



IN THE INDUSTRIAL COURT OF ESWATINI

JUDGEMENT

CASE NO. 440/2013

In the matter between:-

SUPER MABUZA

APPLICANT

AND

ROYAL SWAZILAND SUGAR CORPORATION

RESPONDENT

Neutral citation : *Super Mabuza v Royal Swaziland Sugar Corporation (440/2013) [2019] SZIC 30 (27 March 2019)*

CORAM : **DLAMINI J,**
(Sitting with A.S. Ntiwane & S.P. Mamba Nominated Members of the Court)

Last heard : **15 February 2019**

Judgement Delivered : **27 March 2019**

Summary: *Labour law – Unfair Dismissal: Applicant charged with gross negligence and dishonesty misconduct following the disappearance and subsequent discovery of flesh which when tested through DNA sampling was confirmed as that of missing employee Lucky Sifundza. After a disciplinary hearing Applicant was found guilty dismissed. Held: Gross negligence is a conscious and voluntary disregard of the need to use reasonable care, which is likely to cause foreseeable grave injury or harm. Held further: The Applicant did not consciously and voluntarily disregard the need to use reasonable care. The Applicant's failure to stop the mill did not constitute gross negligence. Held Further: Dishonesty entails a lack of integrity and straightforwardness, in particular a willingness to lie – there must be proof of intention to deceive. In casu there is no proof, on a balance of probabilities, that in compiling his report, the Applicant had an intention to deceive or lie to the Respondent. The Respondent, therefore, has not been able to discharge the onus of proving that the Applicant's dismissal was reasonable in the circumstances. Held: Applicant's application accordingly succeeds.*

1. A single death, no matter the circumstances, is a tragedy. This present matter of Super Mabuza against his former employer Royal Swaziland Sugar Corporation arose as a result of a very tragic occurrence. On 23 May 2012, or there about, at the Mhlume Sugar Mill the life of Lucky Sifundza came to an abrupt end. Nobody seems to know how exactly Sifundza died. Evidence though indicates that a piece of his flesh was discovered in the mill, indicating that he must have been crushed in the mill. A tissue sample of the flesh was taken to a laboratory for identification purposes. According to the pathology report, blood samples were also taken from Sifundza's biological parents and his daughter. Through DNA profiling it was confirmed that indeed the piece of flesh discovered in the mill belonged to the Lucky Sifundza.
2. Following the confirmation by the DNA profiling that indeed the piece of flesh discovered in the mill belonged to Lucky Sifundza, the Applicant to these proceedings, Super Mabuza, was slapped with five (5) counts. Two (2) of these five counts were classified under gross negligence and the remaining three were classified under dishonesty.
3. The charges preferred against the Applicant were as follows;

GROSS NEGLIGENCE:

COUNT 1

In that on the 23rd May 2012, during your shift i.e. 1800hr to 0200hr, during the search for Lucky Sifundza, operators asked you to stop the mill so that they could search in the intercarriers and you refused. This is despite the fact that you had been told by the operators that Lucky was last seen on the mill platform carrying two plates, and only one of the plates he was carrying was found next to no.5 intercarrier.

COUNT 2

As shift supervisor, you failed to ensure that the operators on the mill started the plant, according to correct normal procedure. Albert Nkalanga left his position on the mill platform and went to assist the mill turbine attendant, whilst he abdicated his responsibility to the juice pump attendant. This happened on the 23rd May 2012 and was not happening for the first time and you were fully aware of this breach of procedure.

DISHONESTY

COUNT 3

You have claimed upon questioning that you are not aware what happened to Lucky Sifundza, yet some flesh was recovered from bagasse conveyor no.4 was confirmed by DNA testing to be that of Lucky Sifundza. This shows that Lucky's remains came through with bagasse which comes from the mills. You were within the mill house and you are the shift supervisor, it is therefore inconceivable that you will not see or hear of someone that died within your shift and who works in your area.

Count 4

Dishonest in that your report to senior management after the 23rd May 2012 you completely refuted any possibility that Lucky could have been killed in the intercarriers. By virtue of your position of being 1st line manager as shift supervisor, senior management was hindered in making the correct decision on time, before the discovery of the flesh in bagasse conveyer no.4

Count 5

Dishonesty alternatively dereliction of duty in that you failed to disclose the events that led to the death Lucky Sifundza yet his remains were found in the bagasse conveyor, more human tissues discovered in the effluent oil traps and the cooling towers show that Lucky Sifundza death was covered up as these systems are not physically linked to the bagasse system. [Sic]

4. At the conclusion of the hearing, the Applicant was found guilty in respect of 3 of the 5 counts he was facing. He was found guilty of gross negligence, the allegation against him being that when operators asked him to stop the mill so that a search for Lucky Sifundza could be conducted, he refused. He was also found guilty on two counts of dishonesty. The first being that he claimed upon questioning that he was not aware what happened to Lucky Sifundza yet some flesh that was recovered from bagasse conveyor no.4 was confirmed by DNA testing to be that of Lucky Sifundza. The Chairperson also decided that the Applicant was guilty of dishonesty in that in his report to senior management after the 23rd May 2012, he completely refuted any possibility that Lucky Sifundza could have been killed in the inter-carriers.

5. Following the verdicts of guilty in the 3 counts, the Applicant was dismissed by the Respondent Employer. He appealed against the sanction of dismissal but was unsuccessful. He has now approached this Court for determination of

the dispute. He contends that his dismissal was procedurally and substantively unfair because a) he was not given sufficient time to prepare for his disciplinary hearing and b) in that the Respondent was unable to prove the allegations of misconduct against him. The Respondent on the other hand maintains its stance that the dismissal of the Applicant followed due process and that it was for fair reasons. It contends that the Applicant refused to heed a call by his subordinates to stop the mill and that by so doing he prevented efforts to conduct a thorough search of the missing Sifundza within the precincts of the mill. The Respondent further contends that the Applicant was dishonest when compiling his report in that he refuted the possibility that Lucky Sufundza could have died, notwithstanding information by his subordinates to the contrary, and that by so doing prevented Management from acting promptly in shutting down the mill and investigate his whereabouts.

6. The evidence of the Applicant under oath was as follows; he was employed by the Respondent on 01 March 1995 and was dismissed on 26 February 2013, after a disciplinary hearing. At the hearing he was facing the 5 charges as outlined at paragraph 3 above. He entered a plea of not guilty to all the charges but was found guilty nonetheless.

7. At the time of his dismissal he was the Shift Supervisor and his paramount duties were to supervise the running of the mill and ensure that sugar cane was of good quality and quantity and that it was processed timeously. According to the Applicant, on the fateful day, 23rd of May 2012, he was informed between 7:30 – 7:45pm that Lucky Sifundza was missing. At the time he received this information he was in his office. He went down to Sifundza's work station in the ground to ascertain what exactly had happened. There he found Elijah Mavuso (Juice pump Attendant) and asked him where Sifundza was, and the response he got from Mavuso was that he had last seen Sifundza some 15 minutes earlier.
8. The Applicant then started going around the mill searching and asking if anyone had seen Sifundza. He first went towards the ablutions in the workshop and then to the cane yard. He then went to the main gate and asked the security personnel manning the gate if they had seen Sifundza, but no one had seen him. The Security personnel informed him that none of the night shift employees had clocked out. At the main gate he ascertained that Sifundza's clock card was still in its place, indicating that he had not clocked out.

9. As he was leaving the main gate, he bumped into Dumisani Maseko (RW 1), a General Labourer, and instructed him to go and look for Sifundza in the staff quarters. He also got hold of Sifundza's cellphone number and called him but his number was not available. He then went back to his office and started making calls to the other Supervisors informing them about the disappearance of Sifundza. He also informed his immediate Supervisor (Sifiso Dlamini – RW2) about the disappearance of Sifundza. The Standby Manager, Hans Buitendag and the Factory manager, Thulani Dlamini were also informed about the disappearance.
10. According to the Applicant, from the time he was informed of Sifundza's disappearance, he was actively involved in the search for him. He also solicited the help of the other shift supervisors who assisted in the search for Sifundza. At one point, he instructed all the employees in his department to join the search team. When the physical search for Sifundza yielded no results, the Applicant instructed the diffusor Operator, Dumisani Magagula, to stop intercarrier No.1 for some three minutes and restart again. The Applicant's evidence in this regard was that when inter-carrier no.1 was restarted a loud alarm/siren sound would go off, and the hope was that even

Sifundza would hear it wherever he was. However with all the measures invoked, there was still no trace of Sifundza.

11. At about 10pm the search party was joined by Hans Buitendag. Buitenndag insisted that they search again in all the areas the Applicant and his team had been to, still without any success. Buitendag even went to the extent of instructing the Security personnel to also join in the search. At about midnight the Applicant and Buitendag went to his (Buitendag's) office where calls were made to the Safety and Health Officer Sandile Ndwandwe and the police, informing them about the disappearance. At 1:00am the police came and they were informed of the disappearance and they also joined in on the search. The search for Sifundza continued up to 5:30am without any positive results. After 5:30am the Applicant finally decided to knock off to take a breather after more than 10 hours of searching for Sifundza.
12. Under cross examination the Applicant conceded that his dismissal was procedurally fair even though he had qualms with some of the procedural processes. He informed the Court that if as a Supervisor, he had reason to believe that an employee had accidentally fallen into the mill, he has to stop the mill promptly to retrieve whosoever has fallen into the mill. He

confirmed that as Supervisor he had the power to stop the mill if he had tangible evidence of an accident having occurred.

13. Still under cross examination, the Applicant explained that when he was informed of Sifundza's disappearance, nobody knew exactly as to when he had disappeared. He explained that after the mill tripped, he established that this power trip was caused by a faulty welding machine. The mill was restarted and indications were that everything was fine because everyone was at their duty station, including Sifundza. He pointed out that after resetting the mill and restarting it, he waited for the plant to start up from inter-carrier no.6 to no. 1, and it ran for some time after start up without any malfunction, which indicated that everyone was supposed to be where they were. Having satisfied himself that everything was fine, he went back to his office.
14. When probed further on whether he had specifically checked if every employee was at their duty station, especially Sifundza, the Applicant explained that he did not exactly check to verify if every employee was at their duty station, but looking at how the plant was running, without any malfunction, he knew then that everyone was at his work station. He maintained that since the system was running and functioning perfectly, then

all was well and good. According to him there was no reason for him to suspect that there was something amiss since the system was functioning perfectly. The Applicant reiterated that had Sifundza not been at his duty station on the start-up, there would have been a malfunction of the whole system, and since there was no such malfunction, then it means everyone was where they were supposed to be. He conceded that he did not physically check if Sifundza was at his work station, and he attributes his none checking to the plant functioning well, which means even Sifundza was poking in his workplace. Upon the start-up, according to him, his main priority was to inspect and ensure that the plant was running properly, which he did.

15. The Applicant vehemently denied that by not physically checking that all employees were at their work stations he was grossly negligent. He testified that he received the report that Sifundza was missing some 45 minutes after the start up, and that his colleagues (Sifundza's) were alarmed at his disappearance. But, according to the Applicant, there was nothing to suggest that he had fallen into and had been crushed by the intercarrier, because nobody saw anything, even those who were working with him poking the crushed sugar cane said they had no idea where he had disappeared to. He conceded though that they were alarmed at his disappearance, especially

because when he was last seen he had been carrying 2 porcelain food container items, and that one of these was later found on the floor broken. He clarified though that the broken plate was not discovered immediately after the start up or after it was noted that Sifundza had disappeared but after some time.

16. The Applicant was also cross examined at length on the alleged request for him to stop the mill because there was suspicion that Sifundza had fallen into the inter-carrier. However, he persistently denied and disputed that he had been so requested to stop the mill. He denied that Dumisani Maseko specifically came to him in the diffuser room to request that the mill be stopped so that search could be conducted for the missing Sifundza. Instead, according to the Applicant, when Maseko came to the diffuser room he only spoke to Goodman Magagula and not him, and by that time he had already been made aware that Sifundza was missing.
17. When questioned further by the Respondent's representative, Attorney Mr. Shabangu, on why he did not take it upon himself to stop the mill to conduct a thorough search for Sifundza, the Applicant informed the Court that there was nothing tangible at the time to suggest that Sifundza had fallen into and

was crushed by the inter-carriers. He insisted that no one requested him to stop the mill to allow a search for Sifundza in the inter-carriers because there was no evidence that he had fallen into and had been crushed by the mill. He further testified that stopping the mill could not be his calling but needed someone more senior than him to give the instruction to stop the mill. Even when senior management came to the mill after he had informed them about the disappearance, none of them suggested that the mill be stopped so that a search for Sifundza could be conducted in the mill.

18. The Applicant was questioned about the report he compiled on the incident in which he attributed the disappearance of Sifundza to desertion. He confirmed compiling the report in question but stated that he attributed Sifundza's disappearance to desertion because he was not sure of his behavior on the day in question. He was merely speculating and that what he captured in his report was merely his opinion which he hoped management would verify as well. He denied that he was being dishonest in suggesting that Sifundza could have deserted. He also clarified that his report was not compiled on the same day of the disappearance of Sifundza and that even at that time nobody had an idea of what might have happened to Sifundza. That was the case for the Applicant.

19. First to testify in support of the Respondent's case was Dumisani Maseko. At the time of Sifundza's disappearance he was a general labourer and was in the same shift as the deceased Sifundza on the fateful night. The evidence of Maseko was as follows; on 23 may 2012, the Applicant came to the canteen where he found him together with Johane Dlamini, Thamsanqa Simelane, Sive Vilane and Lucky Dlamini. Upon entering the canteen the Applicant asked Maseko to go and look for Sifundza as he had been reported missing. This was after 7:00pm.
20. Upon learning that Sifundza was missing, this witness says he questioned the Applicant how it was possible that Sifundza had disappeared when the mill had been running smoothly all along. He clarified that he asked this question because he knew that the mill would not run for a long period without any blockages if Sifundza was not at his work station doing the poking. They searched for Sifundza in the dark alleys and corners assuming he might have fallen asleep somewhere but without success.
21. As the search for Sifundza progressed, this witness says he came across Jabulani Dlamini and informed him about the disappearance and search for Sifundza. Jabulani Dlamini was surprised that Sifundza had disappeared and

that there was a full blown search for him. He was not convinced that Sifundza had disappeared because he had personally earlier seen Sifundza in his work station which was next to Elijah Mavuso. So unconvinced was Jabulani Dlamini that Sifundza was missing that he even told this witness that he was crazy to suggest that he had suddenly disappeared when he had seen him just earlier on.

22. After searching for some time without any success, this witness says he then had a discussion with Lucky Dlamini and Goodman Magagula and they decided that it would be best to stop the mill so that a proper search could be conducted in the inter-carriers. At first he says he asked Goodman Magagula to request the Applicant to stop the mill. When the mill did not stop Maseko says he then personally approached the Applicant in the control room to ask that the mill be stopped so that a thorough search could be conducted. According to Maseko, the Applicant did not respond to his request that the mill be stopped and did not stop it either. Instead he took out a torch and gave it to Maseko, with the instruction that he should go and look for Sifundza in his house. Indeed he went to Sifundza's house in the staff quarters and did not find him.

23. Maseko's further testimony was that on returning to the mill from the staff quarters he, together with Lucky Dlamini went to Sifundza's work station and questioned Elijah Mavuso on the disappearance of their colleague. The response he got from Elijah was that Sifundza had died – in vernacular he said '*...umnaketfu ufile*'. He says he did not ask Elijah what exactly he meant by that statement. When questioned by Attorney Mr. Shabangu why he insisted that the mill be stopped, this witness informed the Court that he assumed that if Sifundza had been involved in an accident then the mill ought to be stopped so that a search could be conducted everywhere.
24. Under cross questioning by the Applicant's representative, Attorney Mr. Simelane, this witness confirmed that when he requested the Applicant to stop the mill, he (Applicant) did not respond. However, according to Maseko, the fact that the Applicant did not respond to the request for stopping of the mill coupled with the fact that the mill continued running means that he was refusing to stop the mill. Attorney Simelane questioned him as well on the number of times he made the request for the mill to be stopped, and Maseko's response was that he had made the request 2 or 3 times, and at different locations. His statement though, which was recorded immediately after the incident also makes no mention that he had asked the Applicant 2 or

3 times to stop the mill. When the Applicant's Attorney brought this fact to his attention and the importance of having mentioned it in his statement, Maseko informed the Court that he did not see the need of recording it in his statement.

25. In the statement recorded by Maseko, he states that he suspected that Sifundza was killed before the mill trip, his body was then retrieved during the mill trip because pieces of his flesh were discovered in parts of the mill where the bagasse does not flow to. When questioned on whether he was called as a witness at the disciplinary hearing of the Applicant, Maseko informed the Court that he was never called. However, the minutes of the disciplinary hearing indicate that he was called as a witness but he insisted that he was never called to testify at the hearing of Super Mabuza. In his statement, Maseko also stated that he suspected that by sending him to look for Sifundza in his house he suspected that the Applicant was trying to get rid of him because he was requesting that the mill be stopped.
26. Maseko was also questioned on whether he was aware that Hans Buitendag also came to the mill during the search for Sifundza and he confirmed that he had seen Buitendag during the course of the search. Interestingly though he

never bothered to confront Buitendag with the request that the mill be stopped to conduct a search for Sifundza in the inter-carriers, seeing that the Applicant had ignored his request for the mill to be stopped. If anything, he was aware or ought to have been aware that Buitendag was more senior than the Applicant but he did not see the need of informing him about the request for the mill to be stopped.

27. Under re-examination by the Respondent's Counsel, witness Maseko was also asked as to which arears had not been searched when he made the request that the mill be stopped, and he informed the Court that they had searched everywhere and the only place remaining was the inter-carriers, which could not be searched whilst the mill was running. The Court then questioned him as to how much time had passed from the time when the disappearance of Sifundza was discovered, to the time he made the request for the mill to be stopped, and his response was a full 4 hours had lapsed when he eventually made the request that the mill be stopped.
28. At the conclusion of Maseko's re-examination by his Counsel the Court sought for an explanation from him on why, according to his statement, he says he suspected that Sifundza was murdered before the mill trip and later

retrieved during the mill trip and his body planted elsewhere? He explained that he suspected that Sifundza was killed because the pieces of his flesh were discovered at a different section of the mill where the bagasse from the inter-carriers did not flow to. He further explained that he was saying Sifundza was murdered because if it had been an accident, his helmet would have fallen off and would have been found. But since the helmet was never found next to the inter-carrier, it means that he was thrown into the mill and his body later retrieved and planted in effluent and cooling towers.

29. The Court further questioned Maseko on who he suspected to have retrieved the body of Sifundza and planted it where his flesh was discovered, and his response was that he suspected those working with him in the inter-carriers. He named them as Elijah, Mgcibelo Mahlalela, Sive Vilane and Johane Dlamini. When questioned on whether the Applicant worked close to Sifundza, his response was that he (Applicant) did not, instead he was always stationed in the control room.
30. The Court also questioned Maseko on his request to the Applicant to stop the mill. He reiterated that he made the request for the stopping of the mill some 4 hours after he learnt that Sifundza had disappeared. When questioned if

there was a possibility that, when he made the request for the stopping of the mill, Sifundza could have been found alive, his response was an emphatic no. He maintained that Sifundza was killed before the mill trip and that during the trip the lights went off, that is when he suspects the body was retrieved and planted elsewhere within the mill.

31. From the questions by the Court, the Applicant's Counsel wanted to know from Maseko how it would have benefitted him if the Applicant had stopped the mill when he made the request. His response was that this would have excluded the possibility that Sifundza had died in the inter-carriers and would have helped them know that they had searched everywhere else and not found him.
32. The second and last witness to testify in support of the Respondent's case was Sifiso Dlamini. He is currently employed as the Engineering Manager in the Mechanical department. During the period of the disappearance of Sifundza he was the Front End Engineer at the Respondent's undertaking and the Applicant was his direct subordinate.

33. Dlamini testified that on the night of 23 May 2012, he received a call from the Applicant informing him of the disappearance of Sifundza and that they were currently searching for him. He also got to learn from the Applicant that he (Applicant) had sent one of the employees to go and look for Sifundza in his house in the staff quarters. The Applicant promised to keep this witness updated with feedback as the search progressed.
34. He did not receive any feedback from the Applicant until the next morning when he started his shift at 7am. When he started his shift he found the Safety Manager (Sandile Ndwandwe) in discussion with a Union official (Siboniso Dlamini) that the mill needed to be stopped. When he asked why they wanted the mill stopped they responded harshly, asking him why he wouldn't want the mill stopped when an employee was still missing. That was when he learnt that Sifundza was still missing, and the suspicion was that he had been killed or crushed in the mill.
35. This witness was shocked and taken aback to learn that the suspicion was that Sifundza had been killed or crushed by the mill. He asked if there were any witnesses who could come forward and shed some light on this and was told that nobody had seen anything. He also got to learn that the incident had

already been reported to the Police, the Factory Manager, Duty Manager and the Human Resources Manager. He was surprised at these revelations because nothing had been reported to him by the Applicant.

36. On probing further witness Sifiso Dlamini learnt that no one has seen or witnessed anything in relation to the disappearance of Lucky Sifundza. He was surprised at this revelation because normally the platform where Sifundza worked is always milling with employees and it was therefore inconceivable that nobody had seen anything. As far as Dlamini was concerned somebody should have seen something and immediately asked that the mill be stopped. To him it was unacceptable that nobody had seen anything.
37. He summoned the shift supervisor to his office and learnt that the Applicant had sent an email to him (Dlamini) notifying him of the incident and detailing what steps he (Applicant) had taken in getting to the bottom of this mystery. In this email, according to witness Sifiso Dlamini, the Applicant had apparently concluded that the disappearance of Sifundza could be linked to desertion because they had searched everywhere for him without success and there was nothing to indicate that he could have been killed in the mill.

38. Whilst discussing the issue with the shift supervisor, the Safety Manager and Union Official came to his office and made a request that the mill be stopped so that a search could be conducted in the whole mill for the missing Sifundza. According to the Safety Manager and the Union Official there was a strong suspicion from the Operators that Sifundza had been crushed in the mill. This witness also informed the Court that even the Factory Manager had expressed his doubts about the issue. The Factory Manager had apparently said he also did not believe that Sifundza had been crushed in the mill without anyone seeing anything. But since this was now an official request from the Union that the mill be stopped, indeed it was stopped on that morning, between 9 and 9:30 am.
39. When the mill was stopped the team consisting of witness Sifiso Dlamini, the Factory Manager, the Safety Manager and the Union official proceeded to inspect and search in the inter-carriers for any evidence that he could have been crushed there. During the search and inspection they were also joined by 2 Police Officers. They searched and inspected in the inter-carriers and tanks that collect the juice but could not find any evidence to indicate that the employee could have been crushed in the mill. They found some clothing

rags, which upon close scrutiny turned out to be waste rags used for mopping oil spillages. At that point everybody in the search and inspection team was satisfied that nothing indicated that he could have been crushed in the mill. At 9:30am the mill was back running but the search was still continuing.

40. Witnesses Sifiso Dlamini says he then decided to engage the 2:00am to 10:00am shift Operators asking about the disappearance of Sifundza. All the Operators were convinced that he had been crushed in the mill. Management then decided that a task team be set to properly investigate the disappearance. The task team consisted of Management, Union officials and the company security force. Police were also included but opted to set up their own investigation on the disappearance.
41. The task team conducted its investigation and compiled a report in which it concluded that Sifundza had died in the mill. It could not though state with certainty how he had died because no one had seen anything. The employees though were not happy that the mill had only been stopped for a mere 30 minutes. They wanted a total shutdown of the mill so that a thorough search could be conducted for the body of Sifundza.

42. On 28 May 2012, a piece of flesh was discovered in the bagasse conveyers. The conveyers where the piece of flesh was discovered had not been stopped when the mill was stopped on 24 May. The piece of flesh was discovered when there was a blockage in the bagasse conveyers, and when it was investigated as to what was causing the blockage the flesh was discovered. It was then that management took the decision to stop the mill between 29 and 30 May 2012, to conduct a thorough search of any remains of Sifundza.
43. The piece of flesh discovered on 28 May was taken for DNA testing for purposes of verifying whether indeed it belonged to the deceased Sifundza. Samples were also taken from his relatives. The test results positively linked the discovered flesh as belonging to Sifundza. According to Dlamini it was then that it became clear that Sifundza had died in the mill.
44. This witness says he then decided to conduct his own investigation to determine if there was any misconduct that could have led to the incident in question. He believed that Sifundza had been killed in the inter-carriers, so he wanted to find out if anyone had seen or heard anything. In his investigation he says he discovered that Sifundza had been seen when there was the mill

trip and when the Applicant restarted the mill after checking on what had caused the fault that resulted in the trip.

45. According to his detailed investigations, the mill trip happened at 6:16pm and the mill was restarted at 6:37pm. The mill ran until 7:35pm when the Operators discovered that Sifundza had disappeared. He could not comprehend how it came to be that nobody had seen or heard anything, especially from Sifundza's colleagues who worked next to him. He concluded therefore that there was non-disclosure of information by all the employees in Sifundza's shift as regards what happened to him.
46. In his detailed investigation, this witness also learnt that the Respondent's first witness, Dumisani Maseko, had approached the Operators who were working with Sifundza to ask where he was, and Elijah Maseko had responded to say he had died whilst Mgcibelo Mahlalela had just looked at him with teary eyes without responding. Their mood was somber so to say, and the Applicant had spoken to the same Operators. Thereafter Maseko approached the Applicant just before 9pm to request that the mill be stopped and he (Applicant) did not respond. Goodman also made a similar request to

the Applicant and he still did not respond, instead he sent Maseko to go and look for Sifundza in his house.

47. With this information this witness says he wondered why the Applicant had not stopped the mill when requested to do so. He also questioned why he (Applicant) had not interpreted the somber mood of the Operators to be indicative of something terrible having happened, in the same way Maseko had. On the basis of this information he charged the Applicant with gross negligence and dishonesty charges.
48. According to Dlamini, the gross negligence charges related to his refusal to stop the mill when requested by the employees. On the other hand, the dishonesty charges related to his failure to acknowledge, in his report or in his interview, that Sifundza could have been killed in the mill – this is from the time Sifundza disappeared to the time when a piece of his flesh was found. He ignored all evidence that he died in the mill.
49. Under cross questioning from the Applicant's Counsel witness Sifiso Dlamini confirmed that Dumisani Maseko had made a suggestion to the Applicant that the mill be stopped, and that the Applicant had a discretion on

whether the mill be stopped or not. He also could not confirm with certainty that the Applicant had refused to stop the mill, especially because Maseko's evidence was that he had not responded to the request that the mill be stopped.

50. Dlamini confirmed as well that in terms of his own (Dlamini's) report, immediately upon being notified of Sifundza's disappearance the Applicant did the following as shift supervisor in getting to the bottom of the mystery;

- *He obtained the cellphone number of Sifundza and called it but it was not available.*
- *He instructed some operators go search for him in the toilets and green areas.*
- *He instructed the diffusor operator to stop and start inter-carrier no.1 with the hope that wherever he was Sifundza would hear the start-up siren.*
- *He went to the time keeper's security gate to check if his clock card was still clocked in.*
- *He sent one operator to the village to look for Lucky in his house.*
- *He raised an alarm over the radio to all sectional supervisors about Sifundza's disappearance.*
- *He instructed that the search continue at strategic points throughout the shift.*
- *He informed the Security department, Front End Engineer, Standby duty Manager and the Human Resources Manager about the disappearance.*

51. From the above chronology of events, witness Sifiso Dlamini confirmed that the Applicant, as shift supervisor on the night of the disappearance of Sifundza, took reasonable steps to determine what had happened to him, even though he could not understand the logic of him sending someone to look for him in his house. He confirmed however that from the time it was noted that Sifundza was missing up to the next day when the mill was stopped for 30 minutes there was nothing concrete to suggest what had happened to him.

52. Under further cross examination by Attorney Simelane, this witness confirmed as well that even though Hans Buitendag, the Engineering Manager, immediately came to the mill upon being notified of the disappearance, he also did not direct that the mill be stopped because there was no evidence that Sifundza had been crushed in the mill. Even in his report Buitendag stated that there was no evidence that Sifundza had been killed in the mill. Dlamini also conceded that when he got to the mill the next morning he also did not instruct that the mill be stopped so that the search for Sifundza could be conducted in the inter-carriers. The reason he advanced for not instructing that the mill be stopped is that he did not believe that he had been crushed in the mill because nobody had seen anything.

53. Witness Sifiso Dlamini conceded as well that since the Applicant was stationed at a different location to that of Sifundza, he could not therefore be expected to have seen him get crushed and killed in the mill. When questioned on why then he preferred the gross negligence charge on the Applicant, his response was that since (Applicant) had interacted with the operators who were in a somber mood, he should have interpreted their mood to indicate that something was amiss and should have stopped the mill there and then. According to this witness, the fact that the Applicant failed to interpret the somber mood of the operators means that he was grossly negligent. When questioned if at the time the Applicant had made the decision to stop the mill would Sifundza have been found alive, his response was that he would not have been found alive but his remains would have been recovered because they would still be in the system. What is confusing though in this regard is that the evidence before Court indicates that the flesh discovered was found in the bagasse in the boilers section and there was no evidence found in inter-carriers 5 and 6 to indicate that he had been crushed there.
54. When probed on the dishonesty charge witness Sifiso Dlamini informed the Court that he preferred the dishonesty charge against the Applicant because

management was of the view that he misled them when he said he did not know what had happened to Sifundza. He clarified that since the Applicant was responsible for the shift, then he ought to have known what had happened to him, since he was the one accountable for the shift. He conceded though that in compiling the report, the Applicant was expressing merely his opinion on what he thought could have possibly happened to Sifundza. But in so expressing his opinion management felt that the Applicant ignored the possibility that Sifundza could have been crushed in the mill. Hence the notion that there was a cover up on this incident. Dlamini summed up by informing the Court that management expected that the Applicant ought to have known how Sifundza died, and that for him to say he did not means there was non-disclosure of information, which is categorized under dishonesty in the Respondent's policies, which then culminated in the dishonesty charge. That was the evidence led in support of the Respondent's case.

55. In closing, the Applicant's Counsel submitted that the Respondent's evidence had failed to prove any element of negligence, let alone gross negligence on the part of the Applicant during the search for Lucky Sifundza. Attorney Mr. Simelane further submitted that the request to stop the mill was not an

instruction on the Applicant but was merely a suggestion which he was not strictly obliged to accept and carryout. Simelane also submitted that in fact the Applicant did stop inter-carrier no.1 as they were searching for Sifundza with the hope that wherever he was he would hear the start-up siren when it was restarted.

56. The Applicant's Counsel further argued that at the time the Applicant was asked to stop the mill, not all arears had been searched to the search party's satisfaction. Hence the Applicant instructed others to search for Sifundza in his house, in the cloak room, at the security gate, calling him on his cellphone etc. In essence, according to the Applicant's Counsel, at the time when the request for the mill to be stopped was made, it was still premature because the search team was still conducting an intensive search. All the steps the Applicant took in searching for Sifundza were reasonable, according to his Counsel, and this was also confirmed by witness Sifiso Dlamini under cross examination. These steps also include him informing the security department, the Front end Supervisor, the Standby Duty Manager and the Human Resources Manager.

57. Simelane went on to submit that even if the Applicant had stopped the mill immediately upon being so requested, Sifundza would not have been found alive. This according to him was also confirmed by witness Sifiso Dlamini under cross examination. What useful purpose would have been served by the immediate stopping of the mill if so doing would not have saved the life of Sifundza, Attorney Simelane rhetorically asked?
58. Further argument by the Applicant's Counsel was that Hans Buitendag, the Engineering and Mechanical Services Manager, was informed by the Applicant at about 10pm about the missing Sifundza and when he arrived at the mill, he also did not direct that the mill be stopped. Instead he joined the search party. This, according to Attorney Mr. Simelane, proves that the Applicant cannot be said to have been grossly negligent by not stopping the mill.
59. Another argument by the Applicant's Attorney was that when witness Sifiso Dlamini arrived in the morning of the next day after the incident, he also did not direct that the mill be stopped. According to Simelane, this was because witness Sifiso Dlamini did not believe that Sifundza could have been killed in the inter-carriers without anyone seeing anything. The reaction of witness

Sifiso Dlamini was the same reaction of the Applicant when he was initially informed of the disappearance of Sifundza. That, according to Simelane, explains why the search concentrated in several areas as opposed to the inter-carriers. If Buitendag and Sifiso Dlamini did not deem it prudent that the mill be stopped at the time they arrived at the factory, why was the Applicant charged and ultimately found guilty and dismissed for gross negligence, so the argument went.

60. Another attack by Attorney Simelane was on the evidence that the piece of flesh confirmed by DNA to be that of Sifundza was discovered several days after the disappearance of Sifundza and away from the inter-carriers. There is therefore no conclusive proof of how, where and when Sifundza died. In the inter-carriers for instance, there were no blood splatters to show that he had been killed there. His helmet was also not found within the vicinity of the inter-carriers to suggest that he could have been swallowed there. In respect of the gross negligence charges, Simelane finally submitted that the Applicant, at all material times, acted within the standards of care and reasonableness that a Supervisor of his qualification and experience would have acted in the circumstances.

61. Then in respect of the 2 dishonesty charges the Applicant was also slapped with, Simelane submitted that there was nothing in the report of the Applicant that can lawfully and factually be said to constitute dishonesty. Further submission was that when the Applicant stated in his report that his feeling was that the disappearance of Sifundza could be linked to desertion, he was expressing his view or opinion. And by expressing his view or opinion did not constitute an act of dishonesty, because he honestly, truthfully and genuinely did not know where Sifundza was at the time he compiled his report. More so because even the Respondent's witnesses or anybody in the workplace for that matter, knew for a fact that Lucky Sifundza was killed until the piece of flesh discovered was confirmed to be his through DNA testing.
62. Even the Operators who had uttered the words '*...umnaketfu ufile...*' did not say they had personally witnessed Sifundza being killed in the inter-carriers. As it is, according to Simelane, the Respondent wanted the Applicant to speculate that Sifundza had died in the mill when there was no concrete evidence to that effect.

63. On behalf of the Respondent in closing, Attorney Mr. Shabangu submitted that the evidence of witness Dumisani Maseko indicated that the search for Sifundza showed that he had not clocked out of the factory at the time he was suspected to have disappeared. Further to that, he could not afford to be away from his duty station for more than five minutes. The fact that he had disappeared for an extended period should have been enough to raise an alarm necessitating that the mill be stopped.
64. Shabangu went on to submit that a reasonable person in the Applicant's position would have foreseen the possibility of Sifundza having been crushed by the mill and would have stopped it, particularly at the request of the operators to enable them to search in the inter-carriers for Sifundza. His failure to stop the mill amounted to the misconduct of gross negligence. For that reason, according to the Respondent's Counsel, the Employer was justified in finding the Applicant guilty of gross negligence and imposing the sanction of dismissal.
65. Then in respect of the dishonesty charges, the submission was that the Applicant was charged with dishonesty in that; in his report to management he completely refuted any possibility that Lucky Sifundza could have been

killed in the inter-carriers. Instead, he attributed Sifundza's disappearance to desertion. According to Attorney Shabangu, the Applicant's report to management was crucial to help determine the steps to be taken regarding the saga.

66. By refuting any possibility that Sifundza could have been killed by the inter-carriers, Shabangu argues that the Applicant acted dishonestly, as a result of which the next shift Manager and Applicant's immediate Supervisor did not stop the mill. The argument herein is that the next shift Manager and the Applicant's immediate Supervisor could have ordered that the mill be stopped had the Applicant not refuted the possibility that Sifundza may have been killed in the inter-carriers. As such, the finding of guilty on the dishonesty charge was justified.
67. Then with regards to the procedural aspects of the dismissal, Shabangu submits that the dismissal of the Applicant was procedurally fair in all material respects. This, he argued, was because he was served timeously with the charges and allowed sufficient time to prepare for his defence; he was afforded the right to call witnesses and also to cross examine witnesses called by the employer; he was allowed representation; he was afforded the

opportunity to mitigate after the finding of guilty and he was afforded the right to appeal against the sanction meted out.

68. In determining this present dispute of the parties, perhaps one needs to start off by breaking down the misconduct charges preferred by the Respondent against the Applicant. The charges relate mainly to negligence and dishonesty.
69. To determine negligence, the Courts employ the classic three-part test as formulated in *Kruger v Coetzee 1966 (2) SA 428 (AD)*. In this *Kruger* matter, the Court per Holmes JA said the following at page 430 E – H;

“For the purposes of liability culpa arises if –

(a) a diligens paterfamilias in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years.

Requirement (a)(ii) is sometimes overlooked.

Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case.

No hard and fast basis can be laid down... ”

70. According to **Professor P.A.K. le Roux, in his article ‘Negligence – The Grounds for Disciplinary Action’ in Contemporary Labour Law Vol.5 No.1 August 1995 at 1 to 6**, in general terms, an employee is negligent if his or her conduct deviates from the conduct that a reasonable man [*person*] would have adopted in the same circumstances. The following three elements should have to be considered;
- Would a reasonable man [*person*] in the particular circumstances of the employee, have foreseen the reasonable possibility that his/her conduct would cause harm to another person or his/her property?
 - Would a reasonable man [*person*] have taken reasonable steps to prevent such harm occurring?

If the answer to the above questions are in the affirmative and the employee did not foresee such harm and/or did not take such steps he/she will have been negligent.

71. Now, in order to justify dismissal as an appropriate sanction for negligence, the employer bears the onus to prove that the acts or omissions as it manifested constituted gross negligence.
72. Defining gross negligence versus ordinary negligence, Van Aarde succinctly stated as follows in *National Union of Metal Workers of South Africa obo Selepe v ORAWAB Investments (Pty) Ltd t/a Bergview Engen One-stop* [2013] 5 BALR 481;

“The carelessness or mere failure which constitutes ordinary negligence, changes in gross negligence to an indifference to, and blatant violation of a workplace duty. Gross negligence can be described as a conscious and voluntary disregard of the need to use reasonable care, which has or is likely to cause foreseeable grave injury or harm to persons, property or both. It is conduct that is extreme when compared to ordinary negligence. Gross negligence also focuses on the magnitude of the risks involved, such that, if more than ordinary care is not taken, a serious mishap is likely to occur. Ordinary negligence and gross negligence accordingly differ in degree of consciousness or inattention; and both differ from ‘wilful conduct’, which is conduct that is reasonably calculated to cause damage or injury.”

73. *John Grogan, in Dismissal (2nd edition) at 246 – 247* says this about gross negligence;

“To warrant dismissal at first instance, negligence by an employee must be ‘gross’. Gross negligence may be said to have occurred if the employee is persistently negligent, or if the act of omission under consideration is particularly serious in itself. While in civil law the term ‘gross negligence’ has a technical meaning, in employment law it can be taken to mean negligence that is particularly inexcusable.”

74. Then coming to dishonesty, **Grogan** defines it as a generic term embracing all forms of conduct involving deception on the part of the employee. The employment relationship places a premium on honesty because it is said that conduct involving moral turpitude by employees damages the trust relationship on which it (employment relationship) is founded. Grogan further espouses that dishonesty can consist of any act or omission which entails deceit. This may include withholding information from the employer, making a false statement or misrepresentation with the intention of deceiving the employer.

75. In *Nedcor Bank v Frank and others (2002) 23 ILJ 1243* the Labour Appeal court considered dishonesty and defined it as follows;

“Dishonesty entails a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently.”

76. Fraser J, in *Lynch and Co v United States Fidelity and Guaranty Co [1971] 1 OR 28 (Ont SC) at 37 – 38*, had this to say on dishonesty;

“Dishonesty is normally used to describe an act where there has been some intent to deceive or cheat. To use it to describe acts which are merely reckless, disobedient or foolish is not in accordance with the popular usage or the dictionary meaning.”

77. With that said, coming to the matter at hand, in relation to the gross negligence charges preferred against the Applicant, can it be said the Respondent has proved that Super Mabuza’s acts or omission (as the case maybe) constituted gross negligence? In other words, can it be said that Super Mabuza consciously and voluntarily disregarded the need to use reasonable care, which act was likely to cause foreseeable grave injury or harm to other employees?
78. It is common cause that in respect of the gross negligence charge in respect of which the Applicant was found guilty, the allegation against him was that

during the search for Lucky Sifundza operators had asked him to stop the mill so that they could search for him in the inter-carriers and he refused.

79. The evidence before Court indicates that the Applicant was requested by witness Dumisani Maseko to stop the mill. In his evidence in-chief and under cross questioning by the Applicant's Counsel, Maseko informed the Court that after searching for some time without success for Sifundza he, together with Lucky Dlamini and Goodman Magaula first had a discussion between the three of them and they decided that it would be best that the mill be stopped. He says he first requested Goodman Magagula to ask the Applicant to stop the mill so that the search for Sifundza could be conducted in the inter-carriers. When he noted that the mill was still running he says he then personally approached the Applicant to request that he stops the mill. He informed the Court that he made the request that the mill be stopped to the Applicant 2 or 3 times. Critically, he says the Applicant did not respond to his request, not that he refused. Instead he gave him a torch and instructed him to go and look for Sifundza in his house. One wonders therefore why the Respondent says the Applicant 'refused' when he did not respond to the request but sent Maseko to look for Sifundza in his house as the search was still on-going.

80. The Court notes though that in his statement recorded just 3 months after the incident, witness Dumisani Maseko makes no mention of the fact that he, together with Lucky Dlamini and Goodman Magagula first had a caucus between themselves and they decided that it would be best to stop the mill. He also makes no mention in his statement that he requested the Applicant to stop the mill at least 2 or 3 times. The statement only indicates that he made the request once. In his statement he also makes no mention of the fact that he first asked Goodman Magagula to ask the Applicant to stop the mill, and on seeing that it was still running he then personally approached the Applicant with the request that the mill be stopped.
81. The number of times he made the request for the mill to be stopped and the fact that he had also requested another employee (Goodman Magagula) to ask that the mill be stopped are very crucial and important facts which should have been included in his statement, but were not. As it is, and from the evidence in the statement of Dumisani Maseko, the request to the Applicant that the mill be stopped was made once only, and it was made by Dumisani Maseko. Not only that, it was also crucial that the statement should have indicated that there was this alleged discussion between Dumisani Maseko, Lucky Dlamini and Goodman Magagula where the decision that it would be

best to stop the mill was made. But all of this does not appear in the statement of Maseko which he made a mere 3 months after the incident.

82. There is this other issue which does not add up between the evidence of witness Dumisani Maseko here in Court and the statement he made immediately after the incident of Sifundza's disappearance, which statement is part of the evidence before Court. The chronological order of events according to Maseko's statement is that when Maseko and 2 others (Jabulani and Lucky Dlamini) questioned Elijah Mavuso about the whereabouts of Sifundza, he responded to say '*...ufile umnaketfu.*' Elijah's mood was that of deep sorrow. The statement further states that Maseko saw another employee, Mahlalela, on the mill floor and he was crying – his eyes were red and filled with tears.
83. The chronology of events according to the statement is that after the response from Elijah to the effect that Sifundza had died, coupled with his deep sorrow mood and on seeing Mahlalela who was crying, Maseko then stopped searching for Sifundza and went to look for the Applicant. According to the statement when he found the Applicant in the diffuser control room he said to him '*stop the mill.*' This chronology of events is very important because

according to the statement of Maseko, the request to the Applicant to have the mill stopped was made after learning that he had died and on seeing the deep sorrow mood of Elijah Mavuso coupled with seeing a weeping Mahlalela.

84. The request for the mill to be stopped, according to Maseko's statement, seems to have been fortified by learning that Sifundza had died and was more of an instruction to the Applicant because it is recorded as follows; *'I said to Super "stop the mill..."* In the statement Maseko reveals that after making the request to the Applicant to stop the mill, he (Applicant) sent him to go and search for Sifundza in his house. He even says he thinks when he sent him to go and look for Sifundza in his house he (Applicant) was chasing him away because he was telling him to stop the mill.
85. On the other hand, in his evidence under oath before Court, witness Dumisani Maseko testified that he only learnt of the death of Sifundza from Elijah Mavuso after returning from searching for him at his house without success. Maseko's evidence before Court was that after the search in the staff quarters he went back to the mill and reported to the Applicant, whom he found in the green room/canteen, that he did not find Sifundza. The search for Sifundza

continued and he (Maseko) together with Lucky Dlamini then went to Sifundza's work station where they questioned Elijah Mavuso about the disappearance. It was only then that they learnt from Elijah Mavuso and Mgcibelo Mahlalela that Sifundza had died.

86. The above sequence of events, according to the testimony of Maseko before Court, means that before going to the staff quarters to search for Sifundza in his house, Maseko had not yet spoken to Elijah Mavuso (who informed him that Sifundza had died) and Mgcibelo Mahlalela (who was weeping). The evidence of Maseko before Court means that the request to the Applicant to stop the mill was made before learning that Sifundza had died. This just not add up, and the Court cannot overlook this contradiction.
87. Further to this, in his statement Maseko made a very important revelation which I think cannot be ignored. He was asked what he made of the fact that flesh was discovered in the boilers, effluent and cooling towers. His response as captured in his statement was as follows;

“I think that Lucky was killed by the inter-carrier, but he was then retrieved, because of the flesh that was discovered in the areas where the bagasse does not flow to. I think Lucky was killed before the mill

trip and he was retrieved during the trip. During the trip the lights went out. If it was an accident, the helmet should have been found.”

88. When the Court sought for clarity on this revelation he made in his statement, he was adamant that the death of Sifundza was not an accident. Maseko's speculation is that Sifundza was murdered before being thrown into the inter-carrier before the power trip. When there was the trip, and when the lights were off, his body was then retrieved and dumped in the boilers, effluent and cooling towers. He suspects this is what happened because the bagasse from the inter-carriers does not flow to where Sifundza's flesh was discovered. Indeed, even during the inspection in *loco* of the mill, the Court observed that the bagasse from the inter-carriers does not flow to the boilers. It is therefore a mystery as to how Lucky's Sifundza's flesh ended up in the boilers in the first place. Clearly, with the evidence before Court, it cannot be said that the death of Lucky Sifundza was an accident. Somebody amongst those he was working with in the mill floor ought to have seen something.

89. Obviously, from the evidence of witness Dumisani Maseko, the Applicant had nothing to do with the death of Lucky Sifundza. He cannot be faulted for not stopping the mill because one and there is no evidence to the effect that he refused to stop the mill; Maseko testified that he suspects that Sifundza

was killed before the power trip and two; his body was retrieved during the trip and planted elsewhere. This same witness also informed the Court that he made the request to have the mill stopped some 4 hours after learning of Sifundza's disappearance. Even if the Applicant had stopped the mill then, and taking into account Maseko's suspicions, Lucky Sifundza would not have been found alive because he was already dead then and his body would not have been found there because it had been moved by then.

90. The important revelation Maseko made before Court also came with the names of the people he suspects could have killed Sifundza, retrieved his body from the inter-carriers and planted it elsewhere. He named the suspects as Sifundza's colleagues in the inter-carriers. These are Elijah Mavuso, Mgcibelo Mahlalela, Sive Vilane and Johane Dlamini.
91. Interestingly though, it would seem Maseko never made this revelation to the disciplinary hearing. He says he was never called to testify at the disciplinary hearing of the Applicant. However, witness Sifiso Dlamini was adamant that Maseko was one of the witnesses called to testify at the Applicant's hearing. The disciplinary Chairman's summary also indicates that Maseko was one of the witnesses called to testify. Which of these two versions should this Court

believe? Did Dumisani Maseko testify at the Applicant's hearing or not? If he was indeed one of the witnesses called, did he reveal to the Chairperson his suspicions about Lucky Sifundza having been murdered by his colleagues? If he was not called as a witness, why would the Chairperson record in his findings that he was?

92. With that said, and in light of what the legal authorities say on gross negligence, can it be said that the Applicant, Super Mabuza, consciously and voluntarily disregarded the need to use reasonable care, which conduct was likely to cause foreseeable grave injury or harm to Lucky Sifundza? In this regard, it is a finding of this Court that the Applicant in this matter did not consciously and voluntarily disregard the need to use reasonable care, which disregard could be said to have caused injury or harm to (in this case the death of) Lucky Sifundza. It is a finding of this Court as well that the Respondent has dismally failed to prove that Super Mabuza's failure to stop the mill on 23 May 2012, constituted gross negligence.

93. Then in relation to the dishonesty charges, the allegation against the Applicant was that; because he claimed upon questioning that he was not aware of what had happened to Lucky Sifundza, yet his flesh was recovered

from the bagasse conveyer. He was also said to be dishonest because he refuted the possibility that Sifundza had been killed by the inter-carriers.

94. Witness Sifiso Dlamini conceded before Court that the source of the dishonesty charges against the Applicant stemmed from him expressing his opinion in his report on the disappearance, when he specifically said that his feeling was that Lucky Sifundza's disappearance could be linked to desertion. The *Concise Oxford Dictionary, 9th Edition*, defines an opinion as a belief or assessment based on grounds short of proof. In other words, it is a view or judgement formed about something, not necessarily based on fact or knowledge.
95. In making his opinion about what could have possibly happened to Lucky Sifundza, the Court cannot ignore that the Applicant was merely expressing his view on Sifundza's disappearance without any facts, evidence or knowledge about what could have possibly happened to him. He expressed this opinion a day or so after the disappearance of Sifundza.
96. A couple of days later, five or so days later, the piece of flesh, which was confirmed through DNA testing to be belonging to Sifundza, was then

discovered in the boilers. Does it then mean that because of the discovery of Sifundza's flesh the Applicant was being dishonest in his report? Clearly not. It is a finding of the Court that the Applicant was not being dishonest when he compiled the report in which he expressed his opinion about the disappearance of Lucky Sifundza. When one expresses an opinion it does not mean that when the facts prove otherwise then that person was being dishonest.

97. As espoused in the *Nedcor Bank* case, dishonesty entails a lack of integrity or straightforwardness, and in particular, a willingness to lie. For one to be said to be dishonest, there must be proof of an intention to deceive. In this matter of Super Mabuza, there must be proof on a balance of probabilities that in compiling his report he had the intention to deceive or lie to management.
98. The evidence of witness Sifiso Dlamini was that the Applicant was dishonest in compiling his report because he expressed his opinion and ignored everything else. He said because of the discovery of Sifundza's flesh in the boilers it became clear to him (witness Sifiso Dlamini) that the Applicant's report was aimed at misleading management. In fact, management was of the

view that there was a cover up in the incident of Sifundza's disappearance. The evidence before Court indicates no cover up on the part of the Applicant. If anything, the evidence indicates instead that the Applicant was at the fore front of the search team trying to locate and determine what had happened to Sifundza.

99. An interesting observation by the Court is that the report of this same witness (Sifiso Dlamini), dated 24 May 2012, states that there was a wild speculation by one of the plant operators to the effect that Sifundza could have gotten a lift in one of the cane trucks and left the mill. In terms of Sifiso Dlamini's report, there was also speculation by the operators that perhaps a slat had fallen into the inter-carriers and Sifundza had gone into the carrier to retrieve it and could have been crushed when it (inter-carrier) was restarted. The same Sifiso Dlamini discounted this possibility stating in his report that this possibility did not make sense because according to him; *'...when inter carrier no.6 was started, it is very loud and as such Lucky would have heard it and know that the mill is starting and then rush out. He would have had enough time to get out, as the mill no.5 turbine is started first before, the intercarrier can be run. There is a good 2 minutes at least in between these...'*

100. Hans Buitendag, the Engineering Manager, also filed his own report on 24 May 2012, addressed to the Factory Manager. In it he alluded to a number of possibilities which he thought could explain the disappearance of Sifundza. He outlined these possibilities as follows; *Lucky left the site without permission and did not clock out, he could be on site sleeping somewhere, he could be lying somewhere on site injured, he could have ended up in the mills and got crushed accidentally or he could have ended up in the mill which was self-inflicted.* In this report, Buitendag also informed the Factory Manager that the mill was only stopped the next day and a search in inter-carriers 5 and 6 found no traces of clothing, tissue and bones.
101. All this indicates that almost everyone in the mill had an opinion about the disappearance of the Lucky Sifundza, from the Engineering Manager to the Front End Engineer, to the Operators etc. It cannot be said that all the different opinions by the different employees were dishonest. They could be said to be incorrect but definitely not dishonest. Even the Applicant had his own opinion about the issue. The least that can be said of the Applicant's opinion, like the rest of the other employees' opinions, is that it was incorrect, not that dishonest. The evidence before Court indicates that until

the discovery of Sifundza's flesh, nobody knew exactly what had become of him.

102. One then wonders why the Respondent singled out the Applicant and said he was being dishonest when he said he was not aware of what had happened to Sifundza. Why was he said to be dishonest when he refuted the possibility that Lucky Sifundza could have been killed in the inter-carriers, especially because no evidence was found indicating that he died in the inter-carriers? Instead the piece of flesh was found in the effluent, intercoolers and boilers, away from the inter-carriers. Did the Respondent want the Applicant to lie and say he had knowledge of what could have happened to Sifundza, when he did not? Was he made a scapegoat or a sacrificial lamb as he claims? There are a lot of questions which even this Court cannot untangle in this matter.
103. It is a finding of the Court though that the conduct of the Applicant in compiling his report on 25 May 2012, on the disappearance of Lucky Sifundza, involved no elements of dishonesty. It follows therefore, and in fact is the Court's finding as well, that the Respondent has failed to prove any dishonesty on the part of the Applicant in this matter.

104. In a number of its previous judgements, this Court has authoritatively pronounced that all cases of alleged unfair dismissal are assessed on the basis of procedural and substantive fairness criterion. It has also held that no dismissal will ever be deemed fair if it cannot be proved by the Employer that it was initiated following fair procedures [procedural fairness] and for fair reasons [substantive fairness].
105. The substantive fairness of any dismissal is to be determined on the basis of the reasons on which the Employer relies for arriving at the decision to terminate the services of the employee. The law requires that the Employer must prove that the Employee committed an act of misconduct so severe as to warrant dismissal. So that if an Employer cannot prove that the probabilities of the employee being guilty are greater than the probability that the Employee is not guilty, the dismissal will be deemed to have been substantively unfair.
106. Authors *Cameron, Cheadle and Thompson* in '*The New Labour Relations Act: The Law After The 1998 Amendments* at page 144 – 145 state;
- "A fair reason in the context of disciplinary action is an act of misconduct sufficiently grave as to justify the permanent termination of the relationship...Fairness is a broad concept in any context, and especially in the*

present. It means that the dismissal must be justified according to the requirements of equity when all the relevant features of the case – including the action with which the employee is charged – are considered.” (Court’s underling).

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

108. Before getting into the issue of compensation, there is perhaps this one issue which needs mention by the Court, and it this; From this tragic and painful loss of the life of Lucky Sifundza it is hoped that lessons have been learnt, however painful these maybe. Such a harrowing incident should not repeat itself in a company of the Respondent’s stature in our kingdom. In this regard, serious safety and security measures need to be implemented for the safety and security of all personnel in the mill. Even though one may not be an expert in the field of safety and security, perhaps the Respondent can start

off by installing closed circuit television (CCTV) cameras and monitors in all work areas and corners of the company so that there is surveillance in every space in the mill premises. Had this been in place we would not have been here in the first place because there would have been footage of the incident to explain what could have possibly happened to the now deceased Lucky Sifundza. As the country gears towards first world status in the coming 3 years, in 2022 as envisioned by the King, every one of us should diligently work towards ensuring that we do not just pay lip service to this noble goal but turn it into reality. Such important measures and interventions that impact on the safety and security of all employees should perhaps be the starting point.

109. The Applicant had worked for the Respondent for almost 18 years, he was just 2 days short of completing 18 full years. Since his dismissal he has not been able to secure alternative employment. At the time of his dismissal he was 43 years old. He is married with 2 children, the youngest of whom still attends school. His wife is employed but he was the major breadwinner as he took care of all the major expenses of his family.


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

a) The Respondent is hereby ordered and directed to forthwith pay the Applicant as follows;

<i>i) Notice Pay</i>	<i>E 32,459.00</i>
<i>ii) Additional Notice Pay</i>	<i>E 94,400.00</i>
<i>iii) Severance Allowance</i>	<i>E 236,000.00</i>
<i>iv) 12 months compensation</i>	<i>E389,508.00</i>
<u>Total :</u>	<u>E 752,367.00</u>

111. The Court also orders that the Respondent pays the Applicant's costs of suit.

The Members agree.


T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 27th DAY OF MARCH 2019.

For the Applicant : *Attorney Mr. S.M. Simelane (Simelane Mtshali Attorneys)*
For the Respondent : *Attorney Mr. Z. Shabangu (Magagula & Hlophe Attorneys)*