IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE **Case No.** 381/2014

In the matter between:

MATHEMBA DLAMINI Applicant

And

GUNDANE AND SONS (PTY) LTD Respondent

Neutral Citation: Mathemba Dlamini vs. Gundane and Sons (Pty) Ltd (381/14) [2024] SZIC 20 (06 March 2024)

CORAM: **V.Z. DLAMINI – JUDGE**
(Sitting with Mr. D. Mncina and Mr. D.P.M. Mmango – Nominated Members of the Court)

SUBMISSIONS FILED: 31st August 2023

JUDGMENT DELIVERED: 06th March 2024

SUMMARY: ***Application for determination of an unresolved dispute – Dismissal – Insubordination – Evidence of supervisor who issued instruction not adduced to prove elements of misconduct– Insubordination not proved – Dismissal not permitted by section 36 of Employment Act, 1980 – Dismissal substantively unfair.***

Underpayment – Onus on employee to prove entitlement to higher salary – No legal instrument or contractual provision produced proving entitlement – Onus not discharged.

Housing allowance – Onus on employee to prove entitlement – Not expressly provided in relevant Wage Regulations as alternative to housing – Evidence not led proving entitlement to housing – Onus not discharged.

Ration allowance – Onus on employee to prove entitlement – Absence of legal notice listing employer amongst employers required to supply rations to employees – Onus not discharged.

JUDGMENT

INTRODUCTION

[1] The Applicant, an adult liSwati male of Siphofaneni area in the Lubombo, was employed on the 1st November 2012 as a Maintenance Fitter by the Respondent, a company duly incorporated and registered in accordance with the Company laws of Eswatini and having its principal place of business in Nhlangano in the Shiselweni region.

[2] The Applicant was in continuous service with the Respondent until the 11th June 2014 when he was dismissed following a disciplinary inquiry that found him guilty of insubordination and recommended dismissal. An internal appeal that was lodged by the Applicant was unsuccessful. The

Applicant subsequently reported a dispute for unfair dismissal to the Conciliation Mediation and Arbitration Commission (CMAC); nevertheless, the dispute remained unresolved resulting in CMAC issuing a certificate of unresolved dispute.

[3] The Applicant then filed an application for determination of an unresolved dispute against the Respondent in which he sought the following relief:

(a)	*Underpayments*	*E57, 600.00*
(b)	*Notice pay*	*E7, 000.00*
(c)	*Housing allowance*	*E22, 800.00*
(d)	*Ration allowance*	*E9, 500.00*
(e)	*Maximum compensation for unfair dismissal*	*E84, 000.00*

APPLICANT'S CASE

[4] The Applicant was the only witness who gave evidence in support of his case. He told the court that in 2012 he saw a job advertisement for a Maintenance Fitter tenable at the Iron Ore mine operated by a company known as Salgaocar Swaziland (Pty) Ltd in Ngwenya in the Hhohho region; he applied for the job since he was qualified for it. He was called to an interview and to his surprise, he discovered that the interview was conducted by a certain Ms. Hlophe who was the Respondent's Human Resources [Manager] instead of officers from the aforesaid company. During the interview, the Applicant negotiated for a higher salary than what was initially offered by the Respondent, Ms. Hlophe verbally promised him that he would be paid E7, 000 per month. After the

Respondent offered him the job, which he accepted subject to the adjustment of his salary, he was deployed to the Salgaocar mining operation.

[5] According to the Applicant, despite Ms. Hlophe's promise, the Respondent paid him a sum of E3,500 per month, which was later increased to E3, 800; he earned the aforesaid amount until the termination of his services. He was unhappy about his package and refused to sign the written particulars and contract of employment that were given to him because these did not reflect the sum of E7, 000 he was promised. As he continued working, the Applicant continued to complain about his salary such that the Human Resource Officer based at the mine once charged him for complaining about his salary and allegedly threatening the Respondent's superiors.

[6] It was the Applicant's evidence that before the 5th May 2014, he went on leave and while on leave his Salgaocar supervisor called him to return to work. Since he was far from the mine, he arrived an hour late, this earned him the ire of the supervisor who reported him to the Respondent whose superiors charged him for late coming. The Applicant was also charged for insubordination. According to the Applicant the latter charge arose after the Salgaocar supervisor instructed him to clean a machine before repairing it. He told the court that it was not part of his job description to clean the iron ore mud that clung to the machine, that was the job of the general labourers who were trained on how to remove the mud. The Applicant therefore denied that he defied a lawful and reasonable instruction.

[7] The Applicant further testified that the Salgaocar supervisor who issued the instruction was not called as a witness during the disciplinary hearing. In addition to his claim for underpayments based on the E7, 000 he was promised, the Applicant claimed housing allowance and ration allowance. The Applicant asserted that the claims for housing and ration allowances were based on the provisions of the Mining Regulations Order, 2014, which enjoined the Respondent to pay same.

[8] It was the Applicant's evidence that he has not been gainfully employed since his dismissal. Furthermore, he stated that he had four dependents including his mother and three children.

[9] Under cross-examination, the Applicant denied that he refused to perform his job and that he told his supervisors at the mine that he was tired. When it was put to him that he did not request protective clothing in order to carry out the instructions of the mine supervisor, the Applicant told the court that, as a qualified Fitter, he was prohibited by safety regulations from doing work he was never trained for. He admitted that on the 11th October 2013, he was given a written warning for insubordination; nevertheless, the Applicant stated that his supervisors frequently preferred frivolous charges against him.

[10] The Applicant insisted that he reached an agreement with Ms. Hlophe that he would be paid E7, 000 per month; but conceded that other than his assertion, he had nothing else to prove the agreement. He further denied that the Mining Regulations, 2014 he relied on were not operational at the

time of his service to entitle him to claim the housing and ration allowances.

RESPONDENT'S CASE

[11] The Respondent's only witness Ms. Zodwa Mashwama told the court that at the material time she was the Respondent's Senior Human Resources Officer and was not stationed at the mine. On or about the 5th May 2014, she received a call from the mine supervisor one Punity about the Applicant's refusal to carry out his instruction of fitting a part on a machine; Ms. Mashwama denied that the Applicant was instructed to clean the machine. While the former Senior Human Resources Officer admitted that she was not present when the mine supervisor issued the instruction, the Applicant did not deny the incident when she was discussing the matter with the two after her arrival at the mine.

[12] According to Ms. Mashwama, while she was conducting her investigations she uncovered that the Applicant had also reported an hour late for work and claimed to have used it as compensation for working overtime on a previous day. After completing her investigations, she preferred two charges against the Applicant; these were late coming and insubordination. During the disciplinary hearing, Ms. Mashwama was the initiator. After evidence was led, the chairperson of the hearing found the Applicant guilty of insubordination and exonerated him of the other charge.

[13] Ms. Mashwama further testified that at the time of the hearing, the Applicant had a valid written warning for insubordination, as a result the chairperson of the disciplinary hearing recommended dismissal. According

to the former Senior Human Resources Officer, the Respondent also followed a fair procedure and as such the Applicant's dismissal was fair.

[14] Ms. Mashwama denied that the Applicant was promised a salary of E7, 000 per month; as far as she was concerned, he had a contract of employment that initially offered him E3,500 per month, which was increased to E3, 800. She further told the court that the Applicant's refusal to sign the contract did not nullify the terms of the contract because he continued to work and earn the sum reflected in it. Moreover, Ms. Mashwama stated that the housing and ration allowances claimed by the Applicant were never gazetted; hence, their non-payment by the Respondent.

[15] Under cross-examination, Ms. Mashwama said she was not aware that an employer could not hold an employee to terms of particulars of employment not submitted to the Commissioner of Labour. The former Senior Human Resources Officer also stated that even though she made a follow up on the Applicant regarding the contract, the latter never told her the reason for his refusal to sign it.

[16] According to Ms. Mashwama, it was never brought to her attention that around the 11th October 2013 the Applicant was charged for demanding an increase of his salary. Even though Ms. Mashwama denied knowledge of the charge sheet reflecting the aforesaid charge, she admitted that the Applicant was issued with a written warning for a previous charge of insubordination, which formed one of the charges reflected in the same charge sheet.

[17] Ms. Mashwama admitted that she was not present when the instruction to fit a component of the machine was issued to the Applicant; she further conceded that the supervisor who gave that instruction was not called to testify at the disciplinary hearing; she was however satisfied with the evidence she tendered because the Applicant did not deny the offence when the supervisor relayed the incident to her.

SUBMISSIONS

APPLICANT

[18] The Applicant's representative Mr. Ephraim Dlamini submitted that the Applicant's refusal to sign the contract of employment was consistent with his assertion that the parties agreed that his salary would be E7, 000 per month. The Respondent's failure to submit the Applicant's written Particulars of Employment (Form 22) to the Commissioner of Labour rendered the Applicant's version concerning the agreed salary more probable, so argued Mr. Dlamini. In support of the aforegoing principle, Mr. Dlamini referred to the case of **France Dlamini v A to Zee (Pty) Ltd IC Case No. 86/2002.**

[19] Mr. Dlamini further contended that the Applicant's claim for housing and ration allowances was filed in terms of **regulations 15** and **16** of the **Regulation of Wages (Mining and Quarrying Industry) Order, 2014 (Mining Regulations)**. The Applicant was entitled to housing allowance because it was impracticable for him to commute from home to work daily, so submitted Mr. Dlamini. With regards to the ration allowance, Mr.

Dlamini argued that the Respondent was obliged in terms of the aforesaid regulation to provide the Applicant with rations.

[20] It was Mr. Dlamini's argument that in the absence of the testimony of the mining supervisor who issued the instruction to the Applicant, the latter's evidence remained uncontroverted; Ms. Mashwama's evidence could not gainsay the Applicant's testimony since it constituted inadmissible hearsay; consequently, the Respondent failed to prove insubordination.

RESPONDENT

[21] The Respondent's counsel, Mr. Andile Dlamini submitted that the Respondent's witness' evidence concerning the insubordination was not challenged during cross-examination; what was predominantly impugned was the Applicant's refusal to sign the contract of employment.

[22] Mr. Dlamini argued that the Respondent was entitled to terminate the Applicant's services because he had a valid written warning for insubordination. The employer had no place for employees who are disobedient as his conduct could affect the entire workforce, so submitted Mr. Dlamini. In that respect, counsel referred to the case of **Irene Moeketsi v Metro Cash and Carry (Pty) Limited (IC Case No. 97/2002)** as authority for the aforesaid principle.

[23] It was the Respondent's counsel's contention that in the absence of the mining supervisor's testimony, Ms. Mashwama's evidence was sufficient since she stated that she inspected the site where the Applicant refused to comply with the instruction and gathered all the evidence that was required

to support the charge of insubordination. Mr. Dlamini also argued that even if the court were to find in the Applicant's favour, it could only award compensation based on the salary actually earned by the Applicant.

[23] Mr. Dlamini also argued that the Applicant's claim for underpayment was not proved at all since he failed to prove during cross-examination that there was ever an agreement or arrangement that he would be paid E7, 000. The Respondent's counsel further submitted that housing allowance was not automatic; although the mining regulations did not provide the rate of housing allowance, the rate of E1, 200 on which the Applicant's claim was based was unreasonable, but an amount of E400 per month would at least be justified.

[24] The same contention was made by Mr. Dlamini in respect of the claim for ration allowance; except that he submitted that instead of claiming E500 per month, a sum of E200 would be justified. Having submitted the above, the Respondent's counsel concluded though that the Applicant was not entitled to any of the claims.

ADJUDICATION

Dismissal

[25] It is common cause that the Applicant was employed on a permanent basis; consequently, he was an employee to whom **section 35** of the **Employment Act, 1980 (E Act)** applied. In terms of **section 42(2)** of the **E Act** the employer bears the onus of proving that the reason for terminating an employee's services was one permitted by **section 36** of the

E Act and that taking into account all the circumstances, it was reasonable to terminate the services of the employee.

[26] Put differently, the employer has to prove on a balance of probabilities that the employee's dismissal was substantively and procedurally fair. Considering the Applicant's Statement of Claim and his evidence led during trial, it appears that he was not challenging the procedural aspect of his dismissal. In the court's view, the fact that a disciplinary hearing relied on hearsay evidence to find an employee guilty of misconduct is not a procedural irregularity, but goes to the substantive aspect of the case.

[27] The Applicant was dismissed by the Respondent following a disciplinary inquiry that found him guilty of insubordination. There is a dispute regarding the precise instruction that was given to the Applicant by the supervisor on site. The charge sheet was also not helpful because it did not state the particulars of the offence. The minutes of the disciplinary hearing were also of little use because they were recorded in SiSwati and no effort was made to have them translated into English by a qualified translator.

[28] Notwithstanding the above difficulty, it behooves the court at the outset to expound the relevant principles of the misconduct of insubordination. In the case of **Lucky Dludlu v Swaziland Beverages (Pty) Ltd (14/2012) [2020] SZIC 113 (11 September 2020)** at paras: **11 – 12**, Nsibande JP made the following statement on insubordination:

> *"The general position of our law is that wilful refusal to comply with the reasonable and lawful instruction of an employer or supervisor may justify dismissal. Such behaviour is generally known as*

insubordination. Grogan, Workplace Law Juta 12th Edition, Chapter 12, paragraph 3.8 pages 125-126 advances the hypotheses that the inquiry into the gravity of the specific insubordination considers three aspects: The action of the employer prior to the reasonableness of the instruction, and the presence of wilfulness by the employee. Bhekithemba Mango v Murtorns Cane Contractors (Pty) Ltd (373/04) [2009] SZIC 50 (11 June 2009). [12] Further, it has been said that insubordination warrants dismissal only if it is deliberate and serious that whether it is considered so depends on the circumstances including the manner in which it is expressed, the position of the person whose authority is repudiated and the reason for the employee's defiance. (See John Grogan, Dismissal, Discrimination and Unfair Labour Practices, Juta 2nd Edition Chapter 16 page 308)".

[29] The mine supervisor who issued the instruction was not called to give evidence during the disciplinary hearing and the court finds that the explanation proffered by Ms. Mashwama for not calling him then is not satisfactory. While the evidence of the mine supervisor recorded in the minutes of the hearing would not have been conclusive in the absence of his evidence at the trial, it would still have been circumstantial and of some use to the Respondent.

[30] The Senior Human Resources Officer was not present when the instruction was issued. The version that the Applicant did not refute the mine supervisor's account when Ms. Mashwama interviewed the duo was not put to the Applicant during cross-examination in this court. Besides, even

if that Ms. Mashwama's account were true, that did not excuse her from calling the supervisor as a witness because the Applicant pleaded not guilty when the charge was read to him.

[31] Moreover, Ms. Mashwama did not request to see the condition of the machine when she arrived at the mine to investigate the incident; she did not do so probably because she lacked the technical skill to appreciate the lawfulness and reasonableness of the instruction. Counsel for the Respondent's submission that she inspected the machine when she arrived to investigate the incident is inconsistent with the account given by the former Senior Human Resources Officer during trial.

[32] In the absence of the evidence of the mine supervisor at the disciplinary hearing and in this court, Ms. Mashwama's testimony as to what was expected of the Applicant is of little value; she is not qualified to give an opinion whether the Applicant refused to do the job for which he was employed. In the premise, the former Senior Human Resources Officer's evidence cannot overshadow that of the Applicant who was an expert in his field.

[33] For the above reasons, the court finds that the Respondent has failed to prove that the Applicant's dismissal was for a reason permitted by **section 36** of the **E Act**. To that extent, the Applicant's previous written warning for insubordination cannot assist the Respondent's case. Consequently, the Applicant's dismissal was substantively unfair.

Underpayment

[34] The Applicant contended that he was underpaid because a certain Ms. Hlophe who represented the Respondent during the former's interview for the job promised him a salary of E7, 000 per month. While the court finds that Ms. Mashwama's denial of such promise cannot controvert the Applicant's account because she was not present during the interview, that alone cannot result in Applicant's success on this claim.

[35] The Applicant also relies on the provisions of **sections 22** and **23** of the **E Act** by arguing that the Respondent's failure to submit the particulars of employment form to the Commissioner of Labour after he refused to sign it, proves that he was promised the aforesaid amount.

[36] **Sections 22, 23** and **25** of the **E Act** read as follows:

> *"22 (1) Every employer shall, subject to the provisions of subsection (2) —*
>
> *(a) within two calendar months of the appointed day, give each employee in his employment a completed copy of the form at the Second Schedule;*
>
> *(b) give each employee taken into his employment after the appointed day, a completed copy of the form at the Second Schedule within six weeks of the beginning of that employment.*
>
> *(2) Nothing in this section shall apply in respect of a domestic employee or an employee —*
>
> *(a) who normally works or is expected to work less than twenty-one hours per week;*

(b) who has contracted to work for his employer for a fixed period of six weeks or less and is not re-engaged at the end of that period;

(c) who is a member of the employer's immediate family;

(d) whose terms of service are governed by a collective agreement, a copy of which has been lodged with the Labour Commissioner and a further copy of which is held readily available by the employer for perusal by the employer at his place of employment.

23. (1) The signatures of both the employer and the employee duly witnessed, shall be affixed to the copy of the form at the Second Schedule given to the employee under the terms of section 22.

(2) Where an employee refuses to sign the form, the employer shall so inform the Labour Commissioner in writing, whereupon the Labour Commissioner shall arrange for an Inspector to interview the employee and explain the document and the requirements of this section to him.

(3) If the Inspector is satisfied that the details set out in the form are correct, he shall require both the employer and the employee to sign the employee's copy of the form and witness their signature thereto.

(4) Where for any reason the employee continues to refuse to sign the form, the Inspector shall endorse the form to that effect, thereafter handing it to the employee and certifying in writing to the employer that he has done so.....

25. In any proceedings arising out of the provisions of this Act, a copy of the form in the Second Schedule signed by both the employer and the employee, shall be accepted as prima facie evidence of the matters contained therein at the time it was signed, but nothing in this Act shall deem the form to be a written contract of employment". [Emphasis added].

[37] Although the Respondent attempted to comply with the provisions of **section 22,** it did not adhere to the dictates of **section 23** after the Applicant refused to sign the particulars of employment form. Notwithstanding the Respondent's non-compliance with **section 23**, the Applicant did not dispute the other terms in the particulars of employment form. While it was proven that the Applicant persistently complained about his salary, he did not allege nor prove that he escalated the matter by lodging a formal grievance internally and / or reported a dispute to CMAC.

[38] The Applicant never even invoked the provisions of **section 26** of the **E Act** by filing a complaint to the Commissioner of Labour that his terms and conditions of service were rendered less favourable by reason that he was being paid less than what he was offered. Instead, the Applicant continued to accept the salary that was paid by the Respondent from 2012 until his dismissal in 2014.

[39] Other than his assertion that he was promised E7, 000 per month, the Applicant did not produce any legal instrument or internal document to show that Maintenance Fitters were paid E7, 000 per month during the period 2012 to 2014. He did not require the interviewer to reduce the offer into writing.

[40] The Applicant has the onus of proving that by operation of law or in terms of the contract of employment, he was entitled to the sum of E7, 000 per months. This principle was stated in the case of **Nomsa Mamba v Chrisovik Hair & Beauty Home (IC Case No. 153/2002)**. In the court's view the Applicant was failed to prove that by operation of law or by

agreement, the sum of E7, 000 per month was due to him. The case of **France Dlamini v A to Zee** (above) is distinguishable on the facts.

Housing allowance

[41] The Applicant also claims housing allowance based on the provisions of the **Mining Regulations**. **Section 15** of the **Mining Regulations** reads as follows:

> *"Where an employer [employee] is employed in circumstances where it is impracticable, for reasons of distance, for him to return to his home or normal place of residence at the end of his day's work, his employer shall cause such employee to be housed in accordance with section 152 of the Employment Act, 1980 and the relevant regulation thereto".*

[42] **Section 152** of the **E Act** provides that:

> *"Where an employer[employee] is employed in circumstances where it is impracticable, for reasons of distance, for him to return to his home or normal place of residence at the end of his day's work, his employer shall cause such employee to be housed in such manner as may be prescribed".*

[43] **Section 152** of the **E Act** and **section 15** of the **Mining Regulations** do not make provision for housing allowance as a substitute to housing; for that reason, there is no rate stipulated for housing allowance. There is no

legal basis of claiming housing allowance based on a rate not provided in the **Mining Regulations**. Besides, the Applicant did not adduce evidence to prove that it was impracticable by reason of distance for him to commute from home or normal place of residence to work; this contention was introduced for the first time in his representative's closing submissions.

[44] It would be unfair to award the Applicant housing allowance based on allegations that were not put to the Respondent's witness. What was only put to Ms. Mashwama was that the Applicant was entitled to housing allowance, which she denied. In any event, a literal and purposive interpretation of the **Mining Regulations** supports Ms. Mashwama's assertion that housing allowance was not provided in the regulations. In the premise, the court finds that the Applicant has failed to prove his claim for housing allowance.

Ration allowance

[45] With respect to the Applicant's claim for ration allowance, **section 16** of the **Mining Regulations** reads as follows:

> *"(1) An employer, who, by virtue of section 153 of the Employment Act, 1980, is required to supply food to his employees, shall add to the basic wage of his employees such an amount equivalent to the value of the food required to be supplied.*
>
> *(2) Nothing in this section shall be deemed to preclude an employer from supplying rations to any employee in pursuance of a collective agreement".*

[46] **Section 153** of the **E Act** also provides that:

> *"1) With effect from such date as the Minister may appoint by notice in the Gazette, any employer, who, by virtue of section 98 of the Employment Act, 1962, repealed by this Act, was required to supply food to his employees, shall cease to have such an obligation, but shall in lieu thereof, add to the basic wage of his employees such amount equivalent to the value of the food previously supplied, as the Minister may prescribe in the said notice.*
>
> *(2) For the avoidance of doubt and not withstanding of the Employment Act, 1962, any obligation imposed on an employer by section 98 of that Act shall continue in force until the date to be appointed by the Minister under subsection (1).*
>
> *(3) Nothing in this section shall be deemed to preclude an employer from supplying rations to any employee in pursuance of an agreement made under section 48".*

[47] The Applicant bears the onus of proving that in terms of **section 98** of the repealed **Employment Act 1962,** his employer was or would have been required to supply rations to him. He did not place before court any legal notice by the responsible Minister listing the Respondent amongst the employers required to supply rations or to add the monetary equivalent of the rations to its employees' basic wages. Consequently, the court finds that the Applicant has also failed to prove his claim for ration allowance.

CONCLUSION

[48] The court has found that the Applicant has not succeeded in his claims for underpayment, housing allowance and ration allowance and as such

these claims ought to be dismissed. Nevertheless, the court has found that the Applicant's dismissal was not permitted by **section 36** of the **Employment Act** and was substantively unfair; he is therefore entitled to an award for terminal benefits and compensation.

[49] In awarding compensation to the Applicant, we have considered the following personal circumstances:

- He was in continuous employment with the Respondent when he was dismissed;
- The manner in which he was dismissed;
- At the time of dismissal, the Applicant had four dependents;
- He has not been gainfully employed since his dismissal in 2014

[50] The Court holds that an award of Twelve (12) months' salary to the Applicant as compensation for unfair dismissal is fair and equitable in all the circumstances of the case.

[51] In the result, the Court orders as follows:

51.1 The Respondent is ordered to pay the Applicant the following terminal benefits and compensation:

(a)	Notice pay	E3, 800.00
(b)	Twelve (12) months' compensation	E45, 600.00

51.2 The Applicant is awarded costs.

51.3 The Respondent is directed to pay the Applicant the total sum of **E 49, 400.00** within fourteen (14) Court days of the date of delivery of this Judgement in Open Court.

Members agree.

V.Z. DLAMINI

JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT : Mr. E. Dlamini
(Ephraim Consulting Services)

FOR RESPONDENT : Mr. A. Dlamini
(B.S. Dlamini & Associates)