IN THE INDUSTRIAL COURT OF ESWATINI

CASE NO. 380/2013

In the matter between:-

PAULINE NKAMBULE Applicant

AND

SPEEDY OVERBORDER SERVICES (PTY) LTD Respondent

Neutral citation*:* *Pauline Nkambule* vs *Speedy Overborder Services (Pty) Ltd 380/2013 [2018] SZIC 106 (05 October, 2018)*

Coram: N.NKONYANE, J
(*Sitting with G. Ndzinisa and D. Mmango. Nominated Members of the Court)*

Heard submissions: 16/08/18

Judgement delivered: 05/10/18

SUMMARY---Labour Law---Applicant employed by the Respondent as a Manageress---Applicant verbally dismissed by the Respondent's Managing Director without any disciplinary hearing on 18 May 2009---Respondent serving Applicant's attorney with notification of suspension and disciplinary charges two months later on 17 July 2009---Respondent denying that it dismissed the Applicant on 18 May 2009---Respondent claiming that Applicant was dismissed after a disciplinary hearing that was held in her absence---Respondent failing to produce minutes of disciplinary hearing and letter of dismissal---Respondent failing to call key witnesses to prove its case against the Applicant.

Held---In an application for determination of an unresolved dispute where the employee claims that he was unfairly dismissed by the employer, the burden of proof that the dismissal of the employee was for a reason is on the employer. In casu, the employer failed to discharge that burden of proof, the dismissal of the Applicant was therefore unfair. The Applicant's application is upheld.

JUDGEMENT

1. This is an application for determination of an unresolved dispute instituted by the Applicant against the Respondent in terms of Section 85 (2) of the **Industrial Relations Act No.1 of 2000** as amended, as read together with Rule 7 of the **Industrial Court Rules of 2007.**

2. The Applicant is an adult female citizen of ESwatini and a resident of Zombodze in the Manzini District. The Respondent is a limited liability company duly registered and incorporated in accordance with the Companies Law of the Kingdom of ESwatini, having its principal place of business in Matsapha.

3. The Respondent is involved in the business of cross border transportation of goods. Its owner and Managing Director is Mr. William Stuart. The Applicant was employed by the Respondent as a Manageress on 01 April 1999. She remained in continuous employment until 18 May 2009 when she was verbally instructed by the Managing Director to pack her belongings and leave the premises of the Respondent. There was a dispute whether that conduct by the Managing Director amounted to a termination of the Applicant's services.

4. The Applicant reported the matter to the Conciliation, Mediation and Arbitration Commission ("CMAC") as a dispute. The dispute could not be resolved by conciliation and a certificate of unresolved dispute was issued by the Commission. The certificate of unresolved dispute is annexed to the Applicant's application and it is marked **Annexure "PN2".**

5. The Applicant claims that she was dismissed by the Respondent on 18 May 2009. She claims that her dismissal was both substantively and procedurally unfair because;

5.1 *The Applicant did not commit any offence prior to her dismissal by the Respondent*.

5.2 *The Respondent did not prefer any charges against the Applicant prior to her dismissal.*

5.3 *There was no disciplinary hearing that was held before the Applicant was dismissed*.

6. The Applicant is accordingly claiming payment of notice pay, additional notice, severance allowance and twelve months' salary as compensation for the unfair dismissal.

7. The Respondent is opposed to the Applicant's application. It duly filed its Reply and denied that it unlawfully dismissed the Applicant.

8. The issues for determination by the Court therefore are the following:

8.1 *Was the Applicant dismissed by the Respondent?*

8.2 *If the Applicant was dismissed by the Respondent, was the dismissal for a fair reason*?

9. DISMISSAL.

The Respondent in its Reply denied that it dismissed the Applicant. It remains, therefore, to be established from the evidence before the Court whether or not the Applicant was dismissed by the Respondent. This issue is important because an employment relationship can be terminated in various ways including, *inter alia*, voluntary resignation by the employee, desertion or by effluxion of time in the case of a fixed term contract.

(See: - John Grogan: Workplace Law, 8th edition, page 106).

It was not in dispute that at the time that her services were terminated, the Applicant was an employee to whom Section 35 applied. (See: Section 42 (1) of the **Employment Act No. 5 of 1980** as amended).

10. As already pointed out in preceding paragraph, the Respondent did not deny that the Applicant was an employee to whom Section 35 of the **Employment Act** applied. The Respondent only denied that it dismissed the Applicant on 18 May 2009. Dealing with this issue The Learned Author, John Grogan (Supra) at page 106 stated the following:

"Normally, a dismissal is easy to recognize. A dismissal takes place when the contract is terminated at the instance of the employer and entails some communication by the employer to the employee that the

contract has come to an end. This message can be communicated in words or by conduct, for example, when the employer indicates that the employee will no longer be paid."

11. The evidence before the Court revealed that the Applicant ceased from working for the Respondent on 18 May 2009. On that day, the Applicant was called by the Respondent's Managing Director, Mr. William Stuart ("Mr. Stuart") to his office. According to the version of the Applicant, which was not denied, at about 09:00 to 10:00 AM on 18 May 2009 Stuart came to the workplace and asked the Applicant to follow him to his office. Mr. Stuart told the Applicant that *"Pauline, as from today you take your way and I will take my way"*. When the Applicant asked what he meant, Stuart pulled the drawer and retrieved a cheque for E73, 000:00. The Applicant told the Court that Mr. Stuart told her that he was no longer happy with her and pushed the cheque towards her. The Applicant refused to take the cheque as she said she did not know how Mr. Stuart came to the figure of E73, 000:00.

12. Mr. Stuart thereafter called the driver, Mr. Gama, and instructed him to take the Applicant home with all her belongings and come back with the motor vehicle and park it. The Applicant indeed packed all her belongings and was driven out of the Respondent's premises in full view

of the other staff members. The driver indeed came back with the motor vehicle that the Applicant used to drive and parked it at the Respondent's premises. That was the Applicant's last day at work at the Respondent's establishment.

13. Mr. Stuart did not deny that the Applicant stopped working for the Respondent on 18 May 2009. He told the Court that although the Applicant ceased from working for the Respondent on that day, she did not cease to be an employee of the Respondent because she continued to receive her salary even when she was at home. Mr. Stuart said the Applicant performed her duties well during the first four years and that thereafter he noticed some disloyalties.

14. During cross examination, Stuart denied that he instructed the driver, Mr. Gama, to drive the Applicant home. The cross examination on this issue went as follows:

"Q. Did you not call a driver Gama to drive the Applicant home.

A. I did not.

Q. I put it to you that after she refused the offer you called Gama to drive her home.

A. The door was still open for her to come back to me, but she did not."

15. On the question of dismissal, the cross examination proceeded as follows:

"Q. you still deny that you dismissed her.

A. I dismissed her by writing after everything else had failed."

16. Stuart did not deny that the Applicant was dispossessed of the motor vehicle that she used whilst still employed by the company. During cross examination the following transpired:

"Q. you dispossessed the Applicant of the motor vehicle that she was using.

A. Its ten years ago, it's possible that that happened, but she was still on full pay.

Q. On 18.05.09 you dismissed the Applicant and withdrew the motor vehicle that she was using.

A. <u>The motor vehicle was withdrawn</u> because she was no longer working for the Respondent. She considered the discussion as a dismissal….."

17. Mr. Stuart also said the Applicant was never dismissed but, she was suspended with full pay. The letter of suspension was dated 17 July 2009, well after the Applicant had left the Respondent's employ on 18 May 2009. It was not in dispute that when the Applicant left the Respondent's workplace on 18 May 2009, she was not served with any letter of suspension.

18. From the evidence before the Court, the Court will come to the conclusion that the Applicant was dismissed by the Respondent on 18 May 2009 because;

    18.1 It was not denied that that was the last day that the Applicant worked for the Respondent.

    18.2 There was no evidence that the Applicant resigned from her employment on that day or any other day thereafter. There was also no evidence that she was suspended by the employer.

    18.3 The evidence that the Respondent's Managing Director offered the Applicant payment of E73, 000:00 as terminal benefits was not in dispute. There can be only one reason why the Managing Director made the offer of terminal benefits to the Applicant on that day and that is, he was terminating her services.

18.4 The evidence that the Applicant was ordered by Mr. Stuart to pack her belongings and that she was driven home by the company car was not disputed.

18.5 On that day, 18 May 2009, the Applicant left the Respondent's employ at the instance of the Managing Director, Mr. Stuart. There was no evidence that at any time after the events of 18 May 2009, Mr. Stuart recalled the Applicant and instructed her to resume her duties and she refused.

18.6 There was no evidence that when the Applicant left the Respondent's employ on 18 May 2009, it was on the basis of a suspension or resignation. The notification of suspension relied upon by the Respondent was dated 17 July 2009 and was received by the Applicant's representative on 21 July 2009, two months after the Applicant had left the Respondent's employ on 18 May 2009.

18.7 The Applicant's evidence that she never received any letter of dismissal or minutes of any disciplinary hearing was not disputed. Indeed, the Respondent failed to produce any of these documents before the Court during the hearing of the matter.

18.8 Even though the Applicant admitted that there was some money that was deposited into her account once or twice when she was at home, there was no evidence before the Court to prove that she

was paid for all the months that she was at home without a break. In fact, the Respondent stated in paragraph 10.2 of its Reply that the Applicant was only paid for June and July 2009. The only reasonable conclusion why the Applicant was not paid her salary for May 2009 is that Mr. Stuart knew that he had dismissed the Applicant on 18 May 2009 and he only decided to pay salaries for June and July 2009 in a bid to cover up his unlawful conduct by creating the impression that the Applicant was still on payroll and therefore an employee of the Respondent.

18.9 Mr. Stuart himself stated under oath in the application for an interdict against the Applicant at the Manzini Magistrate's Court, case number 2441/09, in paragraph 7 of the founding affidavit that on 18 May 2009 the Applicant ceased to be an employee of the respondent.

19. **WAS THE DISMISSAL FOR A FAIR REASON:-**

During cross examination Mr. Stuart told the Court that he dismissed the Applicant in writing after everything else had failed. Mr. Stuart however failed to produce any letter of dismissal before the Court.

20. According to the evidence by Mr. Stuart, the disciplinary hearing against the Applicant was held in the absence of the Applicant because she failed to present herself after due notice. The Applicant told the Court that she did not attend the disciplinary hearing because she was no longer an employee of the Respondent having been dismissed on 18 May 2009.

21. As already pointed out herein, there was no letter of dismissal that was produced before the Court. There were no minutes of any disciplinary hearing that were filed with the pleadings or produced in Court during the hearing.

22. The Court however does not sit as a review or appeal Court for disciplinary hearing proceedings. The Industrial Court makes its own finding based on the evidence led before it. The next inquiry therefore is; from the evidence led before the Court, did the Respondent establish that there was a fair reason for the dismissal of the Applicant. The burden of proof was on the Respondent to prove on a balance of probabilities that the reason for the termination of the Applicant's services was one permitted by Section 36 of the **Employment Act** and that, taking into account all the circumstances of the case, it was reasonable to terminate the services of the Applicant.

(**See:- Section 42 (2) of The Employment Act No.5 of 1980 as amended.)**

23. The evidence revealed that the Respondent preferred six charges against the Applicant on 17 July 2009. The Applicant was informed therein that the disciplinary hearing would be held on 05 August 2009 at the Respondent's premises.

24. On Count 1, the Applicant faced a charge of gross misconduct, it being alleged that on or about 12 December 2008 she failed and /or refused to take minutes of a disciplinary hearing despite being instructed to do so by Mr. William Stuart, thereby committing the misconduct of insubordination. It was clearly unfair to prefer this charge against the Applicant. The Court says this because it was alleged that the offence was committed on or about 12 December 2008 and the Respondent decided to institute disciplinary proceedings on17 July 2009, seven months later. Disciplinary proceedings against an employee must be instituted within a reasonable time after the issue comes to the knowledge of the employer. The delay was clearly unreasonable taking into account that there was no evidence that the Respondent was carrying out any investigations on the matter.

25. The Applicant told the Court that she never refused to take instructions to take minutes of the disciplinary hearing. The Applicant said that she only recalls being instructed by Mr. Stuart to discipline Sandile Shongwe for alleged theft of fuel. The Applicant told the Court that she failed to carry out that instruction because she was being asked to do something that was irregular. The Applicant said it was irregular for her to deal with the matter without it first having been dealt with by the accused employee's immediate supervisor. The Applicant said that it was her duty to advise the Respondent Managing Director on the proper disciplinary steps to be taken. This evidence by the Applicant was not disputed.

26. From the evidence presented before the Court, it cannot therefore be said that the Applicant committed any misconduct by failing to do something that was irregular in terms of the internal procedures of the Respondent. There is no obligation on an employee to carry out an irregular or unlawful instruction by the employer. The employer's instruction must be both lawful and reasonable.

27. The Applicant should not, therefore, have been dismissed based on Count 1.

28. On Count 2, the Applicant was charged with the offence of breach of trust, it being alleged that on 27 January 2009 she approached the Respondent's

attorney, Gigi Reid and attempted to enlist her assistance in convincing Mr. Stuart of the innocence of Sandile Shongwe pertaining to the charge of theft or misuse of fuel and asked Gigi Reid not to mention her visit and purpose to Mr. Stuart.

29. There was no evidence led before the Court to prove this charge. The Respondent's Attorney Gigi Reid was not called to testify before the Court to prove these allegations against the Applicant. This charge cannot therefore be sustained. The Applicant should not have been dismissed based on this charge.

30. On Count 3, the Applicant faced the charge of breach of trust/conflict of interest, it being alleged that after she was informed that the company was not going to pay legal fees or bail for Bongani Masuku who had been arrested after he was found transporting dagga across the border in a company motor vehicle, the Applicant opted to pay for the legal fees and bail for the said Bongani Masuku from her personal funds.

31. The evidence led before the Court revealed that after the driver by the name of Bongani Masuku was arrested by the South African Police at Oshoek Border gate, he contacted the Applicant who was also performing the functions of Human Resources Manager at the Respondent's establishment. The Applicant

tried to contact the Respondent's Managing Director but she failed. The Applicant using her discretion as the Human Resources Manager of the company, paid the legal fees and an attorney was secured in the Republic of South Africa who applied for bail on behalf of the driver and the driver was released on bail.

32. During cross examination Mr. Stuart admitted that the Applicant did not use the company funds to pay the legal fees and bail for Bongani Masuku. The Applicant told the Court that she assisted Bongani Masuku so that he could be released from police custody and come back home so that an internal investigation could be carried out. The Applicant said she could not proceed with the internal investigations because the employer started to 'fight' her.

33. The evidence before the Court showed that the Applicant was in charge of the operations of the Respondent. She also doubled as the Human Resources Manager. The driver of the truck having been arrested in a foreign land, she had the duty to see to it that the welfare of the company employee was taken care of. The Applicant told the Court that Bongani Masuku was the driver of the truck and was not responsible for loading the goods. She told the Court that on that day, Bongani Masuku had arrived in the morning from Johannesburg and was released to go and take a rest. He was called in the

afternoon to make another trip to South Africa. He was not in the Warehouse when the parcel arrived and packed in the truck.

34. In her capacity as the Human Resources Manager of the Respondent, the Applicant had the duty to take care of the welfare of the employees. She denied that Mr. Stuart had instructed her not to assist the driver. Instead, she told the Court that she tried to contact Mr. Stuart by telephone to report the incidence but she could not get hold of him. Mr. Stuart himself told the Court that he was in and out of the country most of the time. Assuming for one moment that Mr. Stuart instructed the Applicant not to help the driver, there was no evidence that Mr. Stuart instructed the Applicant not to assist the driver even by using her own money.

35. The evidence before the Court revealed that the driver was released as the Crown withdrew the charges against him. **(See:- page 26 of "R1").**

36. There was clearly no evidence before the Court to suggest that there was any breach of trust or conflict of interest in the manner that the Applicant performed her duties regarding the issue of the arrest of the truck driver. She did not use the company funds to assist the driver. There was no evidence that she acted in violation of any company policy or regulation by securing the release of the driver from police custody in a foreign land. The arrest of the

driver did not mean that he was guilty of any crime. In terms of our law, a person is presumed innocent until proven guilty. In any event, even if the driver was found to have committed a crime by the criminal Court of the Republic of South Africa, that on its own could not have entitled the Respondent to dismiss the driver. The Respondent would have had to conduct its own internal enquiry and subject the driver to a disciplinary hearing and if found guilty, only then could the Respondent had been entitled to dismiss him. Indeed, the Applicant told the Court that she assisted the driver because she wanted to secure his release from police custody so that he could return home in order for an internal investigation to be carried out. That evidence was not disputed. The Applicant should not, therefore, have been dismissed based on this charge.

37. On Count 4, the Applicant was charged with breach of trust, it being alleged that she acted against the interest of the company in chastising the Warehouse Manager, Mr James Nhlengetfwa, for disclosing to the employer the breach of procedure in the handling of the parcel later found to have contained dagga and disclosing that the parcel had not been delivered at the Warehouse prior to dispatch.

38. There was no admissible evidence led by the Respondent to prove the commission of this offence. The Respondent's Warehouse Manager did not

testify before the Court. There was no evidence that he could not testify because it was impossible for him to appear before the Court. The evidence by Mr. Stuart was clearly inadmissible hearsay evidence. There was no evidence that Mr. James Nhlengetfwa testified during the disciplinary hearing, if any was held at all. Applicant should not have been dismissed based on this charge.

39. There being no admissible evidence led before the Court to support the charge on Count 4, the Court will come to the conclusion that it was unfair to dismiss the Applicant based on that charge.

40. In Count 5, the Applicant faced the charge of acting against the interest of the company in that having knowledge that her son, Thami Masangane, had received E1, 528.50 from a client on 14 December 2008 which had not been banked or handed over to the company, she failed to notify the Managing Director of this anomaly or take any action whatsoever.

41. Again, as already pointed out by the Court when dealing with Count 1 herein, it was unfair to charge the Applicant with an offence that is alleged to have occurred about seven months earlier in December 2008. No reason was given by the employer why it had to wait for seven months to prefer the charge

against the Applicant. There was no evidence that the Managing Director only became aware of the alleged anomaly in July 2009.

42. There was also no evidence led before the Court of the Respondent's financial procedures regulating the handing over or banking of funds collected from clients by the drivers. During cross examination, Mr. Stuart agreed that the person who was responsible for receiving money was the accountant, Constance Mabuza. The Applicant told the Court that the money that was collected by Thami Masangane from the client based at Mhlume was remitted and was received by the accountant, Constance Mabuza. The Applicant said after that money was remitted to the accountant, the Managing Director authorized the accountant to use that money for the end of year party. Mr. Stuart did not directly deny this evidence during cross examination. He only said, *"Accounting procedures do not allow that kind of transaction. It was supposed to be banked in order to be accounted for."*

43. The accountant, Constance Mabuza, was not called to testify before the Court. There was no explanation given to the Court why she could not come to Court to testify. The Court will therefore accept the Applicant's version that the Respondent's driver, Thami Masangane, did remit the amount of E1, 528.50 that he had collected from a client at Mhlume to the accountant and that the Respondent authorized the accountant to use that money for the end of year

staff party. The Applicant therefore ought not to have been dismissed on the basis of this charge.

44. The sixth charge was that of insubordination, it being alleged that the Applicant caused the re-engagement of a security guard from Fidelity Security Guards on or about April/May 2009, notwithstanding that the Warehouse Manager James Nhlengetfwa had, with authority, given directive to the Security Company to remove the guard due to suspicions of dishonesty and to replace him.

45. The Warehouse Manager, James Nhlengetfwa did not testify before the Court. There was no evidence that the Applicant was aware that the security guard had been officially replaced by Mr. James Nhlengetfwa. During cross examination the following evidence was elicited from Mr. Stuart;

"Q. You said the Applicant allowed a security guard to return to work.

A. Yes I said that. She overruled my request and brought him back.

Q. Where were you when she said that?

A. I can't recall. I was in and out of the country and when I made my investigations I discovered that it was the Applicant who made him to return. I got that information from Mr. James Nhlengetfwa. The

Applicant was the senior person; no one else could have done that except the Applicant.

Q. Was the Applicant told that the security guard had been sent away?

A. Nhlengetfwa chased him away. It's only the Applicant who could allow him back.

Q. Did Nhlengetfwa tell the Applicant that he had removed the guard?

A. I'm not personally aware."

46. Mr. Stuart's admission that he was not personally aware whether the Applicant knew that the security guard had been removed by Mr. James Nhlengetfwa, and also his admission that he got the information from James Nhlengetfwa was an admission that he was telling the Court hearsay evidence. There was no evidence that Mr. James Nhlengetfwa has relocated to another country and that it was impossible to secure his attendance or his evidence on affidavit.

47. There being only inadmissible hearsay evidence led before the Court, it cannot be said that the Respondent was able to prove the charge against the Applicant. The Court will therefore come to the conclusion that the dismissal of the Applicant substantively unfair.

48. On the issue of procedural unfairness, the Respondent's attorney argued that the Court should find that the dismissal of the Applicant was procedurally fair because the Applicant was offered the opportunity to be heard, but she failed to avail herself of it. The Respondent's attorney's argument was based on **Exhibit "A"** which is the notification of suspension and the disciplinary charges preferred against the Applicant.

49. The suspension was issued on 17 July 2009 when the Applicant was already at home having been dismissed by the Respondent on 18 May 2009. The letter of suspension and the charges were served on the Applicant's lawyer on 21 July 2009, two months later after the Applicant was dismissed on 18 May 2009.

50. The Respondent's attorney argued that as the Applicant was given the opportunity to be heard, albeit after she had already been dismissed, she cannot complain and say that she was not given the opportunity to be heard. The respondent's attorney relied on the judgement of the Labour Appeal Court of South Africa in the case of **Semenya & Others V Commissioner for Conciliation, Mediation and Arbitration & Others, (2006) 6 BLLR 521 (LAC)** where the Labour Appeal Court stated in paragraph 21 that;

"……It is not our law that an opportunity to be heard that is given after the relevant decision has been taken is never good enough. Although generally speaking such an opportunity should be given before the decision can be taken, there are circumstances where an opportunity to be heard that is given after the decision has been taken is acceptable. Where the opportunity to be heard is given after the decision has been taken and it is one of those situations where it is acceptable and the person does not make use of it, it cannot lie in such person's mouth to say that he was not given an opportunity to be heard. In such a case an opportunity to be heard has been given and rejected. The audi alteram parten rule has been rule has been complied with in such a case."

51. The Court is in respectful agreement with the above position of the law laid down by the Labour Appeal Court of South Africa. The golden rule remains, however, that each case must be judged in terms of its own peculiar facts and circumstances.

52. The evidence in this case also revealed that the Applicant was informed in the letter of notification of the charges dated 17 July 2009, that she had the right to appeal. The evidence before the Court that the Applicant was never served with any letter of dismissal or with the minutes of the disciplinary hearing was not challenged. The minutes of the disciplinary hearing and the letter of

dismissal were not produced in Court. Even if, therefore, the disciplinary hearing was held in the absence of the Applicant, the failure to furnish her with the record of the disciplinary hearing and the letter of dismissal meant that she was denied the opportunity to exercise her right to appeal. There was no way that the Applicant could lodge the appeal without having read the record of the disciplinary hearing.

53. The dismissal of the Applicant was therefore also procedurally unfair.

54. **Relief:-**

The evidence revealed that Mr. Stuart instructed the Applicant to pack her belongings and leave the company premises after she failed to accept the amount of E73,000.00 offered to her as terminal benefits. She was dispossessed of the company car that was allocated to her for work purposes. The Applicant said she was maltreated by Mr. Stuart in full view of the other employees at the workplace. There was no doubt from the evidence before the Court that she was thoroughly embarrassed and humiliated. She told the Court that she suffered a heart problem and minor stroke for which she is still treated to date.

55. She told the Court that at the time of her dismissal she was building her home and that that project had to be abandoned. She told the Court that she was

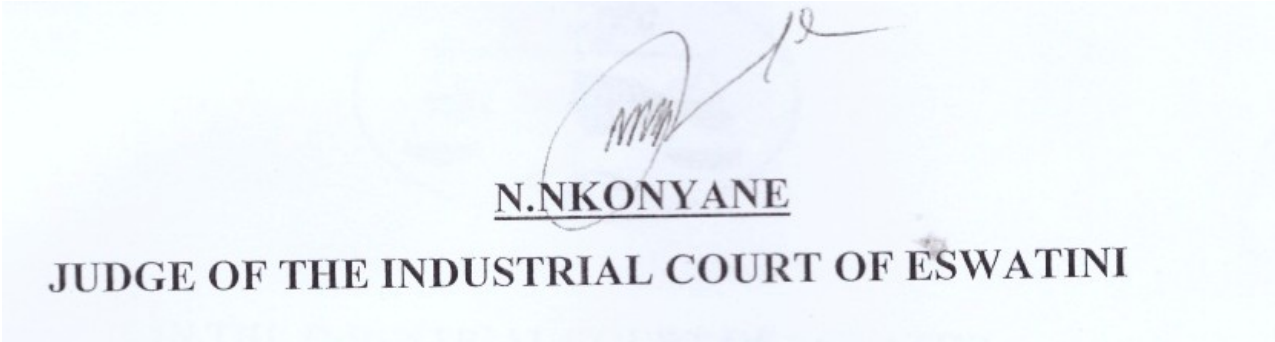
blacklisted. At the time of her dismissal her husband was still alive. Her husband has since passed away. The Applicant had served the Respondent for about ten years with a clean disciplinary record. Taking all these factors into account, the Court is of the view that it will be fair, just and equitable to award maximum compensation to the Applicant.

56. The Court will accordingly make an order that the Respondent pays to the Applicant the following;

a)	Notice pay	E 8, 175.00
b)	Additional Notice	E13, 608.00
c)	Severance Allowance	E34, 020.00
d)	Compensation (12xE8,175:00)	E 98, 100.00
	Total	**E153, 903.00**

e) Costs of suit.

57. The members are in agreement.



N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant:	Mr. I. Mahlalela (Attorney at Madzinane Attorneys)
For Respondent:	Mr. T. Hlandze (Attorney at Gigi A. Reid Attorneys)