IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 158/2011

In the matter between:

CLEMENT DLAMINI

And Applicant

SWAZILAND WATER SERVICES CORPORATION

Respondent

Neutral citation: Clement Dlamini vs Swaziland Water Services Corporation (158/2011) SZIC 07 (2019)

Coram: MAZIBUKO J,
(Sitting with A.Nkambule & M.Mtetwa
Nominated Members of the Court)

Last Heard: 4th February, 2019

Delivered: 12th February 2019

Summary: *1. REAL EVIDENCE*

Applicant charged with misconduct. Respondent's evidence based on equipment which Respondent has failed to bring before Court as exhibit.

Held: Real evidence must be brought before Court as exhibit. Failure to bring real evidence before Court is fatal to the Respondent's defence.

2. ONUS OF PROOF

The onus of proof lies on the party who alleges the existence of a particular issue or fact. The legal principle is that; he who alleges must prove.

JUDGMENT

1. The Respondent is Swaziland Water Services Corporation a body corporate with power to sue and be sued, operating business as such in the Kingdom of Eswatini. In the course of this judgment the Respondent will also be referred to as employer.

2. The Applicant, Mr Clement Dlamini was employed by the Respondent on the 10th June 1984. He was terminated on the 29th September 2010 on allegations of serious misconduct. The Applicant worked as a plumber. The dismissal of the Applicant preceded a disciplinary hearing. The minutes of the disciplinary hearing were handed in by consent and marked exhibit A5. In support of his application the Applicant has attached a Certificate Of Unresolved Dispute which was issued in terms of Section 81(6) of the Industrial Relations Act no. 1/ 2000 (as amended).

2.1. On 10th August 2010 the Respondent wrote the Applicant a letter which was submitted as exhibit A1. In exhibit A1 the Respondent accused the Applicant of having committed 3(three) offences at the workplace, particularly on the 5th August 2010, viz, *"Dishonesty, unauthorized absence from work and bringing the name of the Corporation into disrepute."*

In exhibit A1 the Applicant was called upon to show cause – why disciplinary action should not be taken against him.

2.2 By letter dated 11th August 2010 the Applicant replied the Respondent. The Applicant explained the work he did on the 5th August 2010 and denied that he had committed any of the alleged offences. The Applicant's letter is marked exhibit A2.

2.3 By letter dated 11th August 2010 the Respondent wrote the Applicant an amended list of the disciplinary charges. The Respondent's second letter is exhibit A3.

2.4 By letter dated 16th August 2010 the Respondent suspended the Applicant from work with full pay, pending finalisation of the investigation. The letter of suspension is exhibit R1.

2.5 By letter dated 14th September 2010 the Applicant was summoned to a disciplinary hearing scheduled for the 21st September 2010. The Applicant was charged with 4 (four) disciplinary offences, viz.

"1. On the 5th August 2010, at Khayalami area at a certain Motsa homestead you were seen removing and /or taking meters without authority of the Corporation.

2. *You acted dishonestly in that you took the meters and did not submit/declare them to the Corporation.*

3. *You violated and interfered with the condition of your suspension in that you called Bhekani Sacolo on Wednesday 2nd September about exposing illegal connections at Hlathikhulu.*

4. *Bringing the name of the Corporation into.disrepute in that on the 3rd September 2010 at Assegai Hotel it was discovered that you removed meters and put a bypass connection sometime in 2007."*

The disciplinary charges aforementioned, are contained in exhibit A4.

3. It is common cause that the disciplinary hearing did not proceed on the 21st September 2010 as scheduled. It was postponed to the 28th September 2010. The Applicant was subsequently served with an amended list of charges which is dated 21st September 2010 and is labelled exhibit R2. The charges in exhibit R2 read as follows:

"1. *On the 5th August 2010, at Khayalami area at a certain Motsa homestead you were seen removing and /or taking meters without authority of the Corporation.*

2. *You acted dishonestly in that you took the meters and did not submit/declare them to the Corporation.*

3. *You violated and interferred with the condition of your suspension in that you called Bhekani Sacolo on Wednesday 2nd September when he was exposing illegal connections at Hlathikhulu.*

4. *Bringing the name of the Corporation into disrepute in that on the 3rd September 2010 at Assegai Hotel it was discovered that you removed meters and put a bypass connection sometime in 2007."*

5. *Falsifying corporation documents for lunch out claims wherein you claimed on the 1st , 12th and 14th July 2010 yet you were around town during the lunch periods;"*

4. The disciplinary hearing proceeded on the 28th September 2010. In the course of the hearing the Respondent withdrew charge 4. The Respondent proceeded on the remaining 4(four) charges and charge 5

replaced charge 4 in the list of charges. Therefore in this judgment where there is mention of charge 4, it would mean the former 5.

5. The Applicant was found guilty in all 4(four) remaining charges and was dismissed. The evidence of the Respondent's first witness before Court, Mr Petros Lokotfwako stated thus:

> *"...he [Applicant] was found guilty of all charges that were levelled against him."*
>
> (Record page 73)

The Applicant is now before Court to challenge the dismissal and the circumstances leading to the verdict.

6. At the disciplinary hearing the Respondent called its first witness, a certain Mr Mandla Shongwe, who stated that he was a community based security officer. Mr Shongwe stated that on the 5th August 2010 he was stationed at a shop called Swazi – Hawane at Emaphetselweni area. Between the periods estimated at 11:00 am to 12:00 midday he saw a motorbike near the said shop. A man alighted from the motorbike, and went to read the meter which was stationed at the shop premises.

Thereafter the man rode off in the direction of Khayalami Township from Emaphetselweni area. Mr Shongwe concluded that the man was employed by the Respondent as a meter reader. Mr Shongwe did not communicate with the man.

7. Sometime between 1 and 2 pm the same day, Mr Shongwe saw a motor vehicle being driven past the said shop. The motor vehicle was a blue van with a full canopy. The van was similar to those that are owned by the Respondent. There were 2 (two) occupants in the van. Mr Shongwe could not recognise the faces of the driver and the passenger. Mr Shongwe did not take note of the registration number or any outstanding features of the van. About an hour later Mr Shongwe saw the van being driven in the opposite direction, for instance, it was going where it had come from. The van drove past the shop where Mr Shongwe was. Mr Shongwe did not witness the removal of the meters from the Motsa homestead. About 6 or 7 pm the same day Mr Shongwe was told by his acquaintance that certain houses at Khayalami Township were missing water meters.

8. The Respondent called its second witness Ms Philile Dlamini. At the time material to this case Ms Dlamini was employed as a house – keeper. There were tenants who rented residential houses at the Motsa homestead at Khayalami Township. Ms Dlamini was employed in one of those houses. On the 5th August 2010 about 12:00 midday Ms Dlamini was at her workplace. She heard a sound of a motorbike at the gate. She did not see who rode the motorbike. She did not see what the person was doing inside the yard. She assumed that he was there to read the water meter- because the meter reader often came in a motorbike.

9. About 2:00 pm the same day Ms Dlamini heard the sound of a motor vehicle at the gate. She did not take notice who drove the motor vehicle and how many occupants were there. Later on Ms Dlamini heard voices of people talking within the yard. She did not look and therefore did not see how many people were inside the yard, but she assumed that there were 2 (two) people because of the voices she heard. Ms Dlamini had no idea what these people were doing in the yard. She could not tell when those people left the yard or when the said motor vehicle left the gate. About 6:00 pm the same day Ms Dlamini was told that certain

water meters had been removed from the yard in the Motsa homestead. Ms Dlamini did not see anyone remove those meters. Furthermore Ms Dlamini had no knowledge of how and when the meters were removed.

10. On the 1st charge the Applicant was accused of removing water metres from a certain Motsa homestead at Khayalami Township without the authority of the Respondent. The Applicant has denied that he removed the said meters. The Applicant admitted that he had been assigned inter alia, to work at Khayalami Township on the 5th August 2010, but stated that – due to pressure of work he did not attend that assignment. The Applicant denied that he removed the said meters and further denied that he went to Khayalami Township on the 5th August 2010.

11. Mr Lokotfwako stated at the disciplinary hearing that he relied on a gadget which he called a: Tracker or Tracking System. Each motor vehicle that belongs to the Respondent is fitted with a tracking device. That device indicates where the concerned motor vehicle had been driven and at what specific time. The motor vehicle that the Applicant was driving on the 5th August 2010 had also been fitted with the said tracking device.

12. At the disciplinary hearing Mr Lokotfwako was allowed to incorporate into his evidence his understanding of how the Tracking System operates. Mr Lokotfwako testified that the Tracking System showed that on the 5th August 2010 the motor vehicle in question was driven to the following areas: Mkhondvo, Sewer Ponds, Post Office, Spar, Industrial Site, Emaphetselweni, Post Office and the Respondent's Depot. In his interpretation of the Tracking System Mr Lokotfwako did not mention that the motor vehicle had also been driven to the Motsa homestead at Khayalami Township. Moreover Mr Lokotfwako did not witness the Applicant driving the said motor vehicle to the Motsa homestead, and further did not witness the Applicant removing meters at that homestead. Mr Lokotfwako's evidence was based solely on assumption and speculation but not fact.

13. An extract of Mr Lokotfwako's evidence at the disciplinary hearing confirms this finding and it reads thus:

> *"... the reason why I say he [Applicant] went to Khayalami to take the meters is because I did give him a job to go to Khayalami and I assume he went."*

(Underlining added)

(Exhibit A5 page 62)

Mr Lokotfwako admitted in his evidence at the disciplinary hearing that his allegation against the Applicant was based on assumption and not fact.

14. The conviction of the Applicant especially on the 1st charge was consequently based on assumption. An extract of the verdict confirms this fact and it reads thus:

> "*To the first charge you pleaded not guilty but evidence shows that you were seen in that area, you failed to show me what you were doing there if not to remove, I am not saying that you did but we could have heard more evidence.*"
>
> (Underlining Added)
>
> (Exhibit A5 page 103)

15. According to the chairperson, the Applicant was allegedly '*seen in that area*' but the chairperson failed to state at which area was the Applicant allegedly been at and by which witness. Among the witnesses that

testified at the disciplinary hearing and also at the trial, none testified that he or she saw the Applicant at Khayalami Township, at the Motsa homestead, removing water metres.

16. The chairperson contradicted herself in her verdict when she said that: *'I am not saying that you did but we could have heard more evidence.'*

16.1 What the chairperson meant was that she was not persuaded that the Applicant was guilty of removing the meters from the Motsa homestead. The chairperson mentioned the fact that the evidence that had been led at the disciplinary hearing was insufficient to support the Respondent's accusation. The chairperson expressed a wish that the Respondent had delivered more incriminating evidence especially on the 1st charge, but that was not the case.

16.1 What appears strange and improper is that the chairperson proceeded to convict the Applicant on the 1st charge despite her admission that there was insufficient evidence to convict.

16.3 The conviction of the Applicant on the 1st charge was clearly devoid of evidential support and was therefore irregular.

17. There is another aspect in the verdict of the disciplinary chairperson concerning the 1st charge which requires further attention. An extract of the verdict reads thus:

> *"To the second charge, you acted dishonestly in that you took the meters and did not submit or declare them. We did not hear evidence enough that places you at a distance from those meters, which means that material you said you would like to replace is an acknowledgment that you are aware of what happened to the meters."*
>
> (Underlining added)
>
> (Exhibit A5 page 103)

18. It appears that the chairperson failed to appreciate the distinction between plumbing material and water meters. There was plumbing material which Mr Lokotfwako supplied the Applicant on the 5th August 2010 to enable the Applicant to carry out his work. Mr Lokotfwako confirmed in his evidence that he supplied the Applicant with that plumbing material. An extract of the record at the disciplinary hearing reads thus:

18.1 *"He [Applicant] took the fittings and materials he had to use for the day and did not return anything ..."*

...

Chair: With those assignments you give him material to assist him with the work, is that what you are saying?

Comp: Yes chair."

(Underlining added)

(Exhibit A5 page 28)

18.2 Again Mr Lokotfwako testified regarding the plumbing material as follows:

"*Comp: On the 5th [August 2010] he [Applicant] took equipment to go and work with them at Khayalami, and he never returned them, ..."*

(Underlining added)

(Exhibit A5 page 48)

18.3 At the disciplinary hearing the Applicant's representative confirmed that the Applicant did receive the plumbing fittings or plumbing material from Mr Lokotfwako. The Applicant did not use those fittings or material due to

pressure of work that day. The Applicant tendered to return that material or those fittings.

18.4 The record reads as follows where the Applicant's representative is speaking:

"*CS: ... chair can I proceed and elaborate on why I said the material was still there is because the day he [Applicant] was suspended, he was asked to move out with immediate effect so he did not have a chance of bringing the material back which he was supposed to use at Khayalami where he didn't go.*"

(Exhibit A5 page 70)

18.5 Mr Lokotfwako was able to distinguish between the water meters which had been removed from the Motsa homestead in Khayalami Township and the plumbing fitting or material that he (Mr Lokotfwako) supplied the Applicant, to be used in the course of duty. The chairperson failed to make that distinction.

18.6 The chairperson made an incorrect and baseless finding that the Applicant was aware of what happened to the meters

simply because he was willing to return the plumbing material which he had received from Mr Lokotfwako. That incorrect finding resulted in an irregular conviction of the Applicant.

19. A distinct feature in the Respondent's evidence is that it relied on an alleged Tracking System but failed to bring that instrument and its results to Court. The Respondent's stratagem is to convince the Court that the Applicant is guilty of the 1st and 4th charges because the Tracking system says so. Whatever evidence the Respondent intended to present in its interpretation of the Tracking System, such evidence is inadmissible for failure by Respondent to present in Court the exhibit on which the evidence is based.

20. The alleged Tracking System, its operation and results would constitute real evidence in this case, which the Respondent was supposed to tender before Court. Authority provides that:

"Real evidence consists of things which are examined by the court as means of proof.

...

The evidence is usually intended for the court to look at, but it may also listen, smell, taste or feel. The judge is entitled to rely upon his own perceptions and to draw such inferences as may reasonably be drawn without the need for expert qualifications."

HOFFMAN LH AND ZEFFERTT DT: THE SOUTH AFRICAN LAW OF EVIDENCE, 4th edition, Butterworths, 1988 (ISBN 0 409 03325 1) at page 405.

21. In the absence of the real evidence before Court, the testimony of Mr Lokotfwako is of no assistance to both the Court and the Respondent's defence - where it relies on the Tracking System.

21.1 The Court is unable to make its own determination whether or not the alleged Tracking System is functional and reliable.

21.2 The Court is unable to make its own determination whether or not the alleged Tracking System and /or its results require skill or expertise to examine and/or interprete, and if so whether Mr Lokotfwako has the requisite expertise to carry out that exercise.

21.3 The Applicant and his counsel are also unable to examine the alleged Tracking System and raise such questions as they may find necessary in order to discredit Mr Lokotfwako and/or challenge the functionality of the alleged equipment.

22. On the 2nd charge the Applicant was accused of dishonesty in that: the Applicant allegedly failed to submit or declare the aforementioned water meters to the Respondent. The Applicant's defence is that he could not return water meters which he never took. An extract of the Respondent's evidence reads thus;

"... I would not have returned something that I did not take."

(Record page 55)

23. The Respondent's potential for success in the 2nd charge was completely dependent on her success on the 1st charge. When the Respondent failed to prove commission of an offence on the 1st charge her accusation on the 2nd charge failed automatically. The conviction of the Applicant on the 2nd charge was also irregular.

24. On the 3rd charge the Applicant was accused of violating his conditions of suspension in that he called a fellow employee, a certain Mr Bhekani Sacolo on the 2nd September 2010 when he (Mr Sacolo) was exposing illegal water connections at Hlati. At the time material to the 3rd charge the Applicant was under suspension and therefore allegedly prohibited from communicating with the Respondent's employees.

25. The Respondent referred to conditions of suspension that are contained in a letter dated 16th August 2010 which is marked exhibit R1. In particular the Respondent referred to the following clause which was among the conditions of suspension:

> *"5.3 You shall not communicate in any way, whatsoever, with any employee of Swaziland Water Services Corporation except through me."*
>
> *5.6 Should you fail to heed any of the conditions stipulated herein further disciplinary action may be taken against you."*

26. The Applicant pleaded not guilty to the 3rd charge as he did with the other charges. When the chairperson delivered her verdict she drew an

incorrect conclusion concerning the Applicant's plea to this charge. The chairperson incorrectly declared that the Applicant had pleaded guilty to that charge.

27. An extract of the verdict reads thus:

"I will commend you for having pleaded guilty and showing remorse that you did make the phone call but even the issues that you raised on calling Sacolo are neither here nor there they don't seek to exonerate you from the issue at hand."

(Underlining added)

(Exhibit A5 page 103)

28. The evidence regarding the Applicant's plea reads as follows:

"How do you plead, guilty or not guilty? You will also answer in point form.

A: The charge that occurred on the 5th August, I plead not guilty; and that I removed the meters and did not submit them to the company I plead not guilty; as well as the charge wherein I violated Sacolo by asking him not to expose illegal connections

at Hlati, I plead not guilty, I called him to ask him about my tools which I could not find, ..."

(Underlining added)

(Exhibit A page 23)

29. The Applicant is supported by the Respondent's counsel (Mr Thomo) in his submission that he pleaded not guilty – to all the charges, as shown below:

"Mr Thomo: *Mr Dlamini you were charged with a total of five charges and one was removed and/or withdrawn.*

Mr Dlamini: *I agree my Lord.*

Mr Thomo: *And you entered a plea of not guilty to all the charges.*

Mr Dlamini: *I agree my Lord.*"

(Underlining added)

(Record page 41)

30. The evidence shows that the Applicant pleaded not guilty to the 3rd charge. The entry in the verdict alleging that the Applicant pleaded

guilty is incorrect. The verdict was based on the wrong premise. The irregular verdict led to an unfair dismissal of the Applicant.

31. The Applicant has also attacked the verdict on the 3rd charge from another angle. The Applicant argued further that the letter which contains the conditions of suspension (exhibit R1) was never explained to him by Mr Lokotfwako. According to the Applicant, he arrived at work one morning on the 16th August 2010 and was served with a letter (exhibit R1) by Mr Lokotfwako, and was told to go home with immediate effect – since he had been suspended. The Applicant added that he was directed by Mr Lokotfwako to sign exhibit R1 on the space provided. The Applicant signed as directed and left the Respondent's workplace.

32. The Applicant stated further that he spoke Siswati Language, and could neither speak nor read English Language. The Court has noted that the Respondent has not denied this particular assertion by the Applicant. It follows therefore that every reading material that was meant for the attention of the Applicant had to be translated and/or interpreted in

Siswati. It is common cause that exhibit R1 is written in English Language. The Applicant added that about 4(four) weeks after he had been served with exhibit R1, his children returned from where they had been studying and explained to him in Siswati, the contents of exhibit R1.

33. The Applicant testified as follows under cross examination:

"Mr Dlamini: My Lord I can explain about this letter. I was given this letter when I entered the work place and upon receipt of this letter I was told that I should immediately vacate the premises of the company and the letter was never explained to me.

Mr Thomo: Mr Dlamini can you read English ...

Judge: Before you go there: Mr Dlamini said the letter was handed to him when he reported to (at) work; who is the person who did that, we have to get a name.

Mr Dlamini: It was Mr Lokotfwako.

Mr Thomo: Can you read English Language Mr Dlamini.

Mr Dlamini: No I do not my Lord.

Mr Thomo: *Can you understand, English Language*

Mr Dlamini *No my Lord I do not understand English Language but only understand a few words but I cannot say before Court that I understand the language.*

Mr Thomo: *Did you try to get clarity from anyone to interpret for you?*

Mr Dlamini: *This letter was read to me by children after four weeks when there were [they returned] from school then they try [tried] to explain its contents to me"*

(Underlining added)

(Record pages 52-53)

34. The Applicant's signature appears on the second page in exhibit R1. The Applicant explained that his signature meant only that he acknowledged receipt of exhibit R1. Mr Lokotfwako confirmed that to be the case.

35. Mr Lokotfwako testified that when he served exhibit R1 on the Applicant he also explained to the Applicant the contents therein in Siswati. The Applicant denied that allegation. The Applicant's version

and that of Mr Lokotfwako clearly contradict each other on this crucial point. The Court is unable to establish who between the 2 (two) gentlemen is telling the truth.

36. The applicable legal maxim is: Ei incumbit probatio, qui dicit, non qui negat:

1. *"The proof lies upon him who affirms, not upon him who denies; since by the nature of things, he who denies a fact cannot produce any proof."*

   AGGS: W.H.: WHARTON'S LAW LEXICON, 11th edition, Stevens and Sons 1911 (ISBN not available) page 311.

2. The learned author explained the principle further:

   "The most prominent canon of evidence is, that the point in issue is to be proved by the party who asserts the affirmative."

   AGGS W.H. (supra) page 135.

37. When the Respondent drafted the conditions of suspension, it thereby became obligated to ensure that the person in respect of whom they drafted those conditions, for instance, the Applicant, was made aware of

their existence. The Respondent acknowledges the existence of that obligation. The Respondent avers that it discharged that obligation in that it notified the Applicant about the suspension conditions. The onus is therefore on the Respondent as employer, to satisfy the Court that it communicated the conditions of suspension to its employee (Applicant).

38. In addition to the authority that is cited above, the principle regarding onus of proof provides as follows:

38.1 *"The burden or onus of proof in its ordinary sense is a metaphorical expression for the duty which one or other of the parties has of finally satisfying the court that he is entitled to succeed on his claim or defence which ever it may be.*

...

38.2 *"... the incidence of the burden of proof decides which party will fail on a given issue if, after hearing all the evidence, the Court is left in doubt."*

HOFFMANN LH AND ZEFFERTT DT: (supra) page496.

38.3 In the matter of: KRIEGLER VS MINITZER AND ANOTHER 1949 (4) SA 821 the Court, per Greenberg JA, restated the principle as follows, after consulting various leading authorities on the subject:

"... the burden of proof ... rests upon the party; whether plaintiff or defendant, who substantially asserts the affirmative issue"

...

"The true meaning of the rule is that where a given allegation, whether affirmative or negative forms an essential part of a party's case, the proof of such allegation rests on him."

(Underlining added)

(At page 828)

39. After hearing all the evidence, particularly on this crucial point, the Court is left in doubt as to whether or not the Respondent did explain to the Applicant the conditions of suspension in Siswati. The Respondent has failed to discharge its persuasive burden to prove its allegation. There is therefore no proof before Court that the conditions of

suspension were communicated to the Applicant in Siswati. The Applicant cannot be held liable for breach of suspension conditions which were not communicated to him. Consequently the Court finds that the Applicant is not guilty of the 3rd charge. The guilty – verdict that was issued by the chairperson at the disciplinary hearing was irregular for this reason as well.

40. On the 4th charge the Applicant was further accused of making falsified lunch – out claims for the 1st, 12th and 14th July 2010, yet during the aforesaid days the Applicant worked within Nhlangano town and accordingly was not entitled to submit the lunch – out claims. The Applicant testified that on the aforesaid days he worked outside Nhlangano town and therefore his claim for lunch – out was properly filed.

41. In order to prove the 4th charge, Mr Lokotfwako testified as follows at the trial:

"On the fourth charge ... the evidence we got from the tracking system on Mr Dlamini's car it was discovered that on these three days he claimed to be paid lunch out. It was an illegal claim because he was not

outside Nhlangano. We discovered this whilst we were conducting our investigation after he had been suspended. That was something that was reflected by the Tracking System ..."

(Underlining added)

(Record page 106)

42. According to Mr Lokotfwako the only evidence that the Respondent relied on in order to prove that the Applicant had filed a false claim for lunch out, was the Tracking System. In other words Mr Lokotfwako and the Respondent claimed that the Applicant was guilty of the 4th charge because the Tracking System says so. The Court has already pointed out above that the Respondent has failed to produce the Tracking System and its results before Court. Consequently there is no evidence to prove that the Applicant had committed the offence in the 4th charge.

43. In Section 42(2) of the Employment Act no. 5/1980 (as amended) the general standard of the burden of proof required for the employer to justify the termination of employment is that:

"42(2) The service of an employee shall not be considered as having been fairly terminated unless the employer proves –

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

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

44. Although the Applicant was found guilty of all 4 (four) charges at the disciplinary hearing, the Respondent has failed to prove misconduct, in Court, against the Applicant. The dismissal of the Applicant is in breach of Section 36 of the Employment Act and is therefore unfair.

45. The dismissal resulted in a financial loss to the Applicant. The loss of salary caused the Applicant to fail to maintain his family. The Applicant's children who were studying at university and at high school had to discontinue their studies due to shortage of funds. The Applicant was 53 (fifty three) years old at the time of dismissal. The Applicant had temporary employment for 3 (three) months after dismissal.

46. It is common cause that at the time of dismissal the Applicant earned a monthly salary of E7, 175-00 (Seven Thousand One Hundred and Seventy Five Emalangeni).

The Applicant claimed terminal benefits as follows:

46.1	Notice pay	E7, 175-00
46.2	Additional Notice	E27, 596-15
46.3	Leave pay (60 days)	E16, 557-60
46.4	Severance allowance	E 68, 996-00
46.5	Compensation for unfair dismal	E 86,100-00

47. The Respondent pleaded as follows in its REPLY:

"The allegations contained herein are admitted save to state that the Applicant is not entitled to additional notice pay, 60 days leave pay and severance pay since his dues were paid up to him upon termination of his services due to serious misconduct on his part"

Although the Respondent has alleged that it paid certain dues to the Applicant at the time of dismissal, the Respondent has failed to disclose in its pleadings and the evidence – how much was paid and for what purpose. The Pre-Trial Conference Minute is also silent on this particular issue. It is however clear that the Respondent does not allege

to have paid the Applicant's claim as listed in paragraph 46.1 to 46.5 above. The Applicant testified that he was not interested in reinstatement, in the event he was successful in his claim.

48. There are certain statutory benefits that become payable to the employee who is found to have been unfairly dismissed by his employer. The method of calculation of the said benefits is also provided for in the statute concerned.

48.1 In terms of Section 33 (1) (c) of the Employment Act, the employer is obligated to pay the employee for notice (if the employment was terminated without notice), plus additional notice.

48.2 The Applicant has calculated his salary at E275-95 (Two Hundred and Seventy five Emalangeni Ninety Five Cents) per day. The arithmetic is not in dispute.

48.3 In terms of Section 34 of the Employment Act the employer is obligated to pay severance allowance to an employee, if it is determined that the employment contract was terminated contrary to Section 36 of the Employment Act. The method of

calculation of severance allowance is also provided for in the section.

48.4 In terms of Section 16(6) of the Industrial Relations Act, the employer is obligated to pay compensation to the employee if the latter is found to have been dismissed unfairly. The method of calculation is also provided for in the section.

49. However, different consideration applies to leave pay. The employee's entitlement to leave pay is neither automatic nor dependent upon termination of employment. Also the method of calculation of payment for leave days outstanding is not regulated by the Act. The employee has a duty to plead and prove that he is being owed for leave days and also the amount owing.

50. In its REPLY the Respondent denied, inter alia, that it is liable to the Applicant for leave pay. The Applicant had a duty therefore to prove his claim with evidence. The Applicant failed to adduce the requisite evidence. Consequently the claim for leave pay – fails.

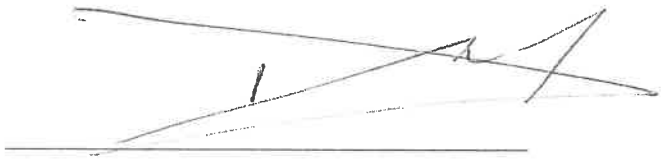
51. The Court appreciates the contribution made by the Respondent in preparing the record of proceedings. In the exercise of its discretion the Court orders each party to pay its costs.

52. Wherefore the Court orders the Respondent to pay the Applicant as follows:

52.1	Compensation (E7, 175-00 x 10)	E71,750-00
52.2	Notice pay	7,175-00
52.3	Additional Notice	E27, 596-00
52.4	Severance pay	E68, 750-00
	Total	E175, 271-00

53. The claim for leave pay is hereby dismissed.

Members agreed



D.MAZIBUKO

INDUSTRIAL COURT - JUDGE

Applicant's Attorney	Mr. Z. Hlophe Of Magagula Hlophe Attorneys
Respondent's Attorney	Mr. V. Thomo Of Sibusiso Shongwe and Associates