



IN THE

INDUSTRIAL COURT OF

SWAZILAND

CASE NO.442/06

In the matter between:-

MICHAEL MAKHANYA

Applicant

And

THE HUB SUPER SPAR

Respondent

Neutral citation: Michael Makhanya V The Hub Super Spar (442/2006)
[2016] SZIC 26 (May 2016)

CORAM: D. MAZIBUKO

(Sitting with A. Nkambule & M.T.E. Mtetwa)
(Members of the Court)

Last Heard: 29th April 2016

Delivered: 27th May 2016

Summary: Labour law; Employee dismissed for breach of workplace regulation. Employer failed to provide the regulation. Consequently employer failed to justify dismissal.

Workplace procedure; Employee dismissed for breach of workplace procedure.

Applicant employed as a Cook. Applicant permitted to taste ingredients before cooking to ascertain freshness. No rules established to regulate quantity, equipment and method for tasting. Tasting left at the discretion of each individual Cook.

Employer failed to prove employee acted irregularly or unreasonably in tasting milk.

Held: Employee acted within limits of his mandate to taste milk for freshness. Dismissal unjustifiable and therefore unfair.

1. The Respondent; The Hub Super Spar, is a company that operates a supermarket in Manzini town in Swaziland. The Applicant Mr Michael Makhanya is a former employee of the Respondent.
2. On the 1st April 1998 the Applicant was employed by Respondent as a Chef or Cook. The Applicant worked as a Cook until 31st May 2005. The Applicant was dismissed from work on allegation of dishonesty. At

- the time of dismissal the Applicant was earning a monthly salary of E1, 475.00 (One Thousand Four Hundred and Seventy Five Emalangen).
3. According to the Respondent the Applicant was discovered to have drunk milk in his work station and the milk was the property of the Respondent. The incident occurred on the 17th May 2005.
 4. The Respondent's first witness, Mr Nelson Madiba Mamba was employed by Respondent as Assistant Manager. On the 17th May 2005 Mr Mamba was responsible for supervising various departments in the supermarket including the kitchen (also referred to as the hot-delicatessen). He testified that he had seen the Applicant that day, carrying various grocery items inside the supermarket including 'Koo' beans in cans and a pint of milk, and the Applicant was walking towards the kitchen where he normally worked. This event took place early in the morning after 7:00 a.m. It would appear the supermarket and the hot delicatessen were under one roof but are distinguishable business units.
 5. Mr Mamba did not ask the Applicant the reason he was carrying the afore-mentioned items because he had considered that the said items would be used in the kitchen for cooking. Shortly thereafter Mr Mamba testified that he overheard a conversation between the Applicant's

colleagues named Nicholas and Londiwe Dlamini talking about consumption of milk. In particular Nicholas raised a concern that he was once reprimanded for drinking milk at work yet other employees are doing the same thing with impunity. After hearing this concern Mr Mamba became alert and vigilant particularly because he had seen the Applicant carrying milk. The two (2) employees mentioned by Mr Mamba namely Nicholas and Londiwe Dlamini denied (at a subsequent disciplinary hearing), the allegation made by Mr Mamba concerning them. They stated that they talked about milk in a different context. Not much however turns on this particular issue.

6. Thereafter Mr Mamba cautiously approached the kitchen area where the Applicant, Londiwe Dlamini and Nicholas were working. When Nicholas and Londiwe Dlamini saw Mr Mamba they allegedly stopped their conversation. Mr Mamba proceeded to search the kitchen area. Mr Mamba noticed the Applicant (who appeared from behind the grill), that he was wiping his mouth. Mr Mamba went to investigate what the Applicant had been doing behind the grill. Mr Mamba noticed a half-full container of milk on the floor and he also noticed the container-lid also lying on the floor. Mr Mamba asked the Applicant what he had been

doing behind the grill. The Applicant responded by tendering an apology. The

other employees viz Nicholas and Londiwe Dlamini also tendered apologies on behalf of the Applicant. Mr Mamba asked all three (3) employees what then was the next step to take. All three (3) allegedly suggested that the matter should end there and then since they had tendered their apologies.

7. Mr Mamba went to report the incident to his Co-manager namely Sheilla Conceicao. Ms Conceicao told Mr Mamba to fetch the pint of milk and he (Mr Mamba) collected it from the kitchen worktop. The Applicant was subsequently charged with a disciplinary offence.

8. According to the Applicant, he needed the 'Koo' beans (canned beans) and the milk as part of the ingredients for a dish that he had planned to cook that morning. It was standard practice for the Cooks at the Respondent's workplace to taste the ingredients before cooking or serving, more especially the perishables, and milk was among the perishable items. The milk was a necessary ingredient in cooking mushrooms and white sauce. The Applicant was in the process of cooking mushrooms that morning. The mushrooms had been chopped

already and were lying on the worktop. The Applicant opened the milk and took some into his mouth in order to taste it for freshness.

9. According to the Applicant, the quantity of milk that he took into his mouth was necessary and sufficient for him to taste it for freshness. He denied that he drank the milk purely for enjoyment or that he exceeded a reasonable limit that was required for tasting.

10. The Applicant gave evidence in support of his claim but did not call other witnesses. The Respondent called three (3) witnesses namely Mr Nelson Madiba Mamba (RW1), Mr Zamani Tsabedze (RW2) and Mr Wilhelm De Koker (RW3). The parties further referred to the minutes of the disciplinary hearing of the 20th May 2005, the outcome of the disciplinary hearing, the Applicant's appeal and the decision of the appeal tribunal. The parties quoted extensively from those documents and they submitted the said documents as exhibits. The contents of the minutes were confirmed as correct by the parties. The Applicant testified as follows on the minutes during cross-examination:

“RA: Mr Makhanya have you read the minutes of the hearing?”

AW1: No my Lord I was not able to read them.

RA: Did you ask your attorney to assist you with the minutes?

RW1: Yes my Lord.

RA: Do you confirm [that] what [is] in the minutes was said in the hearing?

AW1: Yes I do confirm it my Lord.”

(Record page 25)

11. During the trial the Respondent’s witnesses clarified their position that the Applicant has not been dismissed for failing to follow procedure in the manner he acquired the milk and the ‘Koo’ beans from the supermarket area. Instead he was dismissed for consuming the quantity of milk which was missing from the container. The Applicant was expected to pay for the milk before he could open the container and consume its contents. The Respondent’s witnesses presented the following testimony:

11.1 Mr Tsabedze (RW2), the erstwhile store manager, testified as follows regarding the charge, when asked by the Respondent’s Attorney:

“RA: Do you recall what he [Applicant] was charged for?

RW2: *The specific charge I recall centered solely on proving a dishonest ...[act] in the case of drinking a 500ml milk whilst on duty with no proof of payment.*

(Record page 93)

11.2 Mr Tsabedze was asked a similar question by the Applicant's attorney and he responded as follows:

AA: *Mr Tsabedze what was your understanding of the charge, was the misconduct the internal removal of the stock without following the procedures or it was the drinking of the milk?*

RW2: *The drinking of the milk.*

AA: *So the Applicant was not charged for not following the normal procedures of removing the stock from the shop to the hot deli [delicatessen] department?*

RW2: *Yes."*

(Underlining added)

(Record page 110-111)

12. The Applicant testified that the Cooks at the Respondent's workplace had been instructed by management to taste the ingredients which they

were about to use in order to avoid using stale ingredients for cooking. It is not in dispute that the Applicant consumed some of the milk that was in the container. What is in dispute is the quantity that he drank and the purpose for which he drank the milk.

12.1 In his evidence in chief the Applicant stated as follows:

“AA: *Tell the court what happened.*

AW1: *My Lord I took milk [which] I was going to use on cooking mushrooms so before cooking these mushrooms I usually taste it [the milk] and that’s what we were told as to be sure whether its still fit to be used, after that my Lord I did taste it and then pour inside the pot and some of it remained and that was the time whereby one of the employees of Spar [Respondent] came and he suspected me that I drank the milk and then he went to report me at the office.*

Judge: *Now before you go further Mr. Makhanya tell us the name of the person who suspected you, that you drank the milk.*

AW1: *It’s Madiba Mamba [RW1].”*

(Underlining Added)

(Record page 6)

12.2 The Applicant answered a similar question under cross examination as follows:

“RA: What’s your comment in that you were caught drinking a 500 ml milk of Valley Farm [brand].

AW1: My Lord what I can say is that I was testing it whether it was right or not.

FA: Now are we in agreement that you were drinking a 500ml [or] pint of milk.

AW1: Yes my Lord”

(Underlining added)

(Record pages 36-37)

12.3 Mr Mamba (the Respondent’s first witness) supported the Applicant’s evidence when he stated the following under cross examination:

“AA: Mr Mamba just answer the question. How do you taste milk whether it is still fresh?

...

RW1: *I think you can take a spoon and taste it using the mouth.*

AA: *Is that the only method you know Mr Mamba?*

RW1: *The other way [is] you can use your nose.*

AA: *Do you agree with me Mr Mamba that you can also taste by opening the container and put it in your mouth?*

RW1: *You can do that but it can depend on the amount as to how much you consume.*

AA: *You have just told the Court Mr Mamba that Tholakele was called [at the disciplinary hearing] to verify as to whether the staff at the Deli [Delicatessen] was allowed to taste food?*

RW1: *Yes I did say that.*

AA: *What was her evidence in regard to that issue?*

RW1: *I recall that she said they can taste because the food they cook is for the people [customers] they must check that the food is ready to be given [sold] to people [customers].*

AA: So was the applicant as chef allowed to taste the food he was cooking?

RW1: Yes he was supposed to.”

(Underlining added)

(Record pages 62-63)

12.4 Under re-examination Mr Mamba added the following evidence:

“RA: *Were you ever a cook or chef?*

RW1: *No I never was.*

...

RA: *To taste a product that is produced at the hot deli is nothing unlawful?*

RW1: *As far as I know tasting is not an offence because food is prepared for people [customers] so you must taste [to ascertain] if it is fine.*”

(Underlining added)

(Record pages 77-78)

12.5 Mr Tsabedze (the Respondent’s second witness) also supported the Applicant’s evidence when he testified as follows under cross examination:

“AA: Do you recall him [Applicant] telling the disciplinary panel that he tasted the milk and poured it into the pot preparing to cook mushrooms?”

RW2: Yes

AA: According to your understanding of the procedures at the hot deli, was Mr Makhanya [Applicant] allowed to taste milk before using it in cooking?

RW2: In all fairness the understanding is that he was allowed to taste prior to cooking.”

(Underlining added)

(Record page 113)

13. The evidence of the Applicant and that of the Respondent’s witnesses supports the Applicant’s contention that:-

13.1 he was permitted to use milk to cook certain dishes especially mushrooms and white sauce, and

13.2 that he had prepared mushrooms for cooking that morning, and the milk was required for cooking those mushrooms, and

13.3 that the Respondent’s Cooks including Applicant were authorized to taste the milk in order to ascertain that it was fresh and suitable for cooking.

14. It was further established during the trial that the Respondent was not challenging the procedure that the Applicant had used in tasting the milk. The evidence of Mr Tsabedze which is quoted in paragraph 11.1 above makes that point clear.

15. The quantity of milk that the Applicant allegedly used for tasting was subject of dispute. According to the Respondent, the Applicant exceeded the limits of reasonableness in the quantity that he used. It is common cause that the milk in question was in a semi-transparent plastic container which was certified to carry five hundred millilitres (500ml) of liquid. The parties referred to this container as a pint. For the purpose of this case the Court will treat 500ml as equal to a pint even though that comparison is not scientifically correct.

16. According to Mr Mamba the milk container that he recovered from the Applicant was half full. Mr Mamba assumed that the Applicant had drank the missing half. Mr Mamba testified as follows regarding the quantity of milk that remained in the container:

“AA: When you found Mr Makhanya [Applicant] wiping his mouth did you ask where [was the missing] part of that milk gone to?

RW1: I asked him why he was drinking it.

AA: So it will be correct to say that you assumed that he had drunk all the milk [that was missing] in that container?

RW1: I did say that he drank the milk because when he entered the deli [delicatessen] he was carrying the milk with other tins [canned food] he was going to use for cooking but when I entered I found the container containing the milk already half full.”

(Underlining added)

(Record page 63)

16.1 Mr Mamba continued to state as follows:

“AA: What is the quantity of milk that you find [found] in the container?

RW1: it was half of 500 ml which means it was 250 ml.

AA: Was the container transparent?

RW1: It was transparent.”

(Record page 68)

16.2 The evidence of Mr Mamba suggested that the Applicant consumed 250ml of milk. This amount was Mr Mamba's estimate as he had not used an instrument to measure the quantity of milk that remained in the container.

17. The Applicant denied that he consumed 250ml of milk. The Applicant testified that he tasted some of the milk and then poured some into a pot and still some remained in the container that was recovered by Mr Mamba. This evidence appears in the quotation that is recorded in paragraph 12.1 above. The Applicant repeated this assertion under cross examination when he testified as follows:

17.1 "RA: *Now Mr Makhanya if you can remember can you tell the Court whether or not the pint of milk was mentioned in the case of hearing [at the disciplinary hearing.]*

AW1: Yes my Lord it was shown.

RA: Who presented it?

AW1: It was presented by Madiba Mamba my Lord.

RA: Does [Did] it contain milk.

AW1: Yes My Lord it did contain milk.

RA: What was the quantity of the milk?

AW1: It was slightly above half My Lord.”

(Record pages 40-41)

17.2 Still under cross examination the Applicant testified as follows:

“RA: What time did you knock in [report for work] on the 17th May 2005?

AW1: At 6 a.m. My Lord.

RA: What did you do between 6 and 7 [a.m.]?

AW: I took the mushrooms and milk and then prepared it and put it inside the pot.

RA: Did you pour the milk in the pot?

AW1: I had poured [it] My Lord.”

(Underlining added)

(Record page 42-43)

The Applicant’s estimate of the milk that remained in the container differed from the estimate that was given by Mr Mamba. It would appear the milk container was not calibrated. The Applicant and Mr Mamba therefore drew estimates of the quantity of milk that remained in the container by merely looking at the container.

18. Mr Mamba's initial approach was to deny that the Applicant had poured some of the milk into a pot. However under cross examination Mr Mamba had difficulty in denying the Applicant's version. Mr Mamba's evidence reads thus:

“AA: My instruction Mr Mamba is that the applicant opened the milk, he tasted it, and poured it in a pot preparing to cook the mushrooms and put it back on the table, what is your comment on that?”

RW1: There was no pot that was with milk inside but I found the milk on the floor. I would like to ask what was the quantity of what he wanted to cook with a 500 ml because at the Hot deli they used industrial pots?

AA: Mr Mamba did you look as to what was inside all the pots that were in the Hot Deli?

RW1: No I did not look in all the pots”

(Underlining added)

(Record pages 66-67)

19. With respect to Mr Mamba, he could not say under oath that; there was no pot that contained milk –if he had not inspected all the pots in

the hot delicatessen at that moment. Mr Mamba was trying to deny something which he had no knowledge of. The correct position is that Mr Mamba did not inspect the pots in the hot delicatessen at the material time and therefore had no knowledge of whether or not there was a pot that contained milk. Mr Mamba's denial was misleading. The Applicant's evidence that he poured some of the milk into a pot has not been controverted.

20. Mr Mamba estimated the amount of milk that remained in the container at the time he recovered it at 250ml. The quantity of milk that the Applicant poured into the pot is not known. It follows therefore that the amount of milk that the Applicant consumed is also not known. It cannot be said therefore that the Applicant has exceeded the limits of reasonableness in tasting the milk.

21. The Court has also considered the matter from the Respondent's viewpoint. According to the Respondent; the Applicant exceeded the reasonable limits of tasting milk in that he consumed about 250 ml of milk. The Respondent's witness (Mr Mamba) estimated the milk that remained in the container at 250 ml. The Applicant estimated the

remained slightly above half of the container. There is no witness that gave the Court the exact quantity of milk that remained in the container.

At the time of the disciplinary hearing the milk had turned sour. The Applicant is therefore accused of having drunk milk, the quantity of which is not known, but not exceeding 250 ml. The Respondent's witnesses did not state what quantity of milk is reasonable for tasting purposes. It is however a known fact that the ability to taste an edible product for freshness, using the mouth, will necessarily differ from one person to another.

22. There are innumerable variables that would affect a person's ability to taste an edible product for freshness using his mouth. Such variables would include the sensitivity of his taste buds and what the person had been eating or drinking immediately before he tasted the product in question. It is conceivable that it may take one person a 100 ml sip to taste freshness in milk and yet take another person 250 ml sip to arrive at the same conclusion. The fact that one person has consumed a bigger quantity than the other in the process of tasting does not mean that he has abused the tasting privileges. It has not be established

whether the Applicant had dull or sensitive taste buds. Assuming there was proof before Court that the Applicant consumed 250ml of milk (and not less), that proof on its own would not persuade the Court to conclude that the Applicant had exceeded the reasonable limits of tasting milk and was therefore guilty of dishonesty regarding the quantity he had consumed for tasting.

23. The whole point of tasting milk was to determine its freshness. The Applicant was not expected to put the health of the Respondent's customers at risk by cooking their food using milk whose freshness he had not confirmed. The question was; what quantity of milk was considered reasonable for the Applicant to consume in order to determine its freshness? That question remained unanswered. In the absence of a stipulated maximum quantity of milk that is permissible for tasting, the Applicant cannot be said to have exceeded that limit.

24. According to the charge sheet the Applicant was charged with the following offence:

“You were caught drinking a 500 ml Valley Farm full cream milk which you could not prove as paid for or

signed for by security. The above- alleged misconduct is in contravention of paragraph 1.1 of our firm's official Classification and Description of Transgressions."

24.1 According to this charge the Applicant drank milk (which is the property of the Respondent), without proof of payment or authorization by a security officer. According to the Respondent, the Applicant was in breach of a specific section among the Respondent's regulations.

24.2 The Regulations or relevant section thereof, were not made available to the Court. The Court was therefore left in the dark as to what is contained in those Regulations that could be of relevance in the charge for which the Applicant was dismissed. No explanation has been given by the Respondent for failing to produce the alleged Regulations, despite the obvious need to refer to them in order to justify the dismissal.

25. Mr Mamba mentioned that when he confronted the Applicant about drinking milk at the hot delicatessen department, the Applicant apologised and the Applicant's co-workers also apologised on his behalf. After the apology Mr Mamba did not see the need to investigate the matter further. In Mr Mamba's thinking the apology was an admission that the Applicant had committed a misconduct.

25.1 The exact wording of the alleged apology has not been made available to the Court. The Court is therefore unable to interpret the contents of the said apology. Mr Mamba assumed that the said apology was an admission of guilt. In the absence of the exact words that the Applicant and his colleagues allegedly uttered, the Court is unable to conclude that the Applicant admitted his guilt. In short, the Court does not know what the Applicant or the Applicant's colleagues said – when the Applicant was confronted by Mr Mamba in the hot delicatessen department in the morning of the 17th May 2005. The Court therefore rejects the notion that the Applicant admitted guilt before Mr Mamba. An

admission of guilt should be supported by evidence. The Respondent failed to lead the requisite evidence.

25.2 The word ‘apology’ is a conclusion drawn by a listener based on his interpretation of the words uttered by a speaker. It is Mr Mamba who has labelled the Applicant’s response – an apology. Without the exact words allegedly uttered the Court cannot make its own assessment on whether or not the Applicant apologised. An admission by an employee that he is guilty of misconduct must be unequivocal and supported by evidence. The Respondent failed to lead the requisite evidence. The Court therefore rejects the notion that the Applicant apologised and therefore admitted guilt before Mr Mamba.

25.3 The Court has noted that Mr Mamba was called as a witness at the disciplinary hearing. The minutes of the disciplinary hearing indicate that Mr Mamba did not disclose the contents of the said apology. The chairman assumed that Mr Mamba’s assertion was correct; namely that an apology had been tendered and that, that apology

meant an admission of guilt on the Applicant. That assumption was clearly wrong and unfair on the Applicant.

25.4 The Court has further noted an irregularity in the manner the Respondent presented its defence at the trial. While the Applicant was under cross examination the Respondent did not confront the Applicant with the allegation that he had apologised to Mr Mamba. Furthermore, the Respondent did not put to the Applicant its interpretation of the alleged apology. The Applicant was consequently denied a chance to explain before Court what (if at all) he apologised for. If the Respondent felt that the alleged apology and its interpretation was an important item of its evidence, the Respondent's counsel should have confronted the Applicant with that fact. Whatever the applicant would have said (in the witness box) in response to that accusation, would have amounted to evidence for or against him.

25.5 It is unfair, irregular and amounts to a miscarriage of justice for the Respondent to raise an accusation against the Applicant only after the Applicant had left the witness box and thereby deny the Applicant a chance to respond to that allegation. This is a serious irregularity which the Court cannot condone as it is highly prejudicial to the Applicant.

25.6 There is no allegation that the Applicant requested his colleagues to tender an apology on his behalf. Even if the allegation of an apology had been regularly introduced during the trial (which is not the case) still an unsolicited apology allegedly made by a colleague (even if it had been proved) would not bind the Applicant. The alleged colleagues were not called as witnesses to confirm their alleged apology and explain the meaning thereof.

26. In the Reply that the Applicant filed in Court, the offence for which the Applicant was dismissed was stated as follows:

“... Applicant violated the Rules and Regulations of Respondent. He intentionally committed a dishonest act of theft and further put the company’s hygiene standard at risk.”

(Respondent Reply Clause 5)

The Court has noted that the Respondent has added another offence in its Reply which was not in the charge sheet, namely: that the Applicant has ‘*put the company’s hygiene standards at risk*’. Clearly this is not the offence for which the Applicant was found guilty and dismissed.

27. The Respondent’s Regional Manager, Mr De Koker testified that the Applicant had not been charged with violating the Respondent’s health standards. Mr De Koker testified as follows:

27.1 “AA: *Mr De Koker do you recall that the charge [that Mr Makhanya was facing, was not violation of health standards]?*

RW3: It’s true

...

AA: The charge he was faced in [facing] was that he was drinking milk?

RW3: Yes”

(Underlining added)

(Record page 152)

27.2 Furthermore Mr De Koker stated the reason for dismissal of the Applicant as follows:

“AA: *And [in] your evidence you say it was correct to terminate the services of the applicant because it is alleged he had stolen that milk ...*”

RW3: *He had stolen milk, he consumed it without paying for it.*”

(Record page 153)

27.3 Mr De Koker clearly exonerated the Applicant from the fresh allegation that he failed to maintain the Respondent’s hygienic standards.

27.4 Mr De Koker also sat as the appeal tribunal. He confirmed the conviction and dismissal of the Applicant.

28. Mr Tsabedze was asked a pertinent question concerning the offence for which the Applicant was dismissed and he answered as follows:

“AA: *Mr Tsabedze what was your understanding of the charge, was the misconduct the internal removal of stock without following the procedure or it was the drinking of the milk.*

RW2: *The drinking of the milk.*

AA: *So the applicant was not charged for not following the normal procedures of removing stock from the shop to the hot deli [delicatessen] department?*

Yes.”

(Underlining added)

(Record page 111)

28.1 Mr Tsabedze’s evidence exonerated the Applicant from the alleged charge of failing to follow procedure in the manner he removed the milk and other ingredients from the supermarket area to the hot delicatessen.

28.2 Mr Tsabedze was the Respondent’s Assistant Store Manager. He also sat as chairman of the disciplinary hearing. He found the Applicant guilty as charged at the disciplinary hearing and recommended dismissal.

29. The Court does not find evidence of theft of milk or dishonesty on the part of the Applicant. No evidence was led regarding the quantity of milk that a Cook is authorized to use for the purpose of tasting freshness - in milk. The tasting of food and ingredients was a matter which was left at the discretion of each individual Cook. The Respondent's witnesses did not address that issue in their evidence. Instead the Respondent's witnesses gave personal opinions on the equipment that they would prefer to use when tasting milk, which opinions were either formed or fortified after the Applicant had been charged with a disciplinary offence.

29.1 Mr Mamba gave his opinion as follows regarding the issue when asked by the Applicant's attorney:

“AA: Mr Mamba just answer the question. How do you taste milk [to determine] whether it is still fresh?

...

RW1: I think you can take a spoon and taste it using the mouth.”

(Underlining added)

(Record page 62)

29.2 Mr Mamba clearly stated that his evidence is not based on any rule or regulation that applied at the Respondent's workplace. He relied entirely on his opinion or thoughts.

29.3 Mr Mamba was further asked:

“AA: Are you aware of any limit that you have to use to taste food in the Hot Deli [Delicatessen]?”

RW1: I cannot know the limit but like I said before, a person may use a spoon to taste.”

(Underlining added)

(Record page 67)

29.4 Mr Mamba admitted that he was not aware of any restriction on the quantity of food (especially milk) that is applicable to test for freshness. Instead of answering the question Mr Mamba decided to share his thoughts on the equipment which he preferred to use to taste for freshness. Assuming the Applicant had used a spoon for tasting, the question still remains: how many spoonfuls of milk was considered reasonable for tasting? That question remained unanswered.

29.5 Mr Mamba was further asked whether he had acquired any experience as a Cook or Chef and he answered in the negative. The evidence reads thus:

“RA: Were you ever a cook or chef?”

RW1: No I never was.”

(Record page 77)

29.6 Mr Mamba had no knowledge of how Cooks in the Respondent’s hot delicatessen department carried out their food – tasting exercise. He could not assist the Court with the quantity of milk that was reasonable for the purpose of tasting.

30. The Respondent’s second witness Mr Tsabedze testified on the issue of tasting food for freshness and stated the following:

“RA: With this particular instance with Mr Makhanya [Applicant] it is alleged that he was caught drinking the milk is that normal practice?”

RW2: Normal practice would not be actually drinking because if you say drinking in my opinion you are talking about someone who is swallowing several mouthfuls. In our

trade what the cook would say to establish the so called tasting is either, I have since confirmed, is either the chef pours out sort of like a nominal quantity even a capful and taste that or maybe takes a spoon or ladle and pours into that ladle and taste it. But now you are talking specifically like in this case, where you are talking half a 500ml then it becomes very much suspicious and definitely would prove this person has bypassed the acceptable levels of procedural taste I would say and is in fact now drinking.”

(Underlining added)

(Record page 102)

- 30.1 Mr Tsabedze stated that he had ‘*since confirmed*’ what he called ‘*Normal practice*’ regarding tasting food. He did not say who he confirmed with and how that person came to know of the said ‘*Normal practice*’ at the Respondent’s hot delicatessen department. Mr Tsabedze admitted though that his evidence was based on information which he had recently acquired from another source which is unknown to the Court. That evidence is hearsay and is inadmissible.

30.2 The legal position regarding hearsay evidence is that it is not admissible.

*“Hearsay evidence is evidence of statements made by persons not called as witnesses which is tendered for the purpose of proving the truth of what is contained in the statement,
per WATERMEYER, J in Estate de Wet v de Wet 1924 CPD 341. Such evidence is not admissible.”*

CLASSEN CJ: DICTIONARY OF LEGAL WORDS AND PHRASES, vol 2, Butterworths, 1976, SBN 409 01981 0 at pages 167-168.

30.3 Mr Tsabedze testified that he was employed by Super spar Group as Assistant Store Manager based in Mbabane town. The Applicant worked in Manzini town. Mr Tsabedze was not a Cook and had no experience in working at the Respondent’s hot delicatessen department. His involvement in the case was that he chaired the disciplinary hearing wherein the Applicant was charged with an offence. Mr Tsabedze

had no personal knowledge of how Cooks especially at the Respondent's hot delicatessen department carried out the milk - tasting exercise. Mr Tsabedze cannot give evidence of "*normal practice*" at the Respondent's hot delicatessen since he had not experienced same.

30.4 Mr Tsabedze accused the Applicant that he "*bypassed the acceptable levels of procedural taste [tasting]*" but he failed to state what are those acceptable procedural levels required for tasting.

31. The evidence before Court supports the Applicant's contention that he was authorized and obligated to taste milk before using it to cook food for customers. On the 17th May 2005 the Applicant drank some of the milk in a 500ml container for the purpose of tasting the milk for freshness. The Respondent conceded that the Applicant had authority and an obligation to taste the milk but contended that the Applicant drank more milk than was permissible or reasonably necessary for the purpose of tasting it for freshness. No evidence was led before Court to prove the quantity of milk that a Cook was authorized to use for tasting.

32. The Respondent called three (3) witnesses to support its contention. The evidence of the three (3) witnesses is based on hearsay and opinion on a crucial issue namely: the quantity of milk that the Applicant as a Cook was authorized to consume – in order to taste its freshness. Neither of the three (3) witnesses had worked as Cooks at the Respondent’s hot delicatessen. Consequently, all three (3) witnesses have never consumed milk to taste its freshness- at the Respondent’s workplace. They have no experience on the amount of milk that is required for that purpose. Their evidence therefore cannot assist the Court.

33. It is noted that none of the Respondent’s witnesses testified that the Applicant was trained on procedure that should be followed when tasting food. There is no rule that was presented in Court to prove the quantity of milk that should be consumed for tasting purposes. All three (3) witnesses that were called by the Respondent are in management positions. A manager’s estimate of reasonable quantity of milk required for tasting will necessarily differ from that of a Cook. The former relies on conjecture whereas the latter relies on

experience. The Applicant consumed the quantity of milk which, in his assessment as a Cook, was sufficient for him to determine its freshness or otherwise. The conduct of the Applicant does not amount to dishonesty. The Court does not find the evidence of dishonesty on the Applicant.

34. The Applicant was an employee who was protected under section 35 (2) of The Employment Act No. 5/1980 (as amended). The Applicant had permanent employment with the Respondent as a Cook. Section 35(2) provides as follows:

“No employer shall terminate the services of an employee unfairly.”

The Applicant claims that his employment was unfairly terminated.

- 34.1 Section 42(2) of the Employment Act provides that:

“The services of an employee shall not be considered as having been fairly terminated unless the employer prove –

a) that the reason for the termination was one permitted by section 36, and

b) that, taking into account all the circumstances of the case, it was reasonable to terminate the service of the employee.”

34.2 In the matter of MENZI NGCAMPHALALA vs SWAZILAND BUILDING SOCIETY SZIC case no 50/2005 (unreported), the Court explained the provision of Section 42(2) of the Employment Act as follows:

“In terms of Section 42 of the Act, the onus rests on the Respondent to prove that it had fair reason to terminate the Applicant’s services, and that such termination was substantively ... fair and reasonable in all the circumstances.”

(At paragraph 18)

34.3 The Court went on to state that:

“Since the Respondent relies on Section 36(b) of the Act, the onus rests on the Respondent to prove on a balance of probabilities that the Applicant was guilty of committing a dishonest act.”

(At paragraph 19)

34.4 In the matter of: SWAZILAND UNITED BAKERIES vs ARMSTRONG DLAMINI SZICA case no 117/1994 (unreported) the Industrial Court of Appeal emphasized the requirement of Section 42 (2) as follows:

“[There are] two crucial questions laid down by the Employment Act namely:-

1) Was the dismissal unfair? And

2) Was the dismissal reasonable in all the circumstances?”

...

“It is clear from the provisions of Section 42 of the Employment Act that the Court is bound to consider all the circumstances of the case when considering whether the employer has discharged the burden of proving that the dismissal was fair and reasonable.”

(At page 11)

34.5 The Respondent has failed to prove that the Applicant has committed a dishonest act or any form of misconduct. Therefore the termination of the Applicant’s employment is legally unjustifiable and unfair.

35. The Applicant claimed payment of terminal benefits arising from unfair dismissal in the following manner:

“(a) 1 months’ notice	E1, 475.00
(b) Additional notice	E1, 847.00
(c) Severance allowance	E4, 618.40
(d) Payment in lieu of leave (21 days)	E1, 212.00
(e) Compensation for unfair dismissal (12 months salary)	<u>E17, 700.00</u>
Total	E26, 852.40

(f) Further and /or alternative relief.”

35.1 The Applicant testified that at the time of dismissal he was a breadwinner and had a wife and two (2) children. The children attended school. When he lost his employment the Applicant was assisted by his sister to maintain his family. He struggled to find employment after dismissal. The Applicant actually found employment five (5) years after dismissal. The Applicant’s wife was also unemployed. The Applicant suffered loss as a result of the unfair dismissal. In the exercise of its discretion, the Court herewith awards the Applicant ten (10) months compensation for unfair dismissal.

35.2 Save for payment in lieu of leave days, the Respondent did not challenge the computation of the Applicant's claim both in the Reply and also during the trial. However, the Respondent has challenged the legal basis of the claim by arguing that the dismissal was fair. The Court has already determined that the Applicant is entitled to relief for unfair dismissal. The law provides that, that which has not been denied shall be deemed to be admitted.

“Every allegation of fact in the ... declaration [particulars of claim] which is not stated in the ... [Reply] to be denied or not to be admitted, shall be deemed to be admitted ...”

(Underlining added)

Rule 22(3) High Court Rules.

35.3 In the Pre-Trial Conference Minute, dated 16th July 2010, the Respondent denied liability for the Applicant's claim for payment in lieu of leave days. At the Pre-Trial Conference, the Applicant was represented by Attorney LM Simelane while the Respondent was represented by Attorney C. Motsa. Despite a clear denial of liability, the Applicant failed to lead

evidence to prove his claim for leave. The Applicant's claim for leave accordingly fails.

36. Wherefore the Court grants the Applicant relief as follows:

36.1	1 months' notice	E1, 475.00
36.2	Additional notice	E1, 847.00
36.3	Severance allowance	E4, 618.40
36.4	Compensation for unfair dismissal	
	(10 months salary)	<u>E14, 750.00</u>
	Total	E22, 690.40

Members agreed

D.MAZIBUKO
INDUSTRIAL COURT JUDGE

Applicant's Attorney Mr L.M Simelane
LM Simelane & Associates

Respondent's Attorney Mr C. Motsa
Cloete/Henwood/Dlamini Associates
And later
Mr L. Howe

Howe, Masuku & Nsibandze Attorneys