



**IN THE INDUSTRIAL COURT OF SWAZILAND**

**JUDGEMENT**

**CASE NO. 168/2008**

In the matter between:-

**SAMUEL DLAMINI**

**APPLICANT**

AND

**SWAZILAND PLASTICS (PTY) LTD**

**RESPONDENT**

**Neutral citation** : *Samuel Dlamini v Swaziland Plastics (PTY) LTD Others (168/2008) 2015 [SZIC] 47 (30 September 2015)*

**CORAM** : **DLAMINI J,**  
*(Sitting with D. Nhlengethwa & P. Mamba  
Nominated Members of the Court)*

**Delivered** : **30 SEPTEMBER 2015**

**Summary:** *Labour law – Industrial Relations – Applicant claims unfair dismissal by the Respondent, his services having been terminated due to incapacity. **Held** – Incapacity is a legitimate ground for terminating the services of an incapacitated employee, provided that it is done following fair procedure. **Held** – In casu the dismissal of the Applicant was procedurally unfair and but substantively fair.*

1. This is an unfair dismissal claim. The Applicant, Samuel Dlamini claims that his services were unfairly and unreasonably terminated by

the Respondent, his former employer Swaziland Plastics (PTY) Ltd. The evidence of the Applicant under oath was as follows; he was employed by Swaziland Plastics (PTY) LTD as a heavy duty driver in the year 2000. His monthly remuneration was the amount of E2,525.00. He further testified that his services were unfairly terminated by his former employer in the year 2008.

2. Explaining the circumstances that led to the termination of his services, the Applicant testified that on a certain day in October of 2004, whilst doing some manual work at his home cutting off some tree branches, he fell from the tree top and hit his head on a stone on the ground, thereby sustaining a serious injury. He was admitted at a local hospital for a week and thereafter transferred to neighbouring South Africa where he was admitted and treated for three weeks before being discharged due to lack of funds. He then came back to the country where he continued receiving treatment locally.
3. Then in February 2005, he went back to work. Before he could be allowed to resume his duties as a heavy duty driver, the employer felt that it was imperative that he be taken for tests to determine if he was

fit to still drive. Indeed he was taken to a Buscor Limited, a company in Nelspruit, South Africa, where the tests were conducted. A report was compiled and it indicated that he was not yet fit to resume his duties as a heavy duty driver. As a result of the findings in the report, his employer decided that since he could not resume his substantive duties, he be given lighter duties as a general labourer. He however retained his remuneration as a heavy duty driver.

4. The Applicant further testified that he continued with treatment at the Mbabane Government Hospital. According to him, his condition improved so drastically such that in October of 2005, a Doctor Kaseko at the Mbabane Government Hospital wrote to certify that he had been attended at the Hospital and that he had '*...regained auditive acuity enough to be reinstated to his working place as a driver.*' Armed with this correspondence from Dr Kaseko, the Applicant then wrote to his employers indicating that he was now ready to resume his duties as a heavy duty driver. The employer though was unrelenting though, it did not accept this correspondence from Dr. Kaseko. Instead it insisted that the Applicant be again taken back for further tests at Buscor in Nelspruit to determine if indeed he was now fit to so

resume his duties as a driver. Mr. Dlamini testified that he saw no need of him going for further tests since Dr. Kaseko had certified him fit to resume his driving duties. Seeing that the employer would not budge, the Applicant then reported a dispute with the Conciliation Mediation and Arbitration Commission (CMAC), where he was complaining about the conduct of the employer. At CMAC a compromise was reached in terms of which it was agreed that Mr. Dlamini would undergo further tests at Buscor in Nelspruit to determine if indeed he was now fit to go back to his position as a heavy duty driver.

5. The Applicant testified further that indeed, as per the agreement at CMAC, he did undergo another round of tests at Buscor in Nelspruit. And the results of these tests also confirmed that he was now fit to go back to his job as a heavy duty driver. In this regard, the Applicant referred the Court to pages 8 and 9 of his bundle of documents marked 'SD1'. The first document at page 8 is a BUSCOR Clinic certificate of fitness which states that he is '*medically suitable for employment [as a driver]*'. Again the employer refused to accept this proof of his fitness to resume his driving career. Instead the employer

indicated that he would continue working as a general labourer and further reduced his remuneration from E12.82 (twelve emalangeneni and eighty two cents) to E5.70 (five emalangeneni and seventy cents) per hour.

6. Mr. Dlamini could not understand the reason behind his employer's refusal for him to resume his duties as a driver because as far as he was concerned he had now been certified fit to drive by BUSCOR and there was no other report contradicting this last one of February 2007. If there was any such report to contradict this last one, he further testified, it would have been made up by the employer. He then brought it to the Court's attention that in fact there is another report purporting to have compiled in the same period of February 2007, but he quickly disowned same pointing out that he never attended any other tests except for the ones that found he was now fit to resume his career.
7. Under cross examination by the Respondent's representative, Attorney M. Sibandze, the Applicant was first referred to pages 1 to 8 of the Respondent's bundle of documents 'R1'. This is the report in

respect of the Mr. Dlamini's first assessment at BUSCOR. It states at page 8 that '*...his abilities overall are poor and he is therefore presently unfit for driving.*' Mr. Dlamini confirmed knowledge of the report and its findings. Attorney Sibandze then referred him to pages 2 to 5 of the bundle marked 'SD1'. These are the results of tests undertaken on him in February 2007 and they also come to the conclusion that '*Mr. Dlamini cannot be considered for a driving job*'. But the Applicant vehemently disputed that these were results of his second assessment, stating instead that the results were from his first assessment. He again reiterated his assertion that as far as he is concerned, the second assessment cleared him to resume his driving job. Attorney Sibandze then wanted to know from the Applicant as to where the report accompanying his certificate of fitness was and his (Applicant's) crude response was that 'it must be there somewhere...'

8. Attorney Sibandze then clarified to the Applicant that the certificate of fitness he (Applicant) was referring to was peculiar only for his eyesight and that the comprehensive report on his ability to drive was the one which still indicated that he was still unfit to resume driving. But the Applicant would hear none of this, he insisted that the

certificate of fitness was in relation to his injury and it cleared him to drive again. Another issue canvassed by the Respondent's representative was that from the time of his injury in 2005 up to August 2006, the Applicant was remunerated at his usual scale (driver's scale) even though he now executed a general labourer's duties. The Applicant confirmed this to be true. But what he could not accept, so he went on, was the reduction of his salary despite that he was now performing duties as a general labourer. That was the Applicant's case.

9. In support the Respondent's case two witnesses were paraded. First to testify was Tomas Dowding. Dowding was the Financial Manager at the Respondent's undertaking during the Applicant's tenure with the Company. He testified that he was well aware of the Applicants matter. His evidence was that; when he (Dowding) assumed his position at the Respondent's undertaking the Applicant had been in an accident which had apparently occurred on a weekend at his (Applicant's) home. The Applicant had informed management that he had fallen off a tree and had hurt his head when he struck it on a rock on the ground. He had come to work with a bandaged head, was

- bleeding through one of his ears and one of his eyes was bloodshot for a period of more than a month.
10. At the time of this accident, the Applicant was a heavy duty driver and was driving the biggest of the company's trucks, a 10 ton truck. When he returned to work the company was naturally concerned about whether he could still continue in his position as a driver of this 10 ton truck. As management they had a lengthy discussion amongst themselves on how best to deal with the situation and it was decided that Mr. Dlamini be taken for professional evaluation on his ability to still drive. Indeed he was taken to Nelspruit in South Africa where tests were carried out. This was in July 2005. The company received a report which indicated that Mr. Dlamini's abilities overall were poor and that he was therefore at that time unfit for a driving position. Even his medical examination at the time indicated that he was medically unsuitable to drive.
  11. According to Dowding, the company though was hoping that the condition of Mr. Dlamini would improve, hence it was decided that he be retained as an employee of the company. He was thus kept as a



- Labourer but on the remuneration rate of heavy duty driver, meaning that his monthly salary remained unchanged.
12. After a year, in August of 2006, the Applicant approached management to inform them that he now felt better and that he therefore wanted resume his duties as a heavy duty driver. A meeting was convened to deliberate on the issue. In support of his assertion the Applicant presented a report from the Mbabane Government hospital indicating that he was now fit to so resume his duties as a driver. The company though was still very skeptical. It still had in mind the results of the previous year's report which indicated under the heading 'Possible Remedial Action' that; *'It is possible for this person to improve with training, as he displayed positive learning/training potential. However this is likely to be time consuming as a result of his age and brain injuries. Training will have to be broad as many of his abilities are poor, and further training will have to be very intensive.'* (See page 8 of document 'R1' under para 12).
13. A week after the first meeting another one was convened and the company proposed that Mr. Dlamini be taken for another evaluation examination in Nelspruit again. Mr. Dlamini though was not happy

with this proposition. He could not understand why the other Drivers were not being taken for these tests. As it turned out, the Applicant therefore refused to undergo a second examination in Nelspruit to determine his suitability to drive.

14. Then in September of 2006, Dowding wrote to the Applicant advising him that because of his refusal to undergo the examination, the company would have to immediately assess his continued employment as a Labourer at the rate of heavy duty Driver. At the time a heavy duty Driver earned E12.82 per hour whereas a Labourer earned less than half of that, E5.70 per hour. According to the letter, the company viewed the Applicant's wish to continue driving without a second examination as morally indefensible verging on blatant disregard for public safety. He was thus formerly offered a position as Labourer and was also requested to sign a new contract of employment now as a Labourer, failing which his employment with the company would be terminated. According to Dowding though, the Applicant still refused to go for the second test and he eventually reported a dispute with CMAC. At CMAC though an agreement was

- reached in terms of which the Applicant finally agreed to undergo the second examination in Nelspruit.
15. The Applicant then underwent the second examination in February of 2007. Consequently, a report was received by the company indicating that Mr. Dlamini could not be considered for a driving job. Another meeting was convened with the Applicant whereat he was advised that following the latest report from BUSCOR in Nelspruit, the company was now offering him the position of Labourer with effect from 26 February 2007, at the reduced rate of E5.70 per hour. He was given 3 days within which to consider this new offer. After the lapse of the 3 days nothing was forth coming from the Applicant. And on the next day the company, through Dowding, withdrew the offer and terminated his services. The Applicant appealed against the decision but same was not considered because, according to Dowding, he had not been terminated as a result of a disciplinary issue but for his refusal to take the new position offered to him.
  16. Under cross questioning by Attorney Mr. B.S. Dlamini for the Applicant, it was put to witness Dowding that in terms of the certificate of fitness at page 8 of document 'SD1' the Applicant had

been certified medically suitable for employment as a driver. Mr. Dowding confirmed that indeed that is what the certificate of fitness certified. Attorney Dlamini also referred this witness to pages 9 and 10 of document 'SD1' which are the driver vision screening and hearing tests results. These, Attorney Dlamini said, were all results of the second tests and Dowding indicated that the company had received the full report indicating that he still could not be considered for a driving position. Attorney Dlamini then put it to this witness that the report from pages 17 to 21 of document 'R1' in fact related to the first assessment of the Applicant in July 2005, Dowding denied this clarifying that the second report was for the examination of February 2007. Finally he was asked if he disputed contents of the certification by a Dr. Kaseko that the Applicant had regained auditive acuity enough to be reinstated as a driver and Dowding stated that he did not but referred the Court to the reports of the specialist in Nelspruit. When questioned whether he contacted Dr. Kaseko on the assessment he made on Mr. Dlamini and his report he stated that he could not recall. On re-examination Dowding clarified that Dr. Kaseko's report related to the sharpness of the Applicant's hearing hence the company could not rely on it to allow him to resume his driving duties.

17. The next witness in support of the Respondent's case was Kheepo Godfrey Malatja. He stated under oath that he was previously employed by BUSCOR as a Psychometrist. He has an Honours degree in Industrial Psychology and is a registered psychometrist. At BUSCOR his job entailed recruitment and testing of the drivers' driving abilities on a psychometric system. He tested them using what was known as the Vienna test system or the Dover system.
  
18. With reference to document 'R1' at pages 17 to 18 he pointed out that this was the report he compiled after conducting tests on Mr. Samuel Dlamini, the Applicant. He explained that in administering the Dover test on the Applicant he was testing and determining the following abilities on him; a) his eye and foot coordination (determination test), b) his two hand coordination, c) his concentration levels over an extended period (signal detection test), d) his ability to assess hazards on the road together with road signs and be able to react timeously and e) his ability to determine the speed at which an oncoming vehicle is travelling at and its distance (time movement anticipation).

19. With regard to the Applicant's test, Malatja pointed out that in the determination test he performed poorly. He was below the required threshold. His reaction and recovery rates from crisis mode was below par indicating that he did not show any recovery from a crisis situation and simply maintained a poor level (or even decreased level) of performance. This, he stated, indicates poor recovery with major risk behaviour. The Applicant however, scored well on the two hands coordination test, scoring an A, according to Malatja.
  
20. Then on the signal detection test, Malatja explained that this examines the driver's ability to concentrate for a long time and to perceive small changes in his environment. The Applicant on this test performed very poorly again. His ability to concentrate in monotonous conditions was very poor. He pointed out that he was not likely to perceive subtle changes in his environment and further that he was prone to distractibility.
  
21. The next test was what he called cognitrone. This test assesses the candidate's level of concentration and attention to detail or spatial perception (which include general awareness of size and shape as well

- as comparative size). On this assessment the Applicant performed well, scoring an A. However, Malatja pointed out that this subtest is supposed to be completed in 13 minutes but Mr. Dlamini completed it in 24 minutes and 32 seconds, almost double the time allowed. This indicated that Mr. Dlamini was very slow in assessing things in his brain.
22. The final subtest was the time movement anticipation test (ZBA). This one measures the candidate's ability to estimate the speed, distance and direction of moving objects. Candidate's accuracy is on the estimation in terms of his anticipation of the time, speed and direction of the object. On this test the Applicant scored very poorly, obtaining C grades on both time and direction anticipation.
23. The overall score of the Applicant in this test was 35.6%, a C grade. Malatja testified that in view of this score, under no circumstances could he have recommended Mr. Dlamini for a position as Driver because he is a high risk to himself and other road users. When Attorney Sibandze asked if, at the time of the tests, he had been aware that Mr. Dlamini had suffered a head injury, he responded in the

negative. He mentioned as well that given the results he (Malatja) was not surprised that he had suffered a head injury, because he performed well below par. This indicates that his below par performance was attributable to the head injury.

24. When referred to the document at page 8 of 'SD1', the certificate of fitness the Applicant relied on to say he had been certified fit to resume driving, Malatja explained that this was a BUSCOR Clinic medical certificate. He testified that at BUSCOR there is a clinic on site with Nursing Sisters and a Doctor. He went on to clarify that drivers who come for the psychometric testing first have to be examined at the company clinic to make sure that they are medically fit, so that nothing would influence the psychometric tests. At the clinic they check eye sight, lung functionality, hearing, blood pressure etc. He explained that these clinic tests do not assess a driver's ability to drive. So that the certificate of fitness of the Applicant was only in relation to his medical suitability for employment as a driver.
25. Nothing much came out of the cross examination of this witness by Attorney Dlamini. He (Attorney Dlamini), it would seem, was only interested in the legality of the use of the psychometric or dover test to



- determine the suitability of his client to drive. He even went to the extent of suggesting that this psychometric testing is not necessary as long as an individual has been certified medically fit to drive, which witness Malatja denied. That was the Respondent's case.
26. In his arguments in closing, Attorney Dlamini argued that the dismissal of the Applicant cannot be justified or linked to any of the grounds encapsulated in section 36 of the Employment Act. Therefore, it cannot be said that same meets the reasonableness test in terms of section 42 of the same Act.
27. Attorney Dlamini went on to submit that it appears that the dismissal of the Applicant was based on the common law ground of incapacity due to 'ill-health'. A question he posed though, was whether or not the Applicant was incapacitated in such a manner that he was incapable of performing his duties as a driver?
28. Attorney Dlamini also questioned the sending of the Applicant to Buscor in Nelspruit for the psychometric tests, submitting in this regard that it was unlawful for the Respondent to send him there for

the tests to determine his suitability to resume his driving duties. This he said because psychometric testing for purposes of determining a driver's capability to drive is not a requirement in the country. In any event, he further submitted, these were not necessary for determining the Applicant's driving capabilities because he had been certified fit to drive by Dr. H.P. Kaseko in October, 2005, when he said he had 'regained auditive acuity enough' to be reinstated to his position as a driver. Attorney Dlamini also referred to the Buscor certificate of fitness which also stated that he was 'medically suitable' for employment as a driver.

29. For and on behalf of the Respondent, Attorney Sibandze stated that in terms of section 36 of the Employment Act, 1980, there is no specific clause allowing an employer to terminate the services of an employee for incapacity. He however referred the Court to section 35(3)(e) of the same Act, which he submitted contemplates such since it prohibits an employer from terminating the services of an employee due to incapacity, unless the employer can prove that it had no alternative employment. Sibandze further submitted that an employee who is incapable of carrying out his duties can fairly be terminated in terms

of section 36(j) read with section 36(h) of the Employment Act in that the detrimental consequences of physical incapacity are similar to the detrimental consequences of an employee being incarcerated, since he is also unable to carry out his duties.

30. Perhaps as a starting point the Court needs to point out that most of the facts of this present matter are common cause. That is from the injury sustained by the Applicant when he was off duty, to the examinations he underwent to determine his suitability and ability to still drive. Most importantly, it is not in dispute that his services were terminated because of alleged incapacity. The only point of departure between these two litigants is the last examination carried out on Mr. Dlamini at Buscor in Nelspruit. Mr. Dlamini claims that the last set of tests cleared him to be fit to resume his driving career, whilst the Respondents testified contrary, to the effect that the last tests results revealed that he could still not be considered for a driving position. The Court finds, as a matter of fact that the Applicant did go for the second battery of tests, which were conducted by Malatja and who compiled the report at pages 17 to 21 of 'R1'.

31. The Applicant, for starters, relied on the correspondence from Dr. H.P. Kaseko from the Surgical Department at the Mbabane Government Hospital. This correspondence is dated 05 October, 2005 and is addressed ‘to whom it may concern’. It reads thus;

*‘This is to certify that the above mentioned person has been attended to in our unit and has regained **auditive acuity** enough to be reinstated at his working place as a driver.’* (Court’s emphasis).

32. In medical terms, ‘auditory acuity’ is the clarity or clearness of hearing. It is a measure of how well a person hears sounds and is done to determine a patient’s need for hearing aid. The Oxford Reference on line dictionary further states that auditory acuity may refer to the ability to perceive sounds of low intensity, the ability to detect differences between two or more sounds on characteristics such as frequency or intensity or the ability to recognize the direction from which a sound proceeds. For this purpose, an audiometer is used to determine how sensitive the auditory system is to sound, it determines the intensity at which a tone is just audible.

33. In relation to this correspondence from Dr. Kaseko therefore, this means that in essence the good Doctor was saying Mr. Dlamini had regained his hearing ability enough to be reinstated to his driving position. A question the Court asks itself however, is if regaining ones auditory acuity (or the clarity/clearness of hearing) is sufficient to determine that persons capabilities to drive? Clearly not. Auditory acuity is just one of the abilities a driver needs to be considered for the position of driving, definitely not the only one though.
34. From the evidence presented before this Court, what is clear is that the certificate of fitness, which the Applicant relies on for his contention that he was certified fit to drive, only relates his medical conditioning at the time the medical tests were conducted on him. This, the Court finds based on the following; a) the certificate was issued by Buscor Clinic a medical facility of the company Buscor, (Pty) Ltd, b) it specifically states that Mr. Dlamini, in the professional opinion of the person who tested him, is *'Medically suitable for the employment indicated above [Driver]*, (c) Mr. Dlamini underwent vision screening tests, which in the Court's understanding, are meant to help identify

vision problems (see page 9 of document 'SD1'), he also underwent audio tests, which were intended to evaluate his hearing abilities (see page 11 of 'SD1'). All these tests, the Court concludes, were undertaken at the Clinic, with the final determination being that he was now 'medically suitable' for employment as a Driver, hence the certificate of fitness at page 8 of 'SD1'. Apparently, these tests are conducted before the psychometric/Dover tests are done on that particular patient (see paragraph 3 of document 'R1' *He was referred to the eye clinic for eye test. The eye test results confirmed that he has no visual problem*).

35. An online search on what exactly this Dover Test is, indicated that this is an Austrian developed concept. It is said to be a basic skills – competency measurement tool which tests fundamental practical skills. It looks at; *i) eye-hand –foot coordination and reaction; ii) reaction to stimuli in various environmental conditions; iii) auditory discrimination; iv) estimation of the speed and direction of moving objects; and v) basic decision making abilities and concentration levels under monotonous circumstances.*

36. The Dover test is said to be a 'risk detection and accident reduction tool'. It identifies candidates' weak/problematic areas in their fundamental skills. It does not assess whether or not a candidate can actually drive but rather looks at basic foundations skills upon which more specific skill can be built. Poor or weak areas are said to indicate a potential risk in the specific skill area – it does not mean that a candidate will have an accident but rather that they are at a greater risk of potentially having one. This Dover test is said to assess practical skills only, it does not take other factors that affect a candidate's performance into account. It (Dover) should not be used on its own, it should be used in conjunction with other procedures such as interviews, consultations and practical tests where necessary.
37. The overall score of the Applicant was a low 35.6%, an aggregate of C. Malatja, the expert witness of the Respondent, in his remarks in the 2007 results, remarked that candidates such as the Applicant who scored an aggregate of C can be considered for driving positions with caution, if they fall within the borderline range of between 63 and 64.9%. This borderline range, he further remarked, should be looked at in line with trainability, which means they must attain a high C and

- be trainable at the same time. This was not the case with Mr. Dlamini. He obtained a very low C hence the conclusion and recommendation that he cannot be considered for a driving position. Not only that, the recommendation was also that his eyes be checked by a specialist and also that a psychiatrist see him to explain his high level of anxiety.
38. Interestingly, Malatja in his evidence indicated that when he conducted these tests on Mr. Dlamini, he (Malatja) was not even aware that Dlamini had suffered a head injury. And in his summary he opined that the general performance of Dlamini on the psychomotor skills only indicates a high score of omitted reactions, which he stated, indicate cognitive dysfunction due to injury or organ impairment. It is for this reason therefore, that Malatja testified that he could never have recommended Mr. Dlamini for a driving position.
39. Incapacity as a result of injury is recognised as a legitimate reason for terminating the employment relationship in terms of our common law, provided it is done fairly. The Court quickly points out as well that more emphasis is placed on a situation where an employee becomes incapacitated by a work-related illness or injury as opposed to the



consideration that would be given to where the employee suffers an illness or injury whilst off duty.

40. Procedural and substantive fairness are the most paramount factors that need to be considered and taken into account when dealing with an employee's incapacity. Procedurally, the first step would be for the employer to establish whether the employee's incapacity is temporal or permanent. If the incapacity is of a temporal nature, the employer would be advised to investigate the extent of such incapacity or injury; the likely duration of same; and all possible alternatives short of dismissal. As part of fair procedure, the employer must discuss the employee's circumstances with the employee concerned in an attempt to find common ground on what steps could be taken to address the problem. The employee must be given an opportunity to state his case. Clearly the message is that meaningful consultation must take place between the employer and employee. (See *Carr v Fisons Pharmaceuticals (1995) 16 ILJ 179 (IC)*).
41. Ultimately, the substantive test to be applied by the employer is whether the employee is able to perform the work required. If not, then the employer has to probe the extent to which the employee is

able to perform the work; the extent to which the employee's circumstances and duties may be changed to accommodate his disability and; the availability of suitable alternative work. This test found support in the matter of *Davies v Clean Deal CC (1991) 13 ILJ 1230 (IC)* and was cited with approval in *NUM v Libanon Gold Mining Co. Ltd (1994) 15 ILJ 585 (LAC)*.

42. Having said all this, a question the Court asks itself is whether the dismissal of the Applicant in this matter was procedurally and substantively fair? Starting with the procedural aspect, the Court refers to the minutes of a meeting of 23 February 2007, which was held to discuss the 'job status' of Mr. Dlamini (page 22 of 'R1'). These minutes indicate that; as agreed as CMAC in October 2006, that the company would send the Applicant for a follow up test on his driving ability. That was done and the results warned against employing him as a driver. As a result the company then offered the Applicant the position of Labourer from Monday 26 February 2007 at a reduced rate of E5.70 per hour. The Applicant informed the meeting that this was unfair. Despite his protestation he was requested to

confirm his new position on the following Monday the 26 February 2007.

43. Clearly, the procedure adopted by the Respondent in dealing with the issue of Mr. Samuel Dlamini after his second examination is wanting in some respects. The authorities are clear that as part of fair procedure, the Respondent had to discuss the Applicant's circumstances with him, with the aim of attempting to find common ground on the best steps that could be taken to address his problem. He should have been given ample opportunity to state his case. That is not what happened in this matter. From the minutes it is succinctly clear that the Applicant was given a 'take it or hit the road' option. Swazi Plastics (Pty) Ltd was only able to offer Mr. Dlamini a position as Labourer from 26 February 2007, and at a reduced rate of E5.70. In essence Mr. Dlamini was given only 2 days to consider whether he was accepting the company's offer. And it is obvious that this was not a negotiable offer, it was a take it or leave it and loose out kind of situation, much against what is propounded in terms of good industrial relations. The company here was not seeking to find common ground with its employee on his situation, instead it had unilaterally decided

to demote him to the position of Labourer on lower remuneration. This is evident even from the letter terminating his services with immediate effect, without even hearing him, much against the sacrosanct right to be heard. The company should have engaged the Applicant in effective consultation, which means that before making a final decision it should have received representations from him about the proposed offer of alternative work. The Court points out that effective consultation does not mean presenting the affected employee any matter for consultation as a *fait accompli* as was the case in this matter. In the present case, Mr. Dlamini should at least have been afforded the opportunity to persuade the employer on why he should not be dismissed because of his refusal to accept the position of Labourer. Accordingly, the finding of the Court therefore is that the dismissal of Mr. Dlamini was procedurally unfair.

44. On the substantive fairness though, the finding of the Court is that the employer went out of its way to determine whether the Applicant was still able to perform his work as a Driver. This the Company did even though the Applicant had sustained the injury when he was off duty doing his manual chores at his home. The Company should in fact be

commended for having taken Mr. Dlamini through this rigorous psychometric testing of the Dover system. Whether Mr. Dlamini could still drive is not what the psychometric test was about. Rather, it is about 'risk detection and accident reduction'. The Court has taken judicial notice there are a lot of traffic accidents in our country's road which involve these heavy vehicles. Perhaps more companies need to engage their drivers in this rigorous testing to detect risks and thereby significantly reduce the calamities on our roads. It is not in dispute that in this test the Applicant performed very poorly, scoring a low 35.6 percentage points. And based on his score, the recommendation of the expert, Malatja, was that he could not be considered for a driving position. He was considered a high risk. Indeed, with the Applicant behind the steering wheel of a 10 tons heavy truck the company cannot be faulted for going with the recommendation of the psychometric expert. Substantively therefore, it is finding of this Court that the termination of the Applicant's services was fair.

45. Since the Court has already found that the termination of the Applicant was procedurally unfair, then the next consideration is on the compensation it deems just and equitable. The Applicant had been

employed in the year 2000 and was terminated at the end of February, 2007 and without notice. He is now 59 years old, or there about, and married with five children, two of whom are still toddlers. At the time of trial he was in and out of jobs and had no permanent job. He had an unblemished disciplinary record. At the time of dismissal he was earning a monthly salary of E2 525.30. Taking into account all these factors, the Court considers it just and equitable that the Applicant be awarded 6 months compensation [E15 151.80] for the procedurally unfair termination of his services, together with an order that the Respondent pays half of the Applicant's costs. And it is so ordered.

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**T. A. DLAMINI**  
**JUDGE – INDUSTRIAL COURT**

**DATED AT MBABANE ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2015.**

*For the Applicant: Attorney B. S. Dlamini (B.S. Dlamini and Associates)*

*For the Respondent: Attorney M.S. Sibandze (Musa S. Sibandze Attorneys)*