IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No.52/2012

In the matter between:

JAMES NCONGWANE **APPELLANT**

AND

SWAZILAND WATER SERVICES CORPORATION **RESPONDENT**

Neutral citation: *James Ncongwane v Swaziland Water Services Corporation (52/2012) [2012] SZSC 65 (30 November 2012)*

Coram: **S.A. MOORE J.A., M.C.B. MAPHALALA J.A. , E.A. OTA J.A.**

Heard: **19 NOVEMBER 2012**

Delivered: **30 NOVEMBER 2012**

Summary: **The Appellant was dismissed by the Respondent, his employer on allegations of misconduct and dishonesty. He noted an application before the Industrial Court challenging the dismissal: The Industrial Court**

set aside the dismissal as an unfair dismissal and awarded the Appellant payments in consequence thereto under different heads:- The Respondent applied to the Court *a quo* for a review of the decision of the Industrial Court:- The Court *a quo* held for the Respondent, set aside the decision of the Industrial Court premised on the fact that its decision was grossly unreasonable:- It misconstrued the issues before it thus failed to consider relevant evidence and considered irrelevant ones: Appeal to this Court dismissed: decision of the Court *a quo* upheld.

OTA J.A.

[1] This appeal has its roots in Case No. 293/2006 which was launched in the Industrial Court of Swaziland and is predicated on the following grounds:-

1. The Court *a quo* erred in fact and in law in finding that the Respondent had properly filed a review instead of an appeal.

2. The Court *a quo* erred in fact and in law in finding that the Respondent had alleged and proved sufficient grounds of review entitling the Court *a quo* to review and set aside the decision of The Industrial Court.

3. The Court *a quo* erred in failing to consider the main issue before it, i.e. whether, on the evidence available before it, it was fair and reasonable in the circumstances to dismiss the Appellant.

4. The Court *a quo* erred in law in not referring the matter back to The Industrial Court of Swaziland.

5. The Court *a quo* erred in law in not referring the matter back to The Industrial Court for it to be tried and heard before another Judicial Officer.

CHRONOLOGY

[2] This is a case with a long lineage and a checkered history. A brief chronicle of its resume is apposite at the nascent for a better understanding of the reasoning and conclusions reached *in casu*.

[3] It is common cause that the Appellant was employed by the Respondent on 19th December 1995. His services were terminated on the 16th of February 2006, at which time he had risen to the position of Regional Manager (East). By virtue of this position, the Appellant had a travel allowance which covered 2 500 kilometers per month. In the event that more than 2 500 km were travelled on official business, the Appellant was permitted to lodge a travel claim. He was required to prove such a claim by keeping records of his travel. Log sheets which were attached to his claims were used to prove the distances travelled. The Appellant's car allowance covered the vehicle capital cost and the cost of insurance, maintenance and the vehicle licence. The vehicle was to be used for official business, and could, on a limited basis, be used for private purposes. The parties appear to have been happy with this arrangement and the Appellant was duly filing certified claims in this regard, premised on the laid down procedure.

[4] The present acrimony between the parties began with a travel claim which the Appellant filed in respect of a trip he undertook to Tikhuba on the 24th August 2005. It is common cause that the Appellant was

given a lift to Tikhuba in the Operations Director's car. This notwithstanding, the Appellant filed a travel claim for the trip as though it was undertaken in his own vehicle.

[5] Upon having sight of this claim, the Operations Director immediately smelled a rat which generated a series of events. The first being the suspension of the Appellant on the 15th of September 2005, and an investigation into claims made by the Appellant in the preceding months in the 2005 Financial Year. This investigation was carried out by the Respondent's Internal Audit Manager.

[6] It is common cause that on the 4th of October 2005, the Respondent gave notice to the Appellant that the investigation carried out had uncovered a number of irregularities in his travel claims for the months of March 2005 to August 2005. The Respondent consequently preferred 5 charges against the Appellant in relation thereto for the purposes of a disciplinary hearing, which charges all related to allegations of gross misconduct alternatively dishonesty, and sound in the following terms:-

"You are charged with gross misconduct alternatively dishonesty in that:

1. The claim you raised reflected excessive mileage in some instances not corresponding with the radial distances travelled between towns thus intending to unlawfully gain at the Corporation's expense.

2. The claim you raised for August 2005 reflected a trip to Tikhuba on the 24th August 2005, and yet you did not use your vehicle to travel, thus intending to unlawfully gain at the expense of the Corporation.

3. The claim you raised reflected a trip to Tikhuba on 24th August 2005 an area that is outside our area of supply and you had no authority to travel to the aforementioned destination thus intending to unlawfully gain at the Corporation's expense.

4. You raised claims for Saturdays and Sundays travelling to areas outside of your area of responsibility, thus resulting in dishonest travel claims.

5. You did not adhere to the motor vehicle log book policy of the Corporation as specified in 9.5.1 of the Transport Policy, thus resulting in dishonest travel claims."

[7] Suffice it to say that the disciplinary hearing took place wherein the findings of the investigation were presented. The outcome of the

disciplinary hearing was the dismissal of the Appellant on counts 1 to 4 in respect of which he was found guilty. Dissatisfied with this dismissal, the Appellant noted an appeal to the Managing Director of the Respondent who heard the appeal and confirmed the dismissal.

[8] In the wake of these events, the Appellant took further steps by reporting the dispute to the (Concilliation Mediation and Arbitration Commission) on grounds of unfair dismissal. The dispute could not be resolved by the CMAC. This is what precipitated the proceedings in Case No 293/2006 before the Industrial Court for determination of an unresolved dispute in terms of Section 85 (2) of the Industrial Relations Act, 2000, as amended. (The Act).

[9] It is common cause that the inquiry before the Industrial Court was not whether or not the decision of the Respondent in dismissing the Appellant was wrong, but whether the Appellant could on the evidence which was presented before the Industrial Court and which the chairman of the disciplinary hearing was not availed of, be said to have lodged false travelling claims and therefore dishonest in the conduct of his work.

[10] It is common cause that the parties tendered oral evidence before the Industrial Court. The Internal Auditors report was handed in at the proceedings by the Appellant and the Internal Audit Manager who prepared the report, gave evidence in respect thereof.

[11] In its judgment handed down on the 24th of November 2010, the Industrial Court upheld the Appellant's case, declared his dismissal an unfair dismissal and accordingly set it aside. The Court also awarded the Appellant a total amount of E574,167-53 under several heads of payment as well as costs.

[12] Aggrieved by the decision of the Industrial Court, the Respondent as Applicant launched a review application before the Court *a quo*, in a case described as Civil Case No. 504//2011. The inquiry before that Court was whether or not the findings of the Industrial Court were grossly unreasonable.

[13] The case was heard by **M Dlamini J**, who in paragraph [49] of a judgment rendered on 17th July 2012, held that the Industrial Court

"took account of irrelevant considerations and ignored relevant ones''. Premised on this conclusion, the Court *a quo* allowed the review application and set aside the award of the Industrial Court to the Appellant with costs.

[14] It is the foregoing orders of **M. Dlamini** J that birthed this Appeal.

THE APPEAL

[15] In grounds l and 2 of the grounds of appeal, the Appellant contended that the Court *a quo* erred in finding that the Review application had been properly commenced before it. **Mr Lukhele** who appeared for the Appellant, submitted that in the circumstances of this case the proper process that should have availed the Appellant was an appeal pursuant to Section 21 of the Industrial Relations Act, as opposed to a review under Section 19 (5) of the Act.

[16] For his part **Advocate Flynn** contended *replicando* for the Respondent, that the application to review and set aside the judgment of the Industrial Court was on the grounds that it was grossly

unreasonable having regard to the totality of the evidence led before that Court. Counsel therefore submitted that the review application fell within the purview of the Common Law grounds contemplated by Section 19 (5) of the Act.

[17] Now Section 19 (5) of the Act provides as follows:-

> "A decision or order of the Court or arbitrator shall, at the request of any interested party, be subject to review by the High Court on grounds permissible at Common law''.

[18] It is therefore beyond controversy from the above legislation, that though Section 8 (1) of the Act conferred exclusive jurisdiction on the Industrial Court in relation to Employment matters, Section 19 (5) however, specifically retained in the High Court the power of review over the decisions of the Industrial Court and an arbitrator on Common Law grounds.

[19] The question which arises *in casu*, as to the propriety of the review proceedings in contradistinction to an appeal, to redress a grouse over the decision of the Industrial Court, is an old, tired and over flogged

horse. I say this because it has been adumbrated upon in a number of decisions in the Kingdom. The most recent being the decision of this Court rendered on 31st May 2012, in **Doctor Lukhele v Swaziland Water and Agricultural Development Enterprises Ltd Civil Appeal No. 47/2011.** In that decision **Moore JA** with whom **Ebrahim and Dr Twum JJA** concurred, pronounced on this question with particular reference to the case of **Takhona Dlamini v President of The Industrial Court and Another Case No. 23/1997,** which is vociferously urged by both sides in this contest.

[20] It is convenient for me at this juncture, to set out a couple of the paragraphs in the **Doctor Lukhele case (supra)** in a bid to finally lay the question raised *in casu*, to eternal rest. They are as follows:-

> "[27] The classic exposition on the law of review in Swaziland is to be found in the case of **Takhona Dlamini v President of the Industrial Court and Another Case No. 23/1997**
> The opening sentences of **Tebbutt J.A.** expressed the pith of the matter before the Appeal Court for Swaziland with his accustomed clarity where he wrote at page 1:
>
> > "The issue in this appeal is whether a decision of the Industrial Court that it would not hear an application

which an employee sought to bring before it because the matter *"was not properly before it"* should be taken on appeal to the Industrial Appeal Court by the aggrieved employee or brought by the latter on review to the Swaziland High Court"

[28] **Takhona Dlamini's** case was also one of employer and employee. The employee was handed a letter of dismissal from her employment. She complained that her dismissal was invalid, wrongful and unfair. At page 7 **Tebbut J.A**. described the route by which the matter reached this Court's predecessor and highlighted some of the important landmarks along the way:

"The matter came before **Dunn J** who did not consider whether the Industrial Court's decision was correct or not but held that any attack on that decision should not have been brought by way of review to the High Court but should have been taken on appeal to the Industrial Court of Appeal. The relevant portion of his judgment reads as follows:

"The point in this application is that the Industrial Court considered the jurisdiction conferred upon it by Section 5 together with the mandatory procedures to be followed under Part VIII of the Act and held, as a matter of law, that it had no jurisdiction. The applicant is not seeking to rely on any irregularity or impropriety in the process and procedures followed by the Court in

> deciding the point (*in limine*). The cases relied upon by the applicant dealt with the question of the proper exercise of a discretion conferred by statute. The applicant's remedy is one by way of appeal to the Industrial Court of Appeal established by Section 11 of the Act".

He accordingly dismissed the application with costs.
It is against the decision of **Dunn J** that Appellant now comes on appeal to this Court.

> "The sole issue which this Court must decide is what the current forum is in which a party aggrieved by a decision in the circumstances such as the present must seek to have that decision corrected. In other words, is it a matter for review by the High Court or for appeal to the Industrial Court of Appeal? This Court is not called upon to decide if the Industrial Court's ruling was right or wrong as neither of the tribunals mentioned has as yet adjudicated upon that matter and accordingly there is no decision or judgment from either of them in respect of which an appeal would lie to this Court"

[29] At page 314 **Tebbut J.A** cited Section 11 (2) of the Industrial Relations Act No. 1 of 1996 which provided that:

> "A decision or order of the Court shall, at the request of any interested party, be subject to review by the High Court on grounds permissible at common law"

It is to be noted that the above wording is identical to that of Section 19 (5) of the Industrial Relation Act No. 1 of 2000 save for the addition of the words "or arbitrator" in the latter statute.

[30] What follows thereafter is of critical importance to the outcome of the instant appeal. It is this:

> "It is quite clear from the aforegoing that the Legislature was conscious of the differences between an appeal and a review and although it created an Industrial Court of Appeal it confined its jurisdiction to hear appeals from the Industrial Court on questions of law only and specifically retained by Section 11 (5) the jurisdiction of the High Court to review decisions of the Industrial Court on common law grounds. Those grounds embrace, inter alia, the fact that the decision in question was arrived at arbitrarily or capriciously or mala fide, or as a result of unwarranted adherence to a fixed principle, or in order to further an ulterior or improper purpose, or that the Court misconceived its function or took into account irrelevant considerations or ignored relevant ones, or that the decision was so grossly unreasonable as to warrant the inference that the Court had failed to apply

its mind to the matter. (**See Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd & Another 1988 (3) SA 132 (AD) at 152 A-E)**. Those grounds are, however not exhaustive. It may also be that an error of law may give rise to a good ground for review (**see Hera and Another v Booysen and Another 1992 (4) SA 69 (AD) at 84B)".**

[31] Having made reference to **Local Road Transportation Board and Another v Durban City Council and Another 1965 (1) SA 556 (A); Goldfields Investment Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551, and Theron en Ander v Ring Van Wellington Van die NG Sendingkerk in Suid Afrika Andere 1976 (2) SA 1 (AD), Tebbutt J.A.** reproduced what he described as the crystallization of the present-day position in regard to common-law review which **Corbett J.A**. had made in **Hira and Another v Booysen and Another** which I will not copy here as it can be sourced in the judgment itself.

[32] Dealing specifically with the appeal before him, **Tebbutt J.A.** concluded his anaylsis of the complex law involved and its application to circumstances of that case at page 323 of that judgment which reads:

"*In casu* by wrongly deciding (as it must at this stage be assumed) that *de jure*, because of the nature of the Labour Commissioner's certificate the Appellant's application was not properly brought before it, the

> Industrial Court never applied its mind to the issue before it. That was accordingly an irregularity justiciable on review.
>
> It follows that although the learned judge *a quo* was alert to the fact that a matter of law was involved, he erred in not finding that an error of law by the Industrial Court in the circumstances in question was an irregularity justiciable on review by the High Court and not a matter for appeal to the Industrial Court of Appeal. The appeal from the High Court's finding must therefore succeed and the matter must be referred back to it for review". (underline added)"

[21] It is overwhelmingly evident from the foregoing, that the Common Law grounds of review permitted by Section 19 (5) of the Act, falls within the purview of decisions arrived at in the following circumstances:-

1. Arbirarily or capriciously, or

2. *Mala fide* or

3. As a result of unwarranted adherence to a fixed principle or

4. The Court misconceived its function or

5. The Court took into account irrelevant considerations or ignored relevant ones or

6. The decision was so grossly unreasonable as to warrant the inference that the Court had failed to apply its mind to the matter or

7. An error of law may give rise to a good ground of review.

The list is not exhaustive. Each case must be dealt with accordingly to its own peculiarities.

[22] *In casu*, the totality of the foregoing leads me to the ineluctable conclusion, that the Appellant's posture on this subject matter which

is to the effect that this case could not properly lie on review to the High Court, is clearly misconceived. I am of the considered view that the Court *a quo* was well within its jurisdiction when it proceeded with the review proceedings urged before it, based on its findings that the Industrial Court committed an error of law by misconstruing the issues before that Court.

[23] I say this because **Dlamini J** was very much alive to the laid down principles that must guide her in the venture she embarked upon *a quo*. She acknowledged those principles as espoused by jurisprudence including the case of **Takhona Dlamini (supra)** in paragraphs [11] and [12] of the impugned decision. Thereafter, she declared as follows in paragraph [13].

> "[13] What stands to be determined in this case therefore, is whether the learned judge in the Court a quo committed a mistake of law as per **Holmes JA's** observation. This calls for me to turn to the evidence as presented before Court by both parties and the judgment and ascertain whether the conclusion or findings of the learned judge is as a result of considering the totality of the evidence presented. I am very much alive that my duty is not (my emphasis) to reassess the

evidence and say this Court or another sitting would have come to a different conclusion---’’.

[24] The record shows that armed with these entrenched principles the Court *a quo* canvassed the totality of the evidence tendered in the Industrial Court before reaching its conclusions.

[25] From the process of the impugned judgment, it is obvious that what weighed heavily in the mind of the Court a *quo* is the fact that the Industrial Court misconstrued the issues before it and fell into an error of law by failing to consider relevant evidence that formed the crux of the Respondent’s case before that Court.

[26] After considering the totality of the evidence tendered before the Industrial Court, the court *a quo* came to the conclusion that the Industrial Court misconstrued the issues before it based on the following analysis contained in the following paragraphs of the assailed judgment:-

> “[29] The learned Judge, seized with the above evidence concluded:

> "9. As already pointed out in paragraph 7 supra, there was no evidence placed before the Court that the applicant made any false statement or misrepresentation. He simply recorded the distance that he travelled. As to where he was going to is not an issue as he had unlimited use of the motor vehicle. Further, as already pointed out, there was no evidence led to show that the applicant did not in fact, go to the places that he said he went to in the course of executing his duties. A misconduct or dishonesty would in the circumstances of this case have occurred if the applicant was found to have falsified the figures and also shown that he never in fact went to the respondent's substations that he said he went to"..

[30] The Court then found in favour of 2nd respondent and held that his dismissal was unfair.

[31] I agree with the trial judge as reflected at page 7 of the judgment that :

> "8 On behalf of the respondent it was also argued that the dishonesty consisted in the applicant claiming or receiving money that was not due to him..

[34] The learned Judge however, stated the issues before him:

"6 The main argument by the respondent that the applicant committed gross misconduct or dishonesty was that he inflated the mileage because he wanted to exceed the allowed or free mileage of 2,500 km so that he could file a claim with the respondent.

[35] Did the honourable trial Judge understand the issues at hand? This is what I am called to ascertain. If he did, then there is no mistake of law.

[36] Issues in any matter, be it civil or criminal, usually come out clearly under cross-examination of witnesses especially those called upon to establish the cause of action in the absence of pre-trial conference where issues are ventilated.

[37] For purposes of clarity, it is worth repeating the questions posed by applicant to 2nd respondent from page 82 it reads:

"RC: On 15th May 2005 there is a trip from Manzini to Siteki 330 km the distance being alleged is 68 km return trip will 136 referred to the map. It is correct that in fact the log sheets do not tell normal distances between town".

AW: My Lord I did explain before Court that I wouldn't go straight because there were places

substations where I had to attend to a long distances I was attending.

RC: I will demonstrate just how absurd that is because you see if take 330 km and a distance between Manzini and Siteki then you took diversion of 250 km out of your way, is that what you are saying?

AW: It would happen

RC: It will happen in travel of 68 km are you really being serious with this Court.

RC: I see the Internal Audit notes that once Siteki have different entries and little as 67 and as much as 830 km.

AW: Yes my Lord

RC: How can you explain 830 km this is halfway to Cape Town, how can you explain that?

[38] The line of questioning proceeded in similar way in respect of all the distances claimed that were in issue. From this manner of questioning it became clear that the applicant's case from the onset was not that the applicant did not travel to the area reflected in the log book but rather that if he did travel, it was

practically inconceivable under any circumstances that a person travelling within Swaziland around the destination reflected in the log book would travel for such kilometers.

[39] Put differently, the issue was not whether or not 2nd respondent travelled to the areas reflected in the log book. The issue as raised by the applicant was even if one was to assume for a second that 2nd respondent did travel to the areas under scrutiny as per the log book and his evidence under cross examination (because he mentioned Nhlambeni and Lavumisa which were not reflected in the log book) it was practically impossible to travel the distance claimed. The distances in kilometers claimed far exceeded not the allowed 2500 km but the actual physical location of these areas in reality.

[40] This position taken by the applicant is explicitly stated at page 34 part 2 of the transcript where counsel for applicant states:

> "Unfortunately my Lord the policy is not an issue which is before this Court. What is before this Court is the allegations made with regard to counts 1 to 4 and in particular if one looks at count 1 of those charges one sees that what is infact in issue is that he raised the excessive mileage in some instances not corresponding with the radius of distances between towns thus intending to gain at the Corporation's expense and

there has been plenty of cross-examination in respect to that aspect of the matter". (my emphasis)

[41] However, it is clear that the learned Judge misdirected himself on the issue and this can be deduced at page 36 part 2 of the transcript:

> "Judge: I agree with you there but at the same time I think the defence is brought that it may be that he is saying that there was nothing wrong, he did not exceed mileage. At the same time there is no policy against this issue. Why do you say they shouldn't raise a double barrel defence? It may be that he is going to say I did not exceed the mileage here and in any event there was no infraction of the company policy".

[42] Again at page 39 the Honourable Judge demonstrates further that he did not comprehend the issues at hand:

> "Judge If you look at the charges there that he exceeded the mileage. The question is what was the policy relating to mileage. For example in charge 1 that he exceeded the excessive mileage. So the enquiry must be any event what was the allowed official mileage. So that must

come from the policy document of the company. If you look at 3 it says that he had no authority to travel so the Court must enquire, where did this authority come from? So I think broadly we must know what the company policy was in respect of the charges".

[43] The learned Judge seemed to understand the word "*excessive*" to be referring to the laid down 2 500 km whereas applicant raised this word in reference to the actual physical location of the places with regard to the dates or times claimed to have been travelled .

[44] Under no circumstances would applicant have associated the word "*excessive*" to the 2 500 km because that was the very purpose of the policy that whoever travels in excess of 2 500 km should lodge a claim by producing proof of the kilometers in excess of 2 500 km in a form of log book entries".

[27] When this appeal was heard **Mr Lukhele** contended that the Industrial Court was alive to the issues before it and it duly considered the Internal Audit Report as well as the totality of the Evidence before it in its decision. Counsel submitted that his authority for this

proposition lies in the opening statement in paragraph [10] of that Court's decision which is as follows:-

> "Taking into account all the evidence before the Court and also all the circumstances of the case, the Court comes to the conclusion that the dismissal of the Applicant was unreasonable----''.

[28] **Advocate Flynn** argued *au contraire* before us, that paragraph [10] of the Industrial Court's decision must be read in consonance with paragraph [7] where that Court detailed its findings. That no where in the list of the Court's findings in that paragraph or any other part of that Court's decision was there any reference to the central evidence of the Respondent based on the Auditor's Report that analysed the claims and the distances travelled. That the cross examination of the witnesses before the Industrial Court was based on this report. It was the report that also sparked off the disciplinary hearing wherein the report was used. That the report thus flows like a golden thread through the Respondent's case. Counsel further submitted that the Industrial Court completely misunderstood the issues raised before it, ignored this evidence as shown by its findings in paragraphs 7, 10 and other portions of its decision. Rather it took into account irrelevant

evidence, therefore its decision is grossly unreasonable when pitched against the weight of the evidence. This was what led the Court *a quo* to the conclusion in paragraph [49] of the assailed decision which I have hereinbefore set forth above.

[29] I can subscribe to **Dlamini J's** and **Advocate Flynn's** propositions having carefully perused the record myself. I say this because the issue before the Industrial Court as rightly held by the Court *a quo*, was not whether or not the Appellant travelled to the areas reflected on the log book, but whether the distances purportedly travelled when juxtaposed with the actual distances involved, which are all within Swaziland, are realistic. The Industrial Court clearly misconstrued the issues before it. I agree with the Court *a quo* that this fact is clear from paragraph [9] of the Industrial Court's decision which bears repetition at this juncture:-

> "[9] As already pointed out in paragraph 7 supra, there was no evidence placed before the Court that the Applicant made any false statement or representation. He simply recorded the distance that he travelled. As to where he was going to is not an issue as he had unlimited use of the motor vehicle. Further as already pointed out, there was no evidence led to show that

> the Applicant did not infact, go to the places that he said he went to in the course of executing his duties. A misconduct or dishonesty would in the circumstances of this case have occurred if the Applicant was found to have falsified the figures and also shown that he never in fact went to the Respondent's substations that he said he went to".

[30] By misconstruing the issues and proceeding in this way and manner, the Industrial Court committed an error of law. It disregarded relevant evidence contained in the Internal Audit Report which formed the substratum of the disciplinary enquiry that led to the Appellant's dismissal. It ignored the oral evidence of the Internal Audit Manager. This was the evidence that formed the gravamen of the Respondent's case before the Industrial Court.

[31] **Mr Lukhele's** contention that paragraph [10] of the Industrial Courts decision where the Court stated *"Taking into account all the evidence before the Court and also all the circumstances of the case -----''*. Shows that the Industrial Court considered all the evidence before it, is clearly misconceived.

[32] I say this because a judgment of the Court is the reasoned and binding judicial decision of the Court delivered at the end of the trial. It is thus mandatory that it be clear in the judgment that the Court considered all the evidence at the trial and having placed them on an imaginary scale, the balance of admissible and credible evidence tilted towards the victor. In this venture, the Court is required to first of all put the totality of the testimony adduced by both parties on an imaginary scale. It will put the evidence adduced by the Plaintiff on the one side of the scale and that of the Defendant on the other side and weigh them together. It will then see which is heavier not by the number of witnesses called by each party, but the quality or the probative value of the testimony of those witnesses.

[33] In determining which is heavier, the judge will naturally have regard to whether the evidence is admissible, relevant, conclusive and more probable than that given by the other party. Evidence that was rejected by the trial judge should, therefore, not be put in this imaginary scale.

[34] This is because although civil cases are won on a preponderance of evidence, yet it has to be preponderance of admissible, relevant and

credible evidence that is conclusive, and that commands such probability that is in keeping with the surrounding circumstances of the particular case. The totality of the evidence before the Court however must be considered to determine which has weight and which has no weight.

[35] It is after the weighing of the evidence adduced on an imaginary scale, that the Court decides whether a certain set of facts given in evidence by one party in a civil case in which both parties appeared and testified, weighs more than another set of facts. The Court then accepts the evidence that weighs more in preference to the other and then applies the appropriate law to it, before drawing its conclusions.

[36] In the **Nigerian Supreme Court Case of Ezeoke v Nwagbo (1988) INWLR 616 at 627,** the Court expatiated further on these principles. According to it the principle of weighing evidence adumbrated in the case comes into play at two stages of the trial.

(1) When the Judge has to evaluate the evidence on every material issue in the case, he ought to put all the evidence called by each side on that issue on either side of an imaginary scale of justice and weigh

them together, whichever side out-weighs the other in probative value ought to be accepted or believed. If this part of the exercise is properly done, the Court will come out with a number of findings of fact. The Court warned:-

> "A Judge cannot abandon this duty, as it were, merely applying a magical periscope and taking refuge under the cloud of "*I believe*" *or* "*I disbelieve*" **See Alhaji Akibu v Joseph Opaeye (1974) 11 SC 189p 203 also Samuel Oladehin v Continental Textile Mills Ltd (1978) 2SC 23**"

(2) After the findings, the Judge will again put those findings in favour of either side of the balance so as to reach his ultimate decision. Not losing sight of the onus of proof, he should weigh them together to arrive at a decision, based on the facts as found, as to which of the conflicting cases before him is more probable and in view of the law applicable to the case.

[37] *In casu*, the Industrial Court dismally failed to weigh the totality of the evidence before it before making its findings. It appears to have taken cognizance of only the evidence tendered by the Appellant. **Mr Lukhele's** contention that such consideration of the totality of

evidence lies in paragraph [10] of that Court's decision goes to substantiate my views on this subject matter. It was this unfortunate error that led to the findings made by the Industrial Court in paragraph [7] of its decision, which findings are completely against the weight of the evidence placed before it.

[38] The learned judge *a quo* was alive to these facts as can be seen in the tenor of her Ladyship's judgment. This is because in applying the guiding principles evolved in **Takhona Dlamini (supra).,** the Court *a quo* stated as follows in paragraph [45] of the assailed decision, with respect to the findings of the Industrial Court in paragraph [7] of that Court's decision:-

> "45 It is for this reason by misunderstanding the issues at hand that the learned judge rules as follow:-
>
> "7 Before the Court the evidence revealed the following:-
>
> 7.1 The respondent's policy regarding travel claims by Regional Managers was open ended. The applicant had unlimited use

of the motor vehicle. The applicant had unlimited use of the motor vehicle for both official and private use.

7.2 The evidence that the applicant worked on weekends was not disputed.

7.3 The evidence by applicant that he did not have a specific knock-out time is notdisputed.

7.4 During August 2005 he was also Acting Regional Manager for Manzini.

7.5 The claims were approved by his superior before being presented for payment.

7.6 The applicant explained how he made an entry that he had travelled to Tikhuba on 24th August 2005. He said he received a call from his superior at the headquarters at Ezulwini on 23rd August 2005 that the applicant should prepare to travel to Tikhuba on 24th August 2005 together with the Financial Manager. The applicant said in the morning of 24th August 2005 at about 07.00 am he accordingly filed the log sheet. He said the superiors from the headquarters, being Ike Herbst, the Managing Director Peter Bhembe and the Financial Manager Mary Vilakati arrived at Siteki at about 10.00 a.m. They were travelling in a twin cab, and they instructed applicant to travel together with them and leave his motor vehicle. On their return from Tikhuba the applicant said he forgot to make an alteration on

the log sheet and proceeded to drive to Manzini on official duties as he was also the Acting Regional Manager for Manzini. It was not shown during cross examination that this explanation was false or incredible.

7.7 The applicant told the Court that he did not travel on a straight course, but made detours to attend to other substations of the respondent. For example, he said he would enter in the log sheet that he was traveling to Manzini but would find along the way duty would require that he should also go to cover far flung places like Lavumisa. The respondent failed to bring evidence to disprove the applicant's claims that he visited those substations. The respondent could disprove that evidence by simply calling the officers who were based at the substations to come to Court and say that the applicant never came to the substations. The respondent failed to do that. The evidence of the applicant therefore remains unchallenged in that respect .

7.8 Although the applicant's log sheets sometimes showed very high mileage, there was no evidence that the speedometer was interfered with. So whether the mileage was "unreasonably high" as the respondent claimed, there was no evidence that the speedometer readings were false. The applicant did travel the distance recorded in the log sheets".

[39] The reason why the Industrial Court reached the conclusions above as I have already stated, is born out of the fact that it misconstrued the issue before it and thus failed to consider relevant evidence which formed the crux of the application in that Court. Such evidence which is extant in the record of this appeal includes evidence contained in the transcript of the disciplinary hearing marked exhibit F, Evidence of the Internal Auditor who confirms in her evidence that she was not influenced by anyone in her investigation but conducted an investigation on the basis of the relevant document which were before her. Evidence contained in the Internal Auditor's report which was marked annexure "RW1". The sources of information for the report were the travel and transport claim vouchers and the log book sheet. Each log sheet is signed by the Appellant who certifies that the details shown in the sheet are correct. The actual claim vouchers are also signed by the Appellant below words in large capital letter which read *"I Certify that the particulars as shown on claim are true and correct"*. The log sheets records the journey details and the adometer. It is common cause that the actual distances travelled were calculated and inserted on the sheets by the Internal Auditor when she checked them.

[40] Furthermore, there is evidence of the findings of the Internal Auditor that the log sheets do not tally with the known distances between towns and that there was no consistency in the entries . The Appellant did not dispute the contents of the sheets or the distances recorded. The Appellant further admitted that the method of certification and proof in respect of travel exceeding 2 500 km was the log sheet. He confirmed this fact under cross examination. All the log sheets investigated noted similar anomalies and inconsistencies.

[41] The known distance between Siteki and Manzini as shown by the Executive Summary of the Audit Report on page 241 of the book is 68 km. This fact was not disputed. In a bid to demonstrate the implausibility of the Appellant's explanation that he visited other substations on his way to Siteki thus the excessive mileage on his claims, the Respondent based on the evidence which was available before the Industrial Court, which I have also verified as correct averred as follows in paragraphs [11.1] and [11.2] of its affidavit *a quo.*

"[11.1] The Internal Auditor established that the known distance between Siteki and Manzini is 68 km. In the month of August 2005, the applicant recorded, *inter alia,* distances of 477, 488, 775 and 830 kilometers on that route on particular days. The second respondent's attempt to explain these distances, which his entries show, is so implausible that it will be submitted that the explanation ought to have been rejected as false. An analysis by the Internal Auditor of the log sheet for August 2005 showed the following:-

Between 2nd and 4th	477 km	between Siteki and Mbabane
Between 10th and 11th	488 km	between Siteki and Mbabane
Between 18th and 19th	775 km	between Siteki and Manzini
Between 25th and 26th	830 km	between Siteki and Mbabane

[11.2] The Internal Auditor's report found that the other log sheets included similar anomalies and inconsistencies as those noted in the August sheet and it will be submitted that this demonstrated that the applicant was involved in the systematic falsification of the travel claims over a period of time''.

[42] The foregoing is a summary of the evidence which was available before the Industrial Court and which it failed to take cognisance of in making the findings in paragraph [7] of its decision. This was the evidence which the Court *a quo* juxtaposed against the said findings and reached the conclusions in paragraphs [46]–[48] of the impugned decision as follows:-

> "46. Had the Honourable Judge understood the issue before him, he would have considered the evidence of applicant more particularly the roadmap filed by the applicant together with applicant's internal auditor's report and realized that the distances claimed to have been travelled was inconceivable in reality. He would have appreciated that no man could have travelled a distance of 830 km between 25 and 26th August 2005 within the borders of Swaziland, let alone the destinations reflected in 2nd respondent's log book. He would have noticed that even if he were to accept the evidence by the respondent that he did not travel straight, he had to divert to other destinations, such diversion within the radius of Swaziland would not under any circumstances yield to such distances as 830, 402 or 330, 187 km per day. The road map as filed by applicant and the log book would have assisted him in this regard.

47. He would have further appreciated that applicant need not have brought proof of the speedo meter reading not only because at that time it was impossible to obtain same but that it was unnecessary at all under the circumstances as all the evidence relied upon by applicant was submitted by 2nd respondent after certifying the same as correct in a form of the log book and claim vouchers. The learned Judge would have also noted that a distance from Siteki to Zulwini was 68 km and could not be 67 km or 330 km. He would also realize (sic) that the entry of 24th August 2005 to Tikhuba was fraudulent because one needs to also enter the speedometer before and after completing the journey. He would have realized that respondent must have guessed the speedometer entered on this particular day. He would have directed his mind to the response by the 2nd respondent of the Tikhuba trip and realize that the 2nd respondent did not dispute this entry but informed court that it was an error on his part. He would have realized that the response was tantamount to an apology which applicant was at liberty to accept or reject. The Court was certainly not in a position to compel applicant to accept it. He would have taken judicial notice that a person in the position of the respondent was expected to be honest in his dealing and the claim for the trip to Tikhuba which was never (sic) was, was a clear demonstration that the respondent was dishonest and therefore the relationship that was held of trust between the respondent and the applicant could no longer be sustainable under such circumstances. He would have further realized that assuming for a second that 2nd respondent erroneously forgot to cancel the word Tikhuba and replace it

with Manzini as he claimed to have travelled there, he could not have travelled the distance of 187 km as a return trip from Siteki to Zulwini, past Manzini was 68 km. That on it's own was false claim.

48. Further and with due respect to the learned judge, he would have realized that the policy of applicant was never in issue as pointed out that applicant designed the policy for management to be able to claim for any travel that was in excess of 2 500 km and therefore the working hours of the 2nd respondent were immaterial. He would have realized that in the work environment, the 2nd respondent had a duty to be honest and not that his immediate supervisors were to police him. That they approved the claims did not burden them with a duty to scrutinize every claim and therefore exonerate 2nd respondent from his duty to exercise due care in filing for the claim. They were perfectly well entitled to assume that from his position, the 2nd respondent was honest in his claim and not vice versa."

[43] It was the totality of the foregoing analysis that led the Court *a quo* to the conclusion in paragraph [49] of the assailed decision, which bears repetition at this juncture, to wit:

"49 In the result with the dictum in Takhona's case, supra, that the Honourable Judge *"took account of irrelevant considerations*

and ignored relevant ones", the application for review is allowed and the following orders are entered''.

(i) The award by the Court a quo to 2nd respondent (Appellant) is set aside

(ii) Costs to follow the event".

[44] Having myself had due consideration of the facts of this case, I cannot fault the conclusion reached by the Court *a quo in casu*. This is because that Court relied on the principles evolved in the **Takhona Dlamini** case, which it correctly applied to the facts and circumstances of this case before reaching its conclusion. The conclusion reached by the Court *a quo* cannot therefore be faulted.

[45] I am also of the considered view that Appellant's proposal for the matter to be referred back to the Industrial Court to be re-tried by another Judicial Officer is unsustainable. As rightly propounded by **Advocate Flynn**, that will be tantamount to giving the Appellant a second bite at the cherry. In any event, the issues have in my view

been adequately canvassed and settled by the Court *a quo*, thus rendering the course proposed by the Appellant an academic exercise, serving no useful purpose.

[46] This appeal thus fails for want of merits.

ORDER

[47] On these premises it is hereby ordered that this appeal is dismissed with costs, including the certified costs of hiring Senior Counsel.

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E. A. OTA
JUSTICE OF APPEAL

_____

I agree

S. A. MOORE
JUSTICE OF APPEAL

I agree

_____

M. C. B. MAPHALALA
JUSTICE OF APPEAL

For the Appellant : Mr A Lukhele

For the Respondent : Advocate Flynn