable. It is the view of this court that the time it took before filing the Application was inordinately long in the light of the fact that the Industrial Court had ordered immediate payment of compensation to the 1st Respondent. The delay is compounded by absence of any application for condonation, in which the Applicant would have outlined justifiable reasons for the delay.

[47] It is noted that the Applicant first filed an appeal with the ICA, which it later withdrew. It may be argued against the Applicant that it could and should have changed its mind not to proceed with the appeal much earlier than it did.

[48] The court recognizes the Applicant's right of choice to launch the appeal. No authority was furnished to this court to support the argument that the Applicant was bound by its first choice to appeal and that it could not later dabble with a review procedure. The court finds it sufficient to express its disquiet for the Applicant's apparent lack of diligence and the perceived lack of sensitivity to time in its quest to exercise the right to challenge the judgment of the court *a quo*. It is the view of this court that the interests of justice require that the Applicant be heard.

[49] That said, the points in *limine* are dismissed.

The merits

[50] The High Court powers to review decisions of the Industrial Court derive from Section 19 (5) of the Industrial Relations Act / 2000 which 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."* [Emphasis added]

[51] Common law grounds of review and what constitutes them have been a subject of judicial and scholarly discussion in our jurisdiction and elsewhere.

[52] Grounds of review relied upon by the Applicant, as earlier noted are mainly 1) *unfair hearing*; 2) *failure to consider relevant considerations and taking into account irrelevant ones*; 3) and *failure to canvas totality of the evidence resulting in unreasonable decision*. I start with the last two and deal with unfair hearing last.

[53] The Applicant submits in its heads of argument at paragraph 31 that:

> *"The court a quo committed reviewable irregularities by failing to consider relevant evidence that formed the crux of the Applicant's case before the court a quo. The court a quo's misdirection was as a result of the court a quo misconstruing the issues pending before it, taking into account irrelevant considerations and ignoring relevant ones."*

[54] The Applicant submitted that the court *a quo* ignored among others, the evidence that the 1st Respondent was aware that Sifundza had not clocked out of the Applicant's factory; that Sifundza's presence at his work station was critical because in his absence, the mill might stop running.[10]

[10] Applicant's heads para 34.1

[55] It is also submitted that the operators requested the 1st Respondent to stop the mill so that the search for Sifundza could be conducted in the inter carriers. To this end the evidence of Maseko indicated that the 1st Respondent was requested to stop the mill on about two to three occasions, and that the 1st Respondent did not stop the Mill.

[56] The Applicant argues that the court *a quo* ignored the above common cause facts and proceeded to hold that the 1st Respondent was asked only once and that there was no evidence that the 1st Respondent refused to stop the mill. This finding was made, according to the Applicant despite the fact that the mill was not stopped.

[57] The Applicant cites in a blanket form the common law grounds of review, enunciated by the Court of Appeal in **Takhona Dlamaini v President of the Industrial Court & Another,**[11] namely, a decision that is arrived at *arbitrarily*; or *capriciously*; or *mala fide*; or as a result of an *unwarranted adherence to fixed principle*; or in order to *further an ulterior or improper purpose*; that the court *misconceived its function*; or took into account *irrelevant considerations*; or *ignored relevant ones*, or that the *decision was grossly unreasonable* so as to warrant conclusion that the court had *failed to apply its mind to the matter.*

[58] It is noted that before arriving at the decision that the employer had failed to prove that the dismissal of the 1st Respondent was substantively fair, the court *a quo* traversed and unpacked the evidence given by each witness that testified before it. Such evidence included that of the 1st Respondent, the Applicant's witnesses, Dumisani Maseko and Sifiso Dlamini. The court *a*

[11] Appeal Case No. 23/1997.

quo's approach and analysis of the evidence of each witness is meticulous, thorough and bear the hallmarks of full consideration.

[59] The court *a quo* was faced with conflicting evidence of the 1st Respondent and Dumisani Maseko on the question of whether the latter requested the 1st Respondent to stop the mill and that the 1st Respondent refused. The 1st Respondent unequivocally denied that he was asked by Maseko or any other operator to stop the mill. In dealing with this disputed fact the court *a quo* analysed the two versions and subjected them to scrutiny in a manner that any reasonable court would have done. In the course of doing so, credibility of Maseko's evidence on this particular point was brought into doubt. According to the court *a quo* it was questionable that in his prior statement Maseko stated that the 1st Respondent was requested once, whereas before court he said he appeared to give an embellished account, saying that the 1st Respondent was requested three times to stop the mill.

[60] It was within the powers of the court *a quo* as the trier of fact to assess credibility of the witnesses that testified before it as it did. The court *a quo* considered discrepancies or inconsistencies in Maseko's compared to the earlier statement he made when the incident was still fresh in his mind compared to the time he testified before the court *a quo*. That court was better placed to make judgment on the witnesses' credibility and to come to the conclusion of who it believed over the other. The review powers of the court have limitations in that regard. It is my considered view that there was nothing out of the ordinary in the way the court *a quo* dealt with that aspect of the evidence. It should be noted that the court *a quo* also made a finding that even if the 1st Respondent had failed to stop the mill as alleged, that factor could not, owing to the surrounding circumstances, constitute gross negligence on his part. In making this finding the court *a quo* made

observations that other managers who were senior to the 1st Respondent came to the scene but did not consider it prudent to stop the mill. The court *a quo* analysed and considered Maseko's evidence and that of the1st Respondent's immediate Supervisor, Sifiso Dlamini. The court *a quo* noted and took into consideration acknowledgment by Sifiso Dlamini that the 1st Respondent took reasonable steps from inception of the crisis. The court *a quo* also noted from Sifiso Dlamini's evidence that he himself did not stop or order stoppage of the mill because, according to him, there was nothing suggestive at that stage of what had happened that necessitated the mill to be stopped. Sifiso Dlamini's reasoning for not considering stoppage of the mill, was that the operators who were stationed proximate to Lucky Sifundza's work station, claimed to have seen nothing.

[61] The court *a quo's* finding is backed by legal authorities on gross negligence, for instance, a quote from **National Union of Metal Workers of South Africa v ORAWAB Investments (Pty) Ltd**[12] wherein the court had this to say (quoted in part):

> "*...gross negligence can be described as a conscious and voluntary disregard of the need to use reasonable care, which has or is likely to cause foreseeable grave injury or harm to persons, property or both. It is conduct that is extreme when compared to ordinary negligence...* "

[62] The court *a quo* posed the question:

> "*...in the light of what the legal authorities say on gross negligence can it be said that the Applicant Super Mabuza, consciously and*

[12] [2013] 5 BALR 481.

voluntarily disregarded the need to use reasonable care, which conduct was likely to cause foreseeable grave injury or harm to Lucky Sifundza?"[13]

[63] The court proceeded:

"*In this regard it is a finding of this Court that the Applicant in this matter did not consciously and voluntarily disregard the need to use reasonable care, which disregard could be said to have caused injury or harm to (in this case the death) Lucky Sifundza. It is a finding of this Court as well that the respondent has dismally failed to prove that Super Mabuza's failure to stop the mill on 23 May 2012, constituted gross negligence.*"[14]

It is my considered view that the court *a quo* took relevant considerations into account in reaching its conclusion that gross negligence charge was baseless.

[64] On the dishonesty charge it is alleged that the 1st Respondent misled management in his report by saying that he did not know what happened to Sifundza, and by further stating his opinion that Sifundza may have disserted. The court *a quo* noted that the 1st Respondent's supervisor who laid the charge of dishonesty conceded that the 1st Respondent merely expressed his opinion on what could have happened to Sifundza.

[65] The court *a quo* also noted that the 1st Respondent's opinion that Sifundza could have disserted was expressed about a day after Sifundza's disappearance. A couple of days later a piece of flesh which was confirmed

[13] See paragraph [92] of the judgment *a quo*.
[14] Ibid.

by DNA testing to belong to Sifundza was discovered. The court *a quo* asked a pertinent question. Does it then mean that because of the discovery of the flesh, the 1st Respondent was being dishonest in his opinion expressed in the report? The court *a quo* answered itself in the negative that he was not dishonest. By merely being wrong does not equate to dishonesty, the court *a quo* reasoned. The court *a quo* supported its reasoning by reference to the decision in **Nedcor Bank v Frank and Others**[15] in which the court outlined features of dishonesty, which entailed lack of integrity or straight forwardness, and in particular, a willingness to lie. That there must be a proof of an intention to deceive. The court *a quo's* finding was that the Applicant had not established on a balance of probabilities that the 1st Respondent had an intention to deceive or lie to management.

[66] The court noted from a report authored by the 1st Respondent's supervisor Sifiso Dlamini that various speculations had been made by other employees, including managers, about possible whereabouts and what could have happened to their missing colleague. The speculations that turned out to be wrong could not reasonably be labelled as dishonest.

[67] In determining whether the court *a quo's* finding that neither gross negligence nor dishonesty has been proved against the 1st Respondent, was unreasonable, the court leans on the authoritative authority of the Supreme Court decision in **Jabulani Manana v Swaziland Building Society**[16] (cited with approval by the High Court in **The Fridge Factory (Pty) Ltd t/a Palridge v Robert Middleton & Others,**[17]) which expands the common law grounds for review of decisions of the Industrial Court and arbitrators

[15] (2002) 23 ILJ 1234
[16] 35/2019 [2019] SZSC 17 (5th June 2020)
[17] [755/2023] SZHC 245 (11th October 2024).

by the High Court. The Supreme court adopted principles of *irrationality* and *unreasonableness*. The Supreme Court ruled that unreasonableness as a yard stick for determining validity of review grounds should not be limited to *"gross unreasonableness, and that" unreasonableness per se* should suffice in assessing whether the impugned decision is liable for review. This is a departure from the restricted approach concerning grounds for review under common law, espoused by the celebrated Supreme Court's decision in **Takhona Dlamini's** case.[18]

[68] In *casu*, the question is, was the finding of the court *a quo* unreasonable, (not necessarily grossly unreasonable) or irrational?

[69] As noted earlier the judgment rendered by the court *a quo* is articulate well-reasoned and each finding is supported by reference to concrete piece of evidence that is weighed and given due consideration. In addition to that the court *a quo* referred to relevant case law and legal writings and applied the law to the facts in a satisfactory manner. This court, in the exercise of its review powers is unable to find fault with the findings and judgment of the court *a quo*.

[70] This court, likewise finds that the Applicant has failed to substantiate the allegation that the court *a quo* failed to consider totality of the evidence before it.

Unfair hearing

[71] The Applicant contends that the court *a quo* made a finding that the safety standards at the Applicant's mill were inadequate without affording the

[18] Supra.

Applicant a hearing prior to the finding. The Applicant cites *inter alia* Section 21 (1) of the Constitution which it submits entrenches the right of hearing.

[72] It is opportune at this stage to quote in full the statement of the court *a quo* at paragraph [108] of its judgement that gives rise to this complaint. In order to put into proper perspective, verbatim pronouncements in the preceding paragraphs are also relevant. At paragraph [107] of the judgment, the court *a quo* states the following:

> *"[107] With that said, it should follow therefore that the decision of the Respondent to find the Applicant guilty and subsequently terminate his services was substantively unfair. Not only that, but the Respondent had also failed to justify it according to the requirements of equity, when all the relevant features of the Applicant's case are taken and the charges preferred against him are considered. It is a finding of the Court that the Respondent has not been able to discharge the onus of proving that the Applicant's dismissal was reasonable in terms of section 42(2)(b) of our Employment Act, 1980."*

[73] The court *a quo* thereafter ventured into the remarks that became a cause for consternation to the Applicant. In the immediate next paragraph at the court stated the following:

> *"[108] Before getting into the issue of compensation, there is perhaps this one issue which needs mention by the court, and it is this: From this tragic and painful loss of the life of Lucky Sifundza it is hoped that lessons have been learnt, however painful these*

may be. Such a harrowing incident should not repeat itself in a company of the Respondent's stature in our Kingdom. In this regard, serious safety and security measures need to be implemented for the safety and security of all personnel in the mill. Even though one may not be an expert in the field of safety and security, perhaps the Respondent can start off by installing closed circuit television (CCTV) cameras and monitors in all work areas and corners of the company so that there is surveillance in every space in the mill premises. Had this been in place we would not have been here in the first place because there would have been footage of the incident to explain what could have possibly happened to the now deceased Lucky Sifundza. As the country gears towards first world status in the coming 3 years, in 2022 as envisioned by the King, every one of us should diligently work towards ensuring that we do not just pay lip service to this noble goal, but turn it into reality. Such important measures and interventions that impact on the safety and security of all employees should perhaps be the starting point."

[74] These remarks by the court appear after it had pronounced in the preceding paragraph [107] the final part of its findings and decision on the issues it was seized with.

[75] The court *a quo's* impugned remark is followed by paragraph [109] which embarks on the reasons for the award in favour of the 1st Respondent, flowing from the unfair dismissal finding:

"[109] The Applicant had worked for the Respondent for almost 18 years... since his dismissal he has not been able to secure alternative employment. At the time of his dismissal, he was 43 years old. He is married with 2 children...."

[76] None of the reasons advanced by the court for compensation award indicate any influence from earlier observations the court made on the safety standards referred to above. Likewise in the subsequent paragraph wherein it pronounces the award, the court alludes to the evidence that was led before it, the interests of justice and personal circumstances of the 1st Respondent:

"[110] Taking into account all the evidence before Court, together with the interests of justice and fairness and the personal circumstances of the Applicant, the Court makes the following order...."

[77] The court *a quo's* monetary award is reproduced above at paragraph [3] of this judgement. The Applicant was ordered to forthwith make payment of a total amount of E752, 367.00 (Emalangeni Seven Hundred and Fifty-two Thousand and Three Hundred and Sixty-seven) to the 1st Respondent, plus costs of suit.

[78] It is common cause that the court *a quo's* statement on safety measures[19] was made without having required prior input from the parties, the Applicant in particular.

[19] Paragraph [108] of judgement of the the court *a quo*.

[79] The Applicant avers that the court *a quo's* findings have a huge impact on its business:

> *"A company of Applicant's magnitude has to satisfy its export market or stakeholders that it has put in place relevant safety measures at its establishment, to safeguard against injury or loss of life."*[20]

The Applicant expresses concern that the court *a quo's* findings expose it to numerous law suits from people who may act upon them.[21]

[80] The Applicant alleges that the Industrial Court's finding on security measures were irrelevant yet they had a bearing on that court's determination of payable compensation imposed against the Applicant.

[81] Were the court's comments *obiter dicta* or part of the *ratio decidendi* of the judgment? The law on what constitutes *orbiter dictum* statements, the effect and relevance of such statements are looked into hereinafter.

[82] In the Industrial Court of Appeal (ICA) case, **Shongwe v Swaziland National Provident Fund**[22] the appellant was an employee dismissed following a disciplinary hearing. She had lost to the employer before both the Industrial Court and the ICA. She subsequently relaunched her claim before the Industrial Court, seeking to rely and to enforce, as it were, comments from ICA's judgment that criticized the disciplinary chairperson's conduct of aspect of the disciplinary hearing. The Industrial Court having dismissed the claim, the matter once more came before the

[20] Paragraph 33 of founding affidavit.
[21] Paragraph 34.
[22] Industrial Court of Appeal Case No. 21/2017

ICA. The court analysed its prior statements to determine whether they formed part of the *ratio decidendi* of the judgment and if they had any binding effect on other courts.

[83] The ICA ruled that the comments were made *obiter* and not as part of *ratio decidendi* of its judgment. The ICA explained the nature and context of its prior statement:

> *"The Appellant's argument also overlooks the fact that the correctness or otherwise of the findings and decision of the chair were never an issue before the Court a quo. The real issue was whether or not the Respondent was entitled to intervene in the disciplinary proceedings... that is the issue that was before the Appeal Court, and any comment which it made not relevant to the determination of such issue was mere comment which had no binding effect on anyone."*[23] [emphasis added].

[84] The ICA emphasized that whatever that court said upon that matter was mere side comment as opposed to its findings. The court could only make findings if it had been called upon to conduct enquiry on that matter, the ICA observed. The ICA determined that the statements were *"....mere obiter dictum which has no binding effect on any other Court."*[24]

[85] In the case of **Director-General of the Department of Agriculture Forestry and Fisheries of the Republic of South Africa & Another v Namaga Property Trust**[25] the court heard an opposed application for leave to appeal its decision setting aside administrative decision of the Applicant. The court noted from the grounds relied upon by the Applicants that the

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[23] At paragraph [17]
[24] Paragraph [16] supra.
[25] Case No. 4689/2014 High Court of SA Eastern Cap Div Grahamstown

anticipated appeal was not directed against the primary reasons which were indicated in the judgment for setting aside the impugned administrative decision. Th court's primary reasons for its decision were that, the official who made the decision was not authorized to do so.

[86] The court[26] noted that it was apparent from its judgment that he rest of its remarks concerning the merits of Applicant's purported administrative decision were limited to mere observations that did not go to the *ratio* of the judgment.[27] The Court described the nature of *obiter dictum* in these terms:

> *"The nature of obiter dictum is that it does not bind any other Court, even lower Courts. It is a mere expression of an opinion upon points of law which it is not necessary for the decision of the case..."*[28]

[87] The court[29] ruled as an invalid the reason for leave to appeal, the applicants' gripe with the court's strong critique of the applicants' unique decision-making process, which they said constrained them from continuing to use. The court noted that its opinions and views made *obiter* might well be wrong, in which case it was open for the applicant department to persuade other courts in any possible litigation on the wrongness of the court's expressed views. The court highlighted the fact that statements made *obiter* did not constitute a precedent:

> *"The department's comfort lies in the protection afforded to them by stare decisis principle application in our Courts, the corollary of*

[26] Namaga Property Trust, supra.
[27] Supra at paragraph [4].
[28] At paragraph [6].
[29] Director-General Department of Agriculture, supra.

which is that obiter dicta do not bind other Courts." [Emphasis supplied].

[88] The position of the law that *obiter dicta* statements cannot be regarded as authoritative was highlighted in the Supreme Court of Appeal case, **Business Aviation Corporation (Pty) Ltd and Another v Rand Airport Holdings (Pty) Ltd:**[30]

> "...*Secondly, the statement to the contrary by Lord de Villiers in De Beers cannot be regarded as authoritative because it turned out to be both obiter and erroneous.*" [Emphasis supplied].

[89] The SCA[31] judgment acknowledges differing opinions that may arise for time to time whether a statement was *obiter* or not. The answer to such debate the SCA noted, clearly lies in the identification of the issues that were decided.[32]

[90] Definition for *ratio decidendi* proffered by the Supreme Court in **Attorney-General and Another v Masotsha Dlamini**[33] is instructive. Quoting from Black's Dictionary, the Supreme Court (SC) noted that *ratio decidendi* is Latin word for "*deciding*." That it is the principle or rule of law on which the court's decision is founded.

[91] The Supreme Court noted two steps involved in the ascertainment of the *ratio decidendi* as follows:

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[30] [2006] SCA 72 (RSA) at paragraph [18]
[31] Supra
[32] Supra at paragraph [25]
[33] 27/13 2013 [SZSC] 44 (30 July 2013)

"First, it is necessary to determine all the facts of the case as seen by the judge, secondly it is necessary to discover which of those facts were treated as material by the judge..."

[92] *Obiter dictum,* on the other hand, the Supreme Court stated, was Latin for "*something said in passing.*" It proceeds to unpack its occurrence and nature as follows:

> *"A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).*
>
> *Strictly speaking an obiter dictum is a remark or opinion expressed by a judge, in his decision upon a cause (by the way) – that is incidentally or collaterally and not directly upon the question before the Court, or it is a statement of enunciated by the judge or Court merely by way of illustration, argument, analogy or suggestion... in the common speech of lawyers, all such extrajudicial expressions of legal opinion are referred to as dicta or obiter dicta, these two terms being used interchangeably.*[34] [Emphasis supplied].

[93] The Supreme Court[35] concludes:

> *"It follows from the above that the ratio of a judgment is the reason for the decision which is determined by the issue in dispute..."*[36]

[34] Paragraph [36] supra.
[35] Supra.
[36] Supra at paragraph [37].

[94] It follows from the above cited authoritative pronouncement that the *ratio decidendi* of a case would be the decision determining that issue. Therefore, any part of the decision, not determining or dealing with the issue in dispute, or which is not necessary to be determined in deciding the point, operates in the form of embellishment, a mere addendum. Such observation constitutes *obiter dictum*.[37]

[95] Applying the law to the case in *casu*, this court is satisfied that the court *a quo's* statement on safety standards at the Applicant's mill was *obiter dictum* and that it did not form part of the *ratio decidendi* of the court's decision. The *obiter* nature of the remarks is fortified by the fact that they are made after the court had concluded and pronounced its findings on the questions and issues that were serving for determination, that is whether the 1st Respondent's dismissal was fair or not.

[96] The Applicant's claim that the court *a quo's obiter* expressions had a bearing on the quantum of the award against the Applicant, does not hold water. The court *a quo* supported it decision and gave reasons for the award that it made. There was no reference or indication of a relationship in its reasons for the financial compensation it made, to the observations and expressions it made on safety measures.

[97] The Applicant has stated that the court *a quo's* statements on safety measures are erroneous and do not reflect the correct position. Further that the remarks put the company in a bad light with stakeholders and international clients. The Applicant further laments that the remarks expose it to possible litigation.

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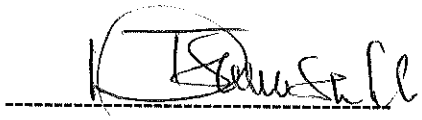
[37] Attorney General and Another Supra paragraph [38]

[98] Without making any finding whether the Applicant's fears and concerns are correct or not, they are however not valid reasons or grounds for the court to review or interfere with the judgment of the court *a quo*. This court has determined that the statements complained of were *obiter* and not *ratio decidendi* of the decision of the court. The Applicant's fears for possible litigation as a result of the court *a quo's* comments can be dispelled by the protection afforded to it by *stare decisis* principle applicable in our courts, the corollary of which is that *obiter dicta* are not binding on other courts, including lower courts. See the court's reasoning in **Director General Department of Agriculture's** case.[38]

[99] Applicant's concerns for alleged damaging potential of the court *a quo's obiter* finding do not qualify as ground for review.

[100] In the result the application for review is dismissed with costs.



Tshabalala
Judge

For the Applicant: Z. Shabangu (Magagula Hlophe Attorneys)
For the 1st Respondent: S M Simelane (Simelane Mntshali Attorneys)
For the 2nd and 3rd Respondents: No appearances.

[38] Supra.