



**CONCILIATION MEDIATION AND
ARBITRATION COMMISSION**

HELD AT MANZINI
325/12

REF NO: SWMZ

In the matter between:

THAMI NDZABUKELWAKO

APPLICANT

AND

PANNAR SEED SWAZILAND (PTY) LTD
RESPONDENT

Coram

ARBITRATOR : **VELAPHI Z. DLAMINI**

FOR APPLICANT : **GCINA MHLANGA**

FOR RESPONDENT : **SARA JANE**
THOMSON

ARBITRATION AWARD - 07/08/17

1. DETAILS OF HEARING AND PARTIES

- 1.1 The arbitration hearing was held between the 6th November 2012 and the 4th April, 2014 at the offices of the Conciliation, Mediation and Arbitration Commission (CMAC) at KaLaNkhosi Building in Manzini in the Manzini district.
- 1.2 The Applicant is Thami Ndzabukelwako an adult Swazi male of Mkhondvo area in the Shiselweni district. Mr. Gcina Mhlanga, an Attorney from M.H. Mdluli Attorneys based in Manzini, represented the Applicant.
- 1.3 The Respondent is Pannar Seed Swaziland (Proprietary) Limited, a company duly incorporated in terms of the Company laws of Swaziland, and carrying on business in Matsapha Industrial Town. Ms. Sarah-Jane Thomson an attorney from Kemp Thomson Attorneys in Mbabane represented the Respondent.

2. ISSUE TO BE DECIDED

The issue for determination is whether or not the Respondent constructively dismissed the Applicant.

3. BACKGROUND FACTS

- 3.1 The Respondent is a producer and supplier of premium quality seed, including major grain crops and pastures and produces for the local market.
- 3.2 The Applicant was employed by the Respondent on the 1st January 2001 as a Junior Sales Representative

and was promoted to the position of Sales Representative; however, he was later deployed to the position of Agronomist.

- 3.3 On the 1st July 2011, the Applicant tendered his resignation from the Respondent; alleging that the conduct of his supervisor towards him made continued employment intolerable; he was earning the sum of E18 750.00 per month.
- 3.4 Mr. Ndzabukelwako subsequently reported a dispute for constructive dismissal to the Commission. The dispute was conciliated, however it remained unresolved and a Certificate of Unresolved Dispute No. 332/12 was issued by CMAC.
- 3.5 The parties then requested for arbitration in terms of **Section 85(2) and (3) of the Industrial Relations Act 2000 (as amended)**, and I was then appointed to decide it through arbitration.
- 3.6 The Applicant seeks the following relief against the Respondent: Notice pay (E18, 780.00); additional notice (E25, 961.54); severance allowance (E64, 903.85); and maximum compensation for unfair dismissal (E225, 000.00). The Respondent has opposed the relief claimed.

4. SURVEY OF EVIDENCE AND ARGUMENTS

- 4.1 The Applicant (AW1) and Ms. Makhosazane Felicia Mdluli gave evidence in support of the former's case. The Respondent paraded three witnesses, namely: Mr. Modupe Tsoeu (RW1); Mr. Jan Van Bilgon (RW2); and Mr. Mike Jackson (RW3).

4.2 APPLICANT'S CASE

AW1: APPLICANT'S EVIDENCE-IN-CHIEF

- 4.2.1 The Applicant testified that he was initially appointed as a Junior Sales Representative, however in 2006, he was promoted to the position of Sales Representative. According to the Applicant, this was a positive move.
- 4.2.2 It was the Applicant's evidence that when he was appointed the Sales Representative, he became head of Pannar Seed Swaziland and reported directly to the Export Marketing Officer, Mr. Mike Jackson, who was based in South Africa.
- 4.2.3 According to the Applicant early in 2009, Mr. Mike Jackson came to Swaziland and while here, he called him (Applicant) to a meeting where Mr. Jackson informed him that he would demote him. There and then Mr. Jackson sketched an organogram to demonstrate that his (Applicant) new position would be lower in rank to the new Sales Representative who would soon be appointed.
- 4.2.4 It was the Applicant's evidence that the Export Marketing Officer gave a description of whom he was to report to after he was demoted. Later in 2009, he saw an advertisement in the newspaper for the position of Sales Representative yet he was the incumbent.
- 4.2.5 The Applicant testified that Mr. Cowin Vilakati was appointed to the position of Sales Representative and took over as head of Pannar

Seed Swaziland. The new Sales Representative took up the position that Mr. Jackson had illustrated on the rough organogram. According to the Applicant, following his demotion to the position of Agronomist, he reported to Mr. Cowin Vilakati.

- 4.2.6 The Applicant stated that no internal procedures were adhered to when he was moved from the Sales Representative position to Agronomist.
- 4.2.7 It was the Applicant's evidence that his job description changed after he became an Agronomist. When he was a Sale Representative, he did a lot of marketing and promotions of the Respondent's products. He also paid visits to retailers to monitor sales of the company's products. Moreover, he was responsible for the general administration of the Swaziland office.
- 4.2.8 According to the Applicant, when he became an agronomist, he was responsible for planting demonstration and trials in the fields. Moreover, he was responsible for advising farmers on how to improve their crops in terms of agronomic technology. The Applicant stated that his rate of pay did not change.
- 4.2.9 It was the Applicant's evidence that the deployment from the position of Sales Representative to Agronomist negatively affected him because he lost the status of being head of the company and this was degrading to him.

- 4.2.10 According to the Applicant, he lodged a grievance against the demotion at Head Office in Greytown, South Africa. The grievance was directed to the Industrial Relations Manager.
- 4.2.11 It was the Applicant's evidence that again in 2009, the company was preparing for an extension officer training which was to be held at Mpophoma Centre in Malkerns. Prior to the seminar, Mr. Jackson convened a meeting of the Pannar Swaziland staff and gave them instructions concerning their responsibilities during the seminar.
- 4.2.12 The Applicant testified that in the preparatory meeting, Mr. Jackson instructed him to make a presentation on PAN 53 and PAN 63 during the extension officer day. According to Mr. Ndzabukelwako, Mr. Jackson emphasized that PAN 53 was to be launched on that day; hence, he should talk more on that hybrid.
- 4.2.13 The Applicant stated that a few days after the seminar, the Swaziland staff received an email from the Export Marketing Officer, where he commented on what transpired during the seminar. It was the Applicant's evidence that Mr. Jackson pointed out certain issues that he said were the negatives of that day. However, he (Mr. Jackson) said the comments were not directed at a specific individual, but to the whole team.
- 4.2.14 According to the Applicant, Mr. Jackson accused him of killing PAN 63 that day. The Applicant stated that even though Mr. Jackson did not

specify his name, but because he was the one presenting on PAN 63, he believed that the negative observation was directed at him.

- 4.2.15 The Applicant testified that the Export Marketing Officer later came to Swaziland on company business. They discussed Mr. Jackson's comments of the email accusing him of killing PAN 63.
- 4.2.16 According to the Applicant, Mr. Jackson stated that the Applicant had misunderstood him, and that the email was not directed at him but at everyone.
- 4.2.17 It was the Applicant's evidence that in another incident in 2009, the office secretary, and warehouse administrator Ms. Clarice Khumalo requested him to collect an import permit for sunflower seed that had been ordered by a customer. According to Mr. Ndzabukelwako, he made the permit open to cater for one (1) ton, which was equivalent to forty (40) bags. He stated that normally they would open the permit in order to accommodate the importation of as many products as possible.
- 4.2.18 It was the Applicant's evidence that what followed was that Mr. Jackson sent an email in which he accused him of purchasing sunflower that exceeded the customer's order. In the email, Mr. Jackson pointed out that the sunflower seed would not sell in Swaziland because it was not a popular crop. Furthermore, the Export

Marketing Officer accused him of under pricing the seed.

- 4.2.19 According to the Applicant, Mr. Jackson's accusations offended him, because in the first place he did not order the sunflower seed, but merely assisted Ms. Clarice Khumalo to get the import permit. Secondly, he did not make the quotation for the customer in question. Thirdly, as an agronomist, he was no longer responsible for sales.
- 4.2.20 The Applicant also stated that he neither ordered nor priced the sunflower seed. Moreover, the customer was unknown to him. Consequently, Mr. Jackson falsely accused him regarding the sunflower seed order.
- 4.2.21 According to the Applicant, in another occasion in 2011, a week before a field day, he requested for a pair of khaki trousers from Mr. Jackson; khaki trousers were normally worn as part of the uniform during field days. It was the Applicant's evidence that he spoke to Mr. Jackson on the phone, however, the latter did not give him a straight answer, but said, "We will see."
- 4.2.22 The Applicant testified that later he received Mr. Jackson's response through Ms. Clarice Khumalo. Mr. Jackson told Ms. Khumalo that he would not be given the uniform because he was earning too much money. It was the Applicant's evidence that Mr. Jackson's remarks to Ms. Khumalo constituted a discussion of his salary yet salaries were confidential.

- 4.2.23 According to the Applicant, after Ms. Clarice Khumalo informed him about Mr. Jackson's remarks, he asked her to record the remarks.
- 4.2.24 It was the Applicant's evidence that in March 2011, the company had a field day in Nhlango; they were getting ready to start when Mr. Jackson confronted him and asked him why the grass was not cut.
- 4.2.25 The Applicant testified that when Mr. Jackson asked him about the uncut grass, he shouted at the highest of his voice and was heard by the people who had attended the field day; the peoples included Ghanaians guests and company employees. According to the Applicant, when Mr. Jackson shouted at him, he kept quiet.
- 4.2.26 The Applicant stated that the following day, he had a meeting with Mr. Jackson. In that meeting, Mr. Jackson asked him why the grass had not been cut; he did give a reasonable explanation. The Export marketing Officer then told him that he expected him to take the brush cutter and cut grass and if there was a need, to should also use a slasher to cut the grass.
- 4.2.27 It was the Applicant's evidence that Mr. Jackson also told him that he was expected to take the hoe and weed the lands. If he failed to do that, he (Mr. Jackson) would be forced to reduce his (Applicant) salary to that of a supervisor's pay rate.

- 4.2.28 The Applicant testified that he believed that Mr. Jackson was a man of his words; his threats usually became real like when he threatened to demote him. Consequently, he (Applicant) approached the Industrial Relations Manager and requested to lodge a grievance.
- 4.2.29 According to the Applicant, the parties (Applicant and Mr. Jackson) were called to a grievance hearing in Greytown on the 21st June 2011. The following people attended the hearing: Mr. Mike Jackson; Mr. Brian Hayes; Mr. Nick Goble; Mr. Jan Van Biljon; he (Applicant); and another female whose full and particulars were unknown to him. Mr. Biljon chaired the hearing.
- 4.2.30 It was the Applicant's evidence that, the parties went through all the complaints he had raised, and a verbal outcome was issued. Generally, the Chairperson's conclusion was that he (Applicant) did not understand Mr. Jackson.
- 4.2.31 The Applicant stated that although minutes of the grievance hearing were recorded, when he requested same, he was not given; the chairperson indicated that because he was going on leave and would only return on the 11th July 2011, he would make a written outcome after that date. Nonetheless, the minutes were given to his attorney a year after the hearing.
- 4.2.32 Mr. Ndzabukelwako testified that after reading the minutes, he discovered that they contained inaccurate information concerning Ms. Claris Khumalo. The minutes recorded that Mr. Jackson

said Ms. Khumalo told him that the Applicant ordered sunflower seed; Mr. Jackson never uttered this statement during the grievance hearing. Moreover, the Applicant averred that the minutes were not reliable because he never signed them.

4.2.33 The Applicant testified that despite reminders, the grievance-hearing chairperson never issued the written ruling after the 11th July 2011. Mr. Ndzabukelwako stated that when he sent the reminders, he was then serving notice following his resignation on the 27th June 2011. His notice lapsed without the issuance of a written outcome such that he left the company. However, the Respondent acknowledged his resignation letter in writing.

4.2.34 It was the Applicant's evidence that he was constructively dismissed.

4.2.35 The Applicant testified that he was unemployed, and was not married and did not have any children.

CROSS-EXAMINATION

4.2.36 Under cross-examination, the Applicant stated that all the pillars of his constructive dismissal claim were equally important. Nevertheless, his complaints started with the demotion.

4.2.37 The Applicant stated that he had no knowledge of the company policy dealing with the

deployment of employees to position best suited to their qualifications and skills.

- 4.2.38 It was the Applicant's testimony that there was a difference between changing jobs and promotion. To him a promotion entailed upgrading the position one currently held to a better one. The new job could be better in terms of remuneration, status, and rank. According to the Applicant status meant the position.
- 4.2.39 The Applicant stated that after he was demoted, he reported to Mr. Jackson on the technical aspect of his job, and to Mr. Cowin Vilakati on administrative matter. He confirmed that Mr. Vilakati did not have an agronomic background.
- 4.2.40 According to the Applicant, as head of the company, Mr. Vilakati's responsibilities included sales, marketing, and the general administration.
- 4.2.41 It was the Applicant's evidence that his direct reports to Mr. Vilakati entailed feedback on the operations in general, including his plans for the week and what had been done; these reports were verbal. According to the Applicant, Mr. Jackson had instructed that Mr. Vilakati and he (Applicant) should discuss working plans and implementation of same.
- 4.2.42 The Applicant testified that after Mr. Jackson scrapped the weekly reports, he made verbal reports to him (Mr. Jackson) about the work that was done; they also communicated through emails.

- 4.2.43 Although the Applicant admitted that he predominantly reported to Mr. Jackson, he insisted that Mr. Vilakati was his boss.
- 4.2.44 The Applicant admitted that while he was still a Sales Representative, he reported to Mr. Jackson and when he was appointed agronomist, he continued to report him. He also conceded Mr. Jackson remained his superior because of his technical knowledge of his (Applicant) responsibilities.
- 4.2.45 The Applicant stated that he did not know how much Mr. Vilakati earned because salaries were confidential. When it was put to him, the Applicant stated that he was surprised that Mr. Vilakati earned 20% less than he did because the Sales Representative was in a superior position; so logically, he was supposed to earn more.
- 4.2.46 The Applicant asserted that it was improbable that he and Mr. Vilakati were equals because when the position of Sales Representative was advertised, the company wanted someone who had a B.Sc. degree in Agriculture. Moreover, Mr. Ndzabukelwako stated that Mr. Vilakati was overall in charge of the Swazi company.
- 4.2.47 The Applicant admitted that he also relied on the organogram to support his claim that Mr. Vilakati was superior to him. According to the Applicant, the advertisement stated that the Sales Representative was head of Pannar Seed Swaziland.

- 4.2.48 The Applicant stated that Mr. Jackson literally said that he would demote him and put somebody on top of him and he would be below that person. Mr. Ndzabukelwako maintained that Mr. Jackson illustrated it using an organogram.
- 4.2.49 The Applicant denied that Mr. Jackson told him that he would move him to a position of strength.
- 4.2.50 It was the Applicant testimony that there was no consultation prior to the discussion where he was told by Mr. Jackson that he would be demoted. It just came as a shock to him when Mr. Jackson informed him that he would be demoted. The Applicant also stated that he found it strange that no procedure was followed before his demotion was announced.
- 4.2.51 The Applicant admitted he signed a new job description for his new appointment. According to him, the reason for signing was that he was desperate for the job; he would have been dismissed if he had resisted.
- 4.2.52 Mr. Ndzabukelwako admitted that the Respondent had a grievance procedure, but he did not report a grievance against his demotion sooner because he did not have the grievance procedure. He stated that he lodged a grievance after consulting the Industrial Relations Manager, Mr Brian Hayes.
- 4.2.53 The Applicant stated that as head of Pannar Seed Swaziland at the time of his demotion, he

used a booklet of rules to run the company. The booklet was titled "*Swaziland Pannar Seed Office Protocol.*"

- 4.2.54 The Applicant admitted that he did not challenge Mr. Mike Jackson when he said he was going to be demoted.
- 4.2.55 Mr. Ndzabukelwako asserted that he became aware of the grievance procedure eighteen (18) months after the alleged demotion. Moreover, he conceded that eighteen (18) months was too long to report a grievance. Nevertheless, he averred that he did not want to do things out of sheer anger lest he applied a wrong procedure and was dismissed.
- 4.2.56 According to the Applicant, he waited eighteen (18) months to find out what the grievance procedure entailed because he did not know where to get it. He was only conversant about a green booklet called '*Conditions of Service for Swaziland Staff,*' which was furnished to him when he was first employed, no other document was given to him.
- 4.2.57 The Applicant asserted that the Respondent was to blame for his lack of knowledge of other company policies, in particular the grievance procedure because it withheld these policies from him. However, he admitted that it was also his responsibility as the head of Pannar Seed Swaziland at that time to ensure that he had all the company policies and procedures.

- 4.2.58 Mr. Ndzabukelwako asserted that a chain of events triggered his decision to approach Mr. Brian Hayes for the grievance procedure.
- 4.2.59 It was put to the Applicant that Mr. Jackson would testify and deny that he said he was going to demote the Applicant but said he would move him to an area of strength and the Applicant thanked him for the good opportunity. He denied what counsel for the Respondent put to him and added that he would not have thanked Mr. Jackson for demoting him.
- 4.2.60 The Applicant admitted that his salary was not reduced when he was demoted. Nonetheless, he asserted that moving from the Sales Representative position was negative because he lost his status as head of the company and was degraded. Mr. Ndzabukelwako asserted that he now had to report to the new Sales Representative Mr. Cowin Vilakati.
- 4.2.61 The Applicant maintained that Mr. Jackson discussed his salary with one of the employees Ms. Clarice Khumalo. According to Mr. Ndzabukelwako, the discussion of a salary meant talking about it.
- 4.2.62 Mr. Ndzabukelwako asserted that remarking that someone is earning too much amounted to a discussion of that person's salary; it was unnecessary to discuss detailed aspects of the salary.

- 4.2.63 The Applicant stated that Ms. Khumalo's written statement supported his version that Mr. Jackson said he was already earning too much money so he should buy his own uniform for the King's field day.
- 4.2.64 It was put to the Applicant that in her statement Ms. Clarice Khumalo said Mr. Jackson said he (Applicant) should buy his own uniform because he earned more, which was different from saying he earned too much money. The Applicant insisted that in the SiSwati version, Ms. Khumalo's statement said so. However, that version was lost in translation when Ms. Khumalo recorded her statement in English.
- 4.2.65 It was put to the Applicant that according to company policy he belonged to a category of employees earning above a certain bracket and were supposed to buy uniform for themselves. Mr. Ndzabukelwako disputed this and asserted that he had been provided with shirts, jackets, and trousers for ten years. Consequently, it was going to be the first time for him to buy uniform.
- 4.2.66 The Applicant stated that the conditions of salaries staff green book did not provide that a certain category of employees should buy their own uniforms. However, he admitted that he would not know what other company policies provided in relation to uniforms because he was not given those policies.

- 4.2.67 The Applicant admitted that Ms. Khumalo never said Mr. Jackson told her the amount of money he (Applicant) earned.
- 4.2.68 Mr. Ndzabukelwako said it was unreasonable to expect him to buy his uniform considering that the company had provided him with the uniform for ten years. Moreover, he had not been consulted prior to being advised about the new policy.
- 4.2.69 The Applicant admitted that apart from what she recorded in her statement, Ms. Khumalo did not add anything else in relation to the Applicant salary.
- 4.2.70 The Applicant stated that although he could not recall, Ms. Khumalo wrote the statement a month or two after the King's field day. It was put to him that the statement was backdated on his instruction. The Applicant denied that Ms. Khumalo backdated her statement.
- 4.2.71 The Applicant admitted that he asked Ms. Khumalo to write the statement after he had approached the Industrial Relations Manager about his desire to lodge a grievance.
- 4.2.72 Mr. Ndzabukelwako maintained that he was a victim of a verbal assault that occurred during the Nhlangano field day and Mr. Jackson was the perpetrator. He asserted that Mr. Jackson shouted at him when he discovered that the grass was not cut.

- 4.2.73 It was put to the Applicant that Mr. Jackson would tell the arbitration that he did not shout at him, but was annoyed because work was not done yet it was a very important day for the Respondent. Moreover, it was put to Mr. Ndzabukelwako that Mr. Jackson did not demean him in any way. The Applicant maintained his version.
- 4.2.74 According to the Applicant the field day was about inviting farmers to see the company's products on the fields as opposed to promoting the hybrids; consequently, he conceded that it was an important day for the Respondent.
- 4.2.75 The Applicant admitted that the day before the field day, Mr. Jackson found him in Nhlangano supervising preparations for the field day; the latter instructed him to show the Ghanaian visitors the company's fields.
- 4.2.76 Mr. Ndzabukelwako conceded that Mr. Jackson had the right to be annoyed because they (Applicant and labourers) did not complete the job. The Applicant also acknowledged that it was his responsibility to ensure that the grass was cut and he did not fulfill that responsibility.
- 4.2.77 According to the Applicant, even though it was his responsibility to ensure that the grass was cut, he could not finish supervising the job because Mr. Jackson assigned him other responsibilities before he could even go to Nhlangano. He stated that he could not refuse

because Mr. Jackson was no longer approachable.

- 4.2.78 The Applicant was asked what arrangements had he made to salvage the situation, seeing that he had not gone to Nhlanguano because he was waiting for Mr. Jackson and the Ghanaian visitors. He maintained that Mr. Jackson had turned out to be a “monster” and no employee could suggest something to him.
- 4.2.79 Mr. Ndzabukelwako admitted that he did not make his own arrangement with his crew to go and cut the grass very early before the field day ceremony commenced. Moreover, the Applicant stated that after Mr. Jackson and the Ghanaian visitors did not turn up for the tour, he could not go to Nhlanguano because he then had to take Ms. Clarice Khumalo to Mbabane for engraving of the field day trophy.
- 4.2.80 The Applicant did not respond when it was put to him that Mr. Jackson did not instruct him to take Ms. Khumalo to Mbabane to engrave the trophy.
- 4.2.81 The Applicant asserted it was difficult for him to take a slasher or hoe to cut grass because it would have felt as if he was being further demoted from agronomist to being a general labourer.
- 4.2.82 Mr. Ndzabukelwako admitted that were the circumstances required and it was an emergency, he had also taken a slasher or hoe to cut grass together with his crew.

- 4.2.83 The Applicant was asked why he never joined his crew to cut the grass the day before the Nhlango field day. He stated that the problem was that Mr. Jackson said he was wasting money by hiring casual labour to cut the grass; he needed to cut the grass himself.
- 4.2.84 Mr. Ndzabukelwako admitted that he never testified in his evidence in-chief that Mr. Jackson said he was wasting money by hiring casual labour. However, the Applicant said the version was recorded in his grievance form marked exhibit "A6."
- 4.2.85 The Applicant admitted that a few days before the Nhlango field day, Mr. Jackson found him (Applicant) sleeping in the car while one labourer were cutting grass. However, he said he was sleeping in the car because he was sick.
- 4.2.86 It was put to him that Mr. Jackson would tell the arbitration that it was a known company policy that were necessary every employee regardless of his or her position had to buckle up and work with the labourers. He maintained that he was sick on that day.
- 4.2.87 The Applicant stated that he was not happy with the procedure adopted at the grievance hearing because he was not given satisfactory responses. For instance, on the sunflower issue, he was told he did not understand Mr. Jackson.
- 4.2.88 The Applicant denied that during the grievance hearing, Mr. Jackson said he accused him

(Applicant) of ordering the sunflower because Ms. Khumalo said he was responsible for the order. He asserted that he saw this explanation for the first time in the minutes of the grievance hearing yet Mr. Jackson never said it.

4.2.89 It was the Applicant's evidence that the grievance hearing outcome was unfair because on each of his pillars no reason was given except that he was told, he did not understand Mr. Jackson.

4.2.90 The Applicant denied that the chairperson of the grievance hearing said there was a conflict in personality between Mr. Jackson and he and that there was a need for them to convene a meeting to resolve the conflict. Instead, what happened was that Mr. Nick Goble invited him (Applicant) to his office and said he should understand that Mr. Jackson was still young; consequently, he was bound to make mistakes.

4.2.91 Mr. Ndzabukelwako was asked why he never approached Mr. Goble earlier about the alleged demotion since it appeared that he had a good relationship with him (Mr. Goble). He stated that Mr. Jackson could not have taken the decision on his own; senior management was involved including Mr. Goble. Therefore, it was pointless to approach him.

4.2.92 The Applicant was referred to a portion of the minutes of the grievance hearing that dealt with his alleged demotion. He asserted that the problem he had was that the minutes were

brought to him a year later, so it would be difficult to remember everything that was said at the hearing.

- 4.2.93 Mr. Ndzabukelwako stated that he verbally asked for the minutes at the end of the grievance hearing. Then after two weeks, he made a written request of the minutes. However, he got the minutes through his attorney during arbitration.
- 4.2.94 The Applicant asserted that his work relationship with Mr. Jackson became sour after he become an Agronomist. Nonetheless, Mr. Ndzabukelwako admitted that as his manager, Mr. Jackson assisted him where necessary. For example, when he went to Ghana and on his return, he had to write a report on his visit; Mr. Jackson gave him the template for reports.
- 4.2.95 The Respondent's attorney referred the Applicant to a number of emails from Mr. Jackson, where the latter appreciated the formers effort and also offered technical assistance. When the Applicant was asked if Mr. Jackson was not a "monster" on those occasions, he said Mr. Jackson collaborated because the company had spent money on his (Applicant's) trips so good reports had to be submitted by Mr. Jackson to his superiors because they would not accept substandard work.
- 4.2.96 The Applicant denied knowledge of what Respondent's counsel said was his performance appraisal for 2008. He asserted that

performance appraisals were harmoniously done, but these were self-appraisals.

- 4.2.97 Mr. Ndzabukelwako admitted that after he became an agronomist, he was presented with a long service award. Moreover, he stated that not every day was gloom and doom; if something was funny; he had a right to laugh. Where anything good happened, he showed appreciation. The long service award was presented to him for having served the company for some time; it not for his performance as an agronomist.
- 4.2.98 The Applicant alleged that when Mr. Jackson first joined the company, he was a good man. However, he later turned against him (Applicant) to become a 'monster'; he did not know what caused the change.
- 4.2.99 Mr. Ndzabukelwako was asked if Mr. Jackson's change towards him could be attributed to his (Applicant's) change in performance. He asserted that Mr. Jackson changed at a time when his (Applicant) performance was good and this could be seen from the compliments Mr. Jackson paid him.
- 4.2.100 Despite alleging that Mr. Jackson shot down his ideas, the Applicant could not recall any idea he suggested that Mr. Jackson shot down.
- 4.2.101 The Applicant said Mr. Jackson's conduct of persistently putting him down and paying him a compliments, but saying negative things about

him behind his back, came to a point where he felt like leaving the company.

- 4.2.102 It was put to the Applicant that Mr. Jackson criticized him because he disagreed with the former's approach to work and he (Applicant) did not like the criticism. Mr. Ndzabukelwako said he was criticized for things he had not done.
- 4.2.103 The Applicant admitted that it was within a senior manager's rights to criticize his or her subordinates for poor performance.
- 4.2.104 It was put to the Applicant that if it was true that Mr. Jackson reported to senior management that his (Applicant) performance was not satisfactory, the company would not have raised his salary annually. Mr. Ndzabukelwako asserted that the company increased his salary even when he was a Sales Representative.
- 4.2.105 The Respondent's counsel put it to the Applicant that constructive dismissal meant when working conditions were so bad for an employee that he cannot be expected to remain working in that undertaking hence he leaves; however in his (Applicant) case he continued to work and decided to react after two years. Mr. Ndzabukelwako stated that his understanding of constructive dismissal was that a series of intolerable events had to have occurred for an employee to be deemed constructively dismissed.

RE-EXAMINATION

- 4.2.106 The Applicant clarified that Mr. Jackson said Mr. Cowin Vilakati as the head of Pannar Seed Swaziland needed to convene weekly meetings every Monday and as Mr. Vilakati's subordinates, they had to submit weekly schedules to him and he would in turn submit them to Mr. Jackson.
- 4.2.107 According to the Applicant, the difference between an Agronomist and Sales Representative was that, an Agronomist goes out to the fields to plant and maintains demos. On the other hand, a Sales Representative works in the office and visits customers periodically to inspect stock levels and address their needs.

AW2:MAKHOSAZANE MDLULI'S EVIDENCE IN-CHIEF

- 4.2.108 AW2 testified that she started working for the Respondent on a seasonal basis in 2003 until she stopped in 2010 after the Nhlanguano field day.
- 4.2.109 Ms. Mdluli stated that she left voluntarily after she witnessed one manager ill-treating the Applicant. According to AW2, the manager shouted at the Applicant and asked him why the grass was not cut. Other colleagues tried to assist the Applicant but the manager ordered them to leave. AW2 stated that Mr. Mike Jackson was the manager who shouted at the Applicant.

- 4.2.110 It was AW2's evidence that Mr. Jackson was aggressive towards the Applicant and the latter kept quiet.
- 4.2.111 AW2 stated when the Applicant was still working, he would hire her to register people during field days the last of which was the Nhlungano field day. She recalled that those who attended included Mr. Cowin Vilakati, Ms. Clarice Khumalo, and other colleagues.
- 4.2.112 It was Ms. Mdluli's evidence that the Nhlungano field day was her last assignment for the Respondent because she stopped working out of protest since it was not the first time Mr. Jackson had shouted at employees and what was worse was that this time around he did it in public. According to AW2, Mr. Jackson demeaned the Applicant.

CROSS - EXAMINATION

- 4.2.113 AW2 stated that she was first employed by one Mr. Phumuza Gama and got to know the Applicant between 2003 and 2004.
- 4.2.114 Ms. Mdluli asserted that since she was not permanently employed, she did not inform the company that she stopped working because of the Nhlungano field day incident.
- 4.2.115 When it was put to AW2, she admitted that the Nhlungano field day was not her last assignment

for the Respondent; she acknowledged that her next engagement was at KaPhunga.

- 4.2.116 Ms. Mdluli stated that later on she was called by Mr. Bheki Dlamini for work, but could not go because she was involved in a car accident. She admitted that the Respondent was not aware that she did not return to work because of the Nhlungano field day incident.
- 4.2.117 It was put to AW2 that she could not be called up again because the Applicant who knew her had left the company. She stated that the Applicant was not the only senior employee who knew her.
- 4.2.118 AW2 denied that she was bitter because since her friend the Applicant had left, the company had not called her up for work again.
- 4.2.119 Ms. Mdluli maintained that Mr. Jackson was aggressive towards the Applicant during the Nhlungano field day.
- 4.2.120 It was put to AW2 that according to her evidence, the people who were available to testify and contradict her version did not witness the incident. She stated that Mr. Cowin Vilakati was saw the episode.

RE-EXAMINATION

- 4.2.121 AW2 asserted that her relationship with the Applicant was strictly worked related.

4.3 RESPONDENT'S CASE

RW1:MODUPE TSOEU EXAMINATION -IN-CHIEF

- 4.3.1 RW1 testified that he had worked for the Respondent for thirty-three (33) years and currently occupied the position of Sales Representative in Lesotho. His role in Swaziland was to help during the field days and the Swaziland field team does the same during the Lesotho field day.
- 4.3.2 Mr. Modupe stated that the purpose of a field day was for the Respondent to market its products to customers and potential customers. The field day was a very important activity in the Respondent's calendar.
- 4.3.3 According to Mr. Modupe, the preparations for field days include weeding, cutting grass and putting billboards.
- 4.3.4 It was RW1's evidence that he was present during the Nhlangano field day that was held in May 2011. On that day farmers, visitors from Ghana and Cape Town and staff from Pannar Seed Swaziland were present; the Applicant also attended.
- 4.3.5 Mr. Modupe testified that he was present when Mr. Jackson spoke to the Applicant regarding the condition of the field. Mr. Jackson told the Applicant that the condition of the field was not acceptable and that they would meet the following day to discuss the issue.
- 4.3.6 According to RW1, Mr. Jackson did not shout at the top of his voice, but simply said the condition

of the field was unacceptable and he would talk to the Applicant about it the following day.

- 4.3.7 RW1 stated that he was closer to Mr. Jackson and the Applicant when the former spoke to the latter about the condition of the field; some of the labourers were there but they were not close to the trio. None of the Ghanaian visitors was close. Mr. Modupe denied that Mr. Jackson screamed violently at the Applicant.
- 4.3.8 It was Mr. Modupe's evidence that he had worked with both the Applicant and Mr. Jackson and whenever he (RW1) was in Swaziland; he never saw any conflict between the Applicant and Mr. Jackson. While he could not deny that, there were problems when he was not around, but as far as he was concerned, the relationship between the Applicant and Mr. Jackson was good.
- 4.3.9 RW1 testified that the Respondent had a policy on preparation of the field for field days.
- 4.3.10 According to Mr. Modupe, apart from May 2011 there was one other incident that occurred in Swaziland in 2010 during the King's field day; the grass was not cut, Mr. Jackson had to do it himself. It was the Applicant's responsibility to hire labour to cut the grass.
- 4.3.11 Mr. Modupe stated that where the company was under pressure and the field day was close, it was reasonable to expect senior managers like Mr. Jackson and he (RW1) to pull up their sleeves

and start cutting grass in order to deliver a well prepared field.

4.3.12 RW1 attested that since he wanted things to be perfect during the field day, he usually worked with his labourers. Moreover, he stated that he did things personally to avoid embarrassment. There was nothing wrong with a manager working in the field because the Respondent's business was in the fields.

CROSS - EXAMINATION

4.3.13 RW1 stated that he only interacted with the Applicant during field days and in the five years he had known the Applicant, there have been ten field days.

4.3.14 According to Mr. Modupe, the Applicant was an agronomist, but formally held the position of Sales Representative. His interaction with the Applicant occurred when the latter occupied the position of agronomist.

4.3.15 Mr. Modupe asserted that the Applicant was promoted from the position of Sales Representative to Agronomist; RW1 believed that the deployment of the Applicant to another position was a promotion regardless of the level of each position was in the company structure.

4.3.16 RW1 was referred to a statement he recorded about the field day. In that statement, he stated that he came early for the field day and he was in the company of Respondent's staff and guests; they found the grass not cut and had to

walk through thick wet grass, hence, their trousers got wet.

- 4.3.17 Mr. Modupe clarified that when he said 'we' in his recorded statement he was only referring to Respondent's staff and labourers; they arrived early to inspect the field before the customers and other guest arrived.
- 4.3.18 According to RW1, Mr. Jackson spoke to the Applicant at the time of the inspection; at that time, there were a few customers. Mr. Modupe admitted that if the labourers and other visitors were close enough to hear, they heard Mr. Jackson talk to the Applicant about the unacceptable condition of the field.
- 4.3.19 When he was asked if the peoples were in a procession, RW1 said the workers did not walk in groups. He stated that everyone was busy with his or her chores. The employees were dispersed in the field while preparing for the field day.
- 4.3.20 Mr. Modupe denied that other people overheard Mr. Jackson speak to the Applicant. However, he clarified that he was busy with his work and did not notice who was listening at that time.
- 4.3.21 RW1 stated that he first contacted Mr. Jackson about the condition of the field before the latter spoke to the Applicant about it.
- 4.3.22 When RW1 was asked if Mr. Jackson spoke to the Applicant after their (RW1 and Mr. Jackson) discussion, he responded that he did not recall,

but he personally told Mr. Jackson that the situation was bad.

- 4.3.23 Mr. Modupe testified that Mr. Jackson spoke to the Applicant as a senior to a junior would when their performance was unsatisfactory. According to RW1, Mr. Jackson spoke firmly to the Applicant to show that the condition the field was unacceptable. Moreover, RW1 asserted that Mr. Jackson spoke in such a manner that the Applicant would understand that he was not happy with his performance.
- 4.3.24 RW1 confirmed that at the time of the field day, the Sales Representative in Swaziland was Mr. Cowin Vilakati. Mr. Modupe asserted that it was the Applicant's responsibility as an agronomist to ensure that field days met Pannar Seed standards.
- 4.2.25 Mr. Modupe denied that the Applicant upset after Mr. Jackson spoke to him about the condition of field. RW1 stated that he had a conversation with the Applicant after the incident, the latter seemed fine to him.
- 4.3.26 RW1 testified that there was no situation that could prevent an agronomist from delivering a good field day because he or she was entitled to hire casual labour to do the job. Mr. Modupe asserted that in his experience in Lesotho he delivered substandard fields.

- 4.3.27 According to RW1, he appraised himself concerning the performance standards and outcome of a field day.
- 4.3.28 It was Mr. Modupe's evidence that the Applicant knew his job and possibly knew the employer's standards concerning field days.
- 4.3.29 RW1 stated that he has never had a conflict with the Applicant and their conversations were usually brief.
- 4.3.30 Mr. Modupe asserted that his work relationship with both Mr. Jackson and the Applicant was the same; none was more important or weightier than the other was.

RW2:JAN VAN BILJON-EXAMINATION - IN - CHIEF

- 4.3.31 RW2 testified that he had worked for the Respondent for twenty (20) years and was currently the Human Resources Manager.
- 4.3.32 According to Mr. Biljon his role entailed amongst others the employment of staff, welfare of employees, ensuring that policies were in place and were applied; he also being responsible for the remuneration of employees.
- 4.3.33 Mr. Biljon stated that the Respondent had a grievance policy and procedure that was kept on the company's electronic management system, but hard copies were made available to most managers. If an employee did not have a copy, he or she was free to apply for one and it was printed from the system. According to RW2,

management and staff had access to the system.

- 4.3.34 It was RW2's evidence that every employee who joined the company was furnished with a letter of appointment and conditions of employment. He stated that if an employee in a management position was not given a copy of the company policy, that employee was expected to take reasonable steps to ensure the policy was availed to him or her.
- 4.3.35 RW2 testified that the company policy was used regularly in the work environment and the Applicant had personally asked for the policy on a regular basis. However, RW2 could not confirm if the Applicant was given a written copy of the company policy, nevertheless he stated that the Applicant could have asked his manager or him (RW2) for the policy.
- 4.3.36 According to RW2, it was unlikely for the Applicant to do his job properly without using the company policy.
- 4.3.37 Mr. Biljon testified that the Applicant's grievance was brought to his attention in June 2011 and he was asked to chair the grievance hearing. He stated that the procedure for lodging a grievance was that the employee raises it with his or her manager. If the employee is not comfortable discussing it with the manager, the employee approaches the manager's senior. However, if the employee is not comfortable with both managers, he or she should report the grievance

to him (RW2) or the Industrial Relations Manager.

- 4.3.38 RW2 stated when lodging a grievance, the employee provides details of the complaint in writing or discusses it with the manager; however, there should be minutes of the meeting. Moreover, RW2 attested that in the grievance policy manual, there is a questionnaire with basic questions about the grievance.
- 4.3.39 According to Mr. Biljon after receiving the grievance facts are gathered, and action is taken to resolve it. If there is a hearing, a senior person who is neutral is identified to chair it. RW2 stated that he did not know anything about the grievance prior to his appointment to chair the hearing.
- 4.3.40 RW2 testified that even though he could not recall if the policy specified a time frame lodging a grievance, the practice was that it must be raised as soon as possible so it is addressed as soon as possible.
- 4.3.41 Mr. Biljon stated that it was unreasonable for the Applicant to report some of the complaints after eighteen (18) months.
- 4.3.42 It was RW2's evidence that after the grievance hearing, he gave a verbal outcome and undertook to write his findings when he returned from leave. He returned from his annual holidays towards the end of July.

- 4.3.43 According to Mr. Biljon upon his return, he wrote his findings as per his undertaking; this occurred a month after the grievance hearing. However, the minutes of the hearing were not prepared by him, but by the secretary immediately after the hearing.
- 4.3.44 RW2 testified that there was nothing in the Applicant's grievance that could give rise to a claim for constructive dismissal. He stated that in his view none of the Applicant's complaints warranted his resignation based on constructive dismissal.
- 4.3.45 Mr. Biljon stated that he understood constructive dismissal to be where the employer makes life miserable for an employee because it wants him or her to resign.
- 4.3.46 It was RW2's evidence that demotion results from a change in an employee's job grade, conditions of employment, salary and loss of certain benefits. RW2 also stated that the Applicant never experienced any change in his conditions of employment; there was also no change in his job grade. The deployment only had to do with the Applicant's area of strength.
- 4.3.47 According to Mr. Biljon, he (RW2) was consulted by the management team that made the decision to move the Applicant to another position. No one suggested that the Applicant should be demoted. RW2 also attested that deploying the Applicant from Sales

Representative position to Agronomist was a sideways move.

4.3.48 RW2 stated that it was possible within the Respondent's structure that employees with the same job grades could enjoy different salaries. Applicant's case was not unique because the company made these placements regularly.

4.3.49 Mr. Biljon testified that to his knowledge there was no discussion about the Applicant's work performance; consequently, he was not moved because of poor performance. The management team's discussion centred on the company's need of a technical person and the Applicant had those qualifications and skills.

4.3.50 RW2 testified that his findings as chairperson of the grievance hearing were that there was a conflict in personality. When Mr. Jackson was direct and stern, the Applicant misinterpreted his approach. Moreover, it was Mr. Biljon's view that regarding the field day, poor performance was in issue. He averred that it was important that the Applicant and Mr. Jackson addressed the issues so they could continue to work together.

4.3.51 Mr. Biljon stated that he also thought that Mr. Jackson was not aware that the Applicant was misinterpreting his directness otherwise he would have found other avenues to put his point across to the Applicant.

4.3.52 According to RW1, his recommendation was that the Applicant and Mr. Jackson should meet and

find a way to work together because the issues that caused the conflict could be resolved. Mr. Biljon stated that although it was difficult to determine who was right or wrong because it was the Applicant's word against Mr. Jackson. However, from his (RW2) experience with Mr. Jackson's way of operating, he was inclined to conclude that he handled incidents in question fairly, but the Applicant misinterpreted him.

- 4.3.53 It was RW2's evidence that regarding uniform, the company policy was that factory employees are provided with the overalls because they needed it for their jobs. Nonetheless, during field days everybody is given a field day shirt, but have to buy khaki trousers.
- 4.3.54 Mr. Biljon said he was surprised by the Applicant's version that before Mr. Jackson was employed received uniform free of charge. The company policy was that employees at Applicant's level bought their own uniform and those at a lower level were provided with it.
- 4.3.55 According to Mr. Biljon, he sent a summary of the minutes of the grievance hearing to the Applicant by email; hence, the latter received a copy of the minutes.
- 4.3.56 RW2 testified that the Applicant's letter of resignation was dated 27th June 2011 and the grievance hearing was held on the 24th June. Mr. Biljon also stated that he issued his findings a month later.

- 4.3.57 Mr. Biljon stated that the Applicant resigned even before meeting Mr. Nick Goble and Mr. Jackson to resolve the issues as he (RW2) had recommended in his report. Moreover, he attested that during the grievance hearing, he got the distinct impression that the Applicant would not accept a finding that was not in his favour and stated this in his summary. According to RW2, during the hearing, the Applicant believed he was right and everybody else was wrong.
- 4.3.58 It was RW2's testimony that the Applicant's desired outcome of being reinstated to the Sales Representative's position would not have been beneficial because that position had already been filled. Moreover, RW2 asserted that the redeployment would have meant moving the Applicant away from his strengths.
- 4.3.59 RW2 stated that other than the Applicant's allegations that Mr. Jackson threatened to cut his salary, discussed his salary and verbal attacked him no evidence was led to substantiate the allegations in the light of Mr. Jackson's denial. Consequently, he recommended that they hold a meeting to resolve their differences.
- 4.3.60 Mr. Biljon attested that if the meeting that he recommended between the Applicant and Mr. Jackson had gone ahead, he would have known about it because they would have reported to him or Mr. Brian Hayes.

- 4.3.61 According to RW2, during the time he had worked for the Respondent he has never dealt with employees' complaints that were related to Mr. Jackson's management style.
- 4.3.62 Mr. Biljon testified that the Applicant had the opportunity to report the alleged demotion sooner, but he never did. He stated that the Respondent had an open door policy. Furthermore, RW2 attested that the Applicant was in charge of the Swaziland operation; hence, he should have tried sooner to get hold of the policy.
- 4.3.63 RW2 stated that the Applicant did not exhaust all channels in alerting the company about his grievances.

CROSS-EXAMINATION

- 4.3.64 RW2 clarified that he had been in the Human Resources Manager position for nineteen (19) years three (3) months after initially serving as Human Resources Administrator for nine (9) months.
- 4.3.65 Mr. Biljon acknowledged that the Applicant was never a manager. RW2 further admitted that since the Applicant was not a manager he did not have access to the company policy. However, he maintained that since his manager had the policy, he should have requested it from his manager.
- 4.3.66 RW2 admitted that the Applicant's managers could have erred if the Applicant had requested

for the policy, but they did not give him. However, he also asserted that the Applicant erred by neglecting to request for it.

- 4.3.67 According to RW2, managers had an obligation to ensure that operations and administrative issues conformed to company policies; hence, managers were required to know and understand them.
- 4.3.68 RW2 admitted that when the Applicant was employed, he was only given a letter of employment and the conditions of service.
- 4.3.69 Mr. Biljon stated that his contact with the Applicant were infrequent, however they would bump into each other once in a while in the corridors of the company building in Grey Town. RW2 admitted that the grievance hearing was the only forum where he formally interacted with the Applicant. However, he (RW2) also stated that he further sent an email with a summary of his findings to the Applicant after the hearing.
- 4.3.70 RW2 stated that he would be shocked if the summary of findings he referred to were not part of the documents that were produced at arbitration. However, Mr. Biljon asserted that he was not the person who prepared the documentation for the arbitration.
- 4.3.71 Mr. Biljon stated that he was not aware if the Applicant had approached Mr. Brian Hayes first to enquire about the grievance procedure. Nevertheless, RW2 averred that when the

Applicant submitted the completed grievance form he (Applicant) informed him (RW2) that he consulted with Mr. Hayes.

- 4.3.72 RW2 testified that the oral summary he made at before the adjournment of the grievance hearing was similar to the written findings, which stated that the Applicant and Mr. Jackson should meet to resolve whatever disputes they had.
- 4.3.73 According to Mr. Biljon, after the management committee meeting that discussed the Applicant's deployment; he signed a new job description accepting his new responsibilities. RW2 stated that the Applicant never objected to the change of jobs at the time.
- 4.3.74 It was Mr. Biljon's evidence that the Applicant never complained that the minutes of the grievance hearing were inaccurate. Moreover, he stated that the Applicant was supposed to get a copy of the minutes as soon as the secretary had typed them, which was a week after the hearing.
- 4.3.75 It was put to RW2 that the Applicant only saw a copy of the minutes when they were availed to his attorney in preparation for arbitration. Mr. Biljon stated that a copy of the minutes would have been made available to the Applicant if he had requested for one.
- 4.3.76 According to RW2, a demotion does not constitute a ground for constructive dismissal because it depends on the reason for

redeploying the employee after holding discussions.

- 4.3.77 It was put to RW2 that the Applicant's evidence was that there was no discussion before he was deployed, he was given a directive. Mr. Biljon asserted that from the evidence that was presented at the grievance hearing, he got the impression that there was a discussion.
- 4.3.78 RW2 denied that the Applicant was demoted since he signed the job description stating his new responsibilities.
- 4.3.79 Mr. Biljon stated that signing the new job description did not mean that the Applicant was barred from exploring other avenues, however a reasonable person would have objected sooner than two years if he was not happy with the deployment.
- 4.3.80 It was put to RW2 that the move from the position Sales Representative to Agronomist degraded the Applicant's status since he now had to report to someone else when all the employees were previously reporting to him. Mr. Biljon stated that the Applicant continued to report to Mr. Jackson.
- 4.3.81 According to RW2, the Applicant's status did not change because status was related to job grade that meant the level of responsibility he had within the organization did not change.
- 4.3.82 Mr. Biljon stated that a change in the nature of responsibility for an employee did not constitute

a demotion. However, a change in the level of responsibility was a demotion. RW2 illustrated that he did not have to manage people to obtain a certain level of responsibility because he was managing the knowledge of the organization, which is equivalent to managing people at certain level.

- 4.3.83 RW2 conceded that when Mr. Jackson consulted him about restructuring the Swazi company, the Applicant was not present in that meeting.
- 4.3.84 According to Mr. Biljon, he was updated about the Applicant sideways move and the new job description; he subsequently changed the Applicant's job title on the company system.
- 4.3.85 Mr. Biljon stated that because the Applicant subsequently signed the new job description, he assumed that Mr. Jackson had consulted him before the placement.
- 4.3.86 It was RW2's evidence that the need for someone with technical skills was realized in 2009. Mr. Biljon also asserted that the opening was caused by the Respondent's change of its business strategy that saw the company expending its market from retailers to the farmers directly.
- 4.3.87 RW2 stated that concerning the Applicant's uniform, his manager was responsible for ensuring that company policy was strictly applied.

- 4.3.88 Mr. Biljon asserted that the Applicant only received the same shirt just like everybody else, but it was unlikely that he was given more than a shirt.
- 4.3.89 According to RW2, after the Applicant was moved to the new position, the vacancy was advertised in the newspaper. It was put to RW2 that the vacancy was advertised before the Applicant was moved to the new position. Mr. Biljon stated that the advertisement might have been issued simultaneously with the management team discussions and subsequent consultations between Applicant and the company.

RE-EXAMINATION

- 4.3.90 Mr. Biljon clarified that even though the Applicant was not a manager by job description, by virtue of being a Sales Representative at the time, he held the most senior position in the Swazi company.
- 4.3.91 RW2 further clarified that as a senior employee, the Applicant would have had access to the computerized system in Swaziland.

RW3: MIKE WILLIAM JACKSON EXAMINATION-IN-CHIEF

- 4.3.92 RW3 testified that the Respondent employed him as Export Marketing Officer on the 1st November 2007 but he currently held the position of Business Development Manager. His responsibility was to manage the company's

business in countries where Pannar Seed was based.

- 4.3.93 Mr. Jackson stated that he first came into contract with the Applicant when he (RW3) was managing Pannar Seed Swaziland from 1st November 2007 until the beginning of 2012. The Applicant was one of his subordinates until he (Applicant) resigned.
- 4.3.94 Regarding the Applicant's complaint that he was demoted, RW3 stated that following diminishing sales every year, the Respondent's management resolved to take action. The company had an option to employ a second sales representative like before; however, a decision was taken that the company needed an agronomist in its team.
- 4.3.95 According to Mr. Jackson, the company considered the strengths and weakness of everybody in the team and concluded that the Applicant's strengths were in the agronomy section; subsequently a position of agronomist was created in the structure. The Applicant was qualified for the position because he had a BSc degree in Agriculture from the University of Swaziland; nobody else in the company had similar qualifications.
- 4.3.96 Mr. Jackson testified that the Applicant signed a new job description to confirm that he accepted the new position of Agronomist. The witness confirmed the job description when it was shown to him during arbitration.

- 4.3.97 RW3 stated he held meetings with the Applicant to discuss the pros of such a move and the possibilities for growth. The Applicant had the opportunity to raise any objection about the impending move, but did not.
- 4.3.98 It was RW3's evidence that instead of raising an objection about the changes, the Applicant actually thanked him several times for the opportunities and for certain events which had occurred as a result of moving to the new position. The witness said he was not aware of anybody else to whom the Applicant indicated his dissatisfaction with the deployment.
- 4.3.99 RW3 testified that if the Applicant was unhappy about the move, there was a company procedure he could have followed to address his concerns. Firstly, the Applicant could have raised his objection with him (RW3); moreover, he could have declined to sign the job description or he could have taken the issue further to his (RW3's) superior Mr. Nick Goble. Furthermore, the Applicant could have lodged a grievance in terms of the company policy.
- 4.3.100 According to Mr. Jackson, if the Applicant had refused to sign the new description, the company would have further discussed the matter with him and explained to him why it was a good move. As a last resort, the company would have explained the situation about where Swaziland was in terms of sales. RW3 denied

that the Applicant would have been dismissed for refusing to sign the new job description.

- 4.3.101 Mr. Jackson stated that the Applicant had a good working relationship with Mr. Nick Goble, the Regional Manager for Africa. Moreover, the Applicant as senior person in Swaziland came to the Head Office in Grey Town and had contract with the Regional Manager. Consequently, it should not have been difficult for him to report a grievance.
- 4.3.102 It was Mr. Jackson's evidence that there were occasions when the Applicant was dissatisfied with certain issues at the workplace, but he informed him (RW3) about them as soon as possible.
- 4.3.103 RW3 also stated that there were two instances where the Applicant complained instantly. These were the events involving PAN 63 and the order for sunflower seed. According to RW3, this showed that the Applicant knew that schedule one of the policy stated that an employee should first lodge a grievance with his immediate superior.
- 4.3.104 RW3 testified that the ethos tried to develop within the staff in Swaziland was that they should always aspire to improve to outsmart the company's competitors; hence, he sent emails to the staff to reinforce that attitude.
- 4.3.105 Mr. Jackson stated that judging from his responses in the other issues, the Applicant

should have complained immediately if he was unhappy with the move from sales representative to agronomist.

- 4.3.106 RW3 asserted that Applicant's salary and benefits did not change because of his redeployment.
- 4.3.107 It was Mr. Jackson's evidence that when he discussed the move with the Applicant, he never used the word '*demotion*', because demotion was a negative thing yet the exercise was meant to be a positive structural change to strengthen the company.
- 4.3.108 Mr. Jackson testified that what transpired in the meeting to discuss the move was that, he explained to the Applicant that his strengths were in the agronomy side, that is planting trials, planning demos, submitting reports and observing hybrids. Moreover, RW3 stated that the Applicant had previously confided in him that he had a problem with speaking to large groups of farmers or on the radio and yet these were the duties of the Sales Representative.
- 4.3.109 RW3 further stated that instead of pushing the Applicant to do something he was not comfortable with, he (RW3) thought the company needed an agronomist and the Applicant was the right person to take up the position.
- 4.3.110 Mr. Jackson asserted that he also mentioned to the Applicant that in the South Africa company

the position of Agronomist was higher than a Sales Representative's position. Moreover, RW3 said he explained the opportunities for growth in the new position as opposed to the Sales Representative position, which was limited.

- 4.3.111 Mr. Jackson denied ever producing an organogram to demonstrate where the new position was in relation to the Sales Representative's position. RW3 stated that he used gestures to explain to the Applicant that it was not a downward move, but a lateral one.
- 4.3.112 According to RW3, the agronomist position was a professional or specialized position that not everybody could occupy because to qualify for it an employee needed to have a science degree.
- 4.3.113 RW3 confirmed that when the Applicant was moved to the new position, Mr. Cowin Vilakati was appointed Sales Representative. Mr. Vilakati had a background in sales, warehouse, and staff management. Mr. Jackson averred that Mr. Vilakati's salary was several thousand less than Applicant's salary.
- 4.3.114 It was Mr. Jackson's evidence that as time went on, it became clear that the restructuring was a correct move because the road side demos yielded fruits and the company picked up. Moreover, the company launched new hybrids. The witness added that because the company had a new sales representative who was confident on radio and quite charismatic in front of crowds, sales improved.

- 4.3.115 Mr. Jackson denied that after his deployment, the Applicant reported to Mr. Vilakati. He asserted that before each season, he (RW3) sat down with the Applicant to discuss demos and progress reports. According to RW3, the Applicant sent his reports directly to him, but Mr. Vilakati never submitted any sales reports. Moreover, Mr. Jackson asserted that the Applicant never submitted reports to Mr. Vilakati.
- 4.3.116 RW3 testified that concerning the Applicant's complaint that he falsely accused him of killing PAN 63, RW3 stated the incident emanated from the events of training for Swaziland extension officers that was held at Mphophoma Malkerns; Government officials attended the seminar. The Respondent's team was given slot to talk about its products, including topics on general agronomy and improvement of yields.
- 4.3.117 RW3 testified that it was the launch of their hybrid PAN 53; it was a new mainline hybrid. Mr. Jackson stated that he noted several points for improvement in his company's presentation; one of the points was that he believed that another hybrid PAN 63 was not promoted on the day.
- 4.3.118 According to Mr. Jackson, he sent the email, which was a congratulatory and his message was that a product should be promoted regardless of personal opinions. RW3 stated that he felt that from a business point of view if the company had stock in the warehouse, that stock should be promoted. If an employee had

negative views about a product, he should not talk about them to potential customers, but should only talk about the positive aspects of the product.

- 4.3.119 It was Mr. Jackson's evidence that the points he raised in the email were directed at the team of three employees who made the presentations, he never singled out anyone. Moreover, RW3 maintained that the email was positive and reasonable and after his comments that PAN 63 was "killed" that day, no action was taken against anyone.
- 4.3.120 Mr. Jackson stated that a manager should be able to congratulate his staff while pointing out areas that need improvement so that everyone in the workplace grows. Furthermore, RW3 asserted that every employee must be able to tolerate constructive criticism. If there was stagnation in the business the company's competitors would overtake it.
- 4.3.121 RW3 testified that if a manager did not criticize employees, complacency will creep in resulting in a culture of substandard performance which is not good for the business. Moreover, employees will not improve if they are not criticized for their mistakes. Feedback about an employee's performance and some guidance results in improved performance.
- 4.3.122 According to Mr. Jackson, after receiving the Applicant's email on PAN 63, he phoned him and clarified that his comments were not directed at

any individual. Moreover, RW3 stated that his comments in the email were not intended to be false accusations. However, because of his (RW3) busy schedule, he only came down to Swaziland a month later to address the issues raised in the Applicant's emails.

- 4.3.123 RW3 stated that the Applicant also complained that he (RW3) falsely accused him of ordering sunflower seed yet the product was not in demand. Mr. Jackson stated that in a meeting held at head office that was attended by Mr. Nick Goble, the Applicant and he (RW3), the company's position regarding minor variations such as sunflower seed was that it should be ordered only on specific orders.
- 4.3.124 Mr. Jackson stated that while he was at head office, the stock controller informed him that the Swaziland staff had placed an order for a ton of sunflower seed, however he (RW3) was not aware of this order, yet the procedure was that seed must be imported into Swaziland through him (RW3).
- 4.3.125 According to RW3, he also noticed that on the invoice, the wrong price was used; the stock controller further informed him that the staff in Swaziland had given her the price. He then phoned Ms. Clarce Khumalo, who referred him to Saris, Saris in turned referred him (RW3) to the Applicant.
- 4.3.126 RW3 testified that he was concerned about the order because the right channels had not been

followed, the wrong price was used and the order was massive. Everyone had told him that the Applicant was responsible for the order. He (RW3) tried to phone the Applicant, but could not reach him, he then sent an email explaining the problems and consequences of the event.

- 4.3.127 It was RW3's evidence that he was the one who was going to take the pressure from management about the order; so he explained this to the Applicant through the email. The following day, he (RW3) received an email from Applicant and judging by its contents, it was obvious that the Applicant was upset because he explained that his role in the matter was to collect and fax the permit to head office.
- 4.3.128 Mr. Jackson stated that the Applicant further explained that he got involved in the order because Mr. Cowin Vilakati was busy and Ms. Khumalo requested him (Applicant) to fetch the permit.
- 4.3.129 According to RW3, at first it was the PAN 63 issue and now there was another issue concerning sunflower seed, he believed there was too much finger pointing, he (RW3) then came to Swaziland to hold a staff meeting. It was communicated in that meeting that the email he (RW3) had sent regarding sunflower seed order was incorrect; nonetheless, the Applicant should have sent the import permit to him (RW3). It was further emphasized that the finger pointing should stop.

- 4.3.130 RW3 testified that his coming to Swaziland to discuss the sunflower issue showed that he took Applicant's email seriously. Mr. Jackson said he believed the Applicant's complaints were handled well. Moreover, he stated that if that was not the case, the Applicant should have escalated the issue to Mr. Nick Goble; but after the meeting, everyone was on the same page. According to Mr. Jackson, the people responsible for the sunflower seed order were Clarice and Saris.
- 4.3.131 RW3 denied that he told the Applicant he needed to take the hoe and weed demos. He further denied remarking that the Applicant must use the brush cutter to cut grass as he was wasting company money by hiring labourers. Mr. Jackson also refuted the allegations that he told the Applicant that if he failed to weed demos and cut grass himself, he would cut his salary.
- 4.3.132 According to Mr. Jackson, the statement attributed to him was false because he (RW3) did not have the power to cut employees' salaries. RW3 stated that what transpired was that he drove past the field in Nhlanguano and saw the Applicant's car. He also noted that one person was cutting grass with a brush cutter; and this was before the field day. He thought that a team was supposed to be preparing the field.
- 4.3.133 It was RW3's evidence that, he walked up to the Applicant's car and found him asleep in the car.

According to Mr. Jackson, he did not lose his temper, he just told the Applicant that he could not afford to be sitting in the car, or sleeping when only one person was working, he should have a whole team so that the work was finished in a day.

- 4.3.134 RW3 stated that he told the Applicant that he needed to hire more people to get the job done. If he thought he was falling behind schedule, he should ask for assistance from colleagues.
- 4.3.135 Mr. Jackson testified that he cited the previous year's example where they had a field day and were behind schedule, he (RW3) took a brush cutter and cut the grass. He told the Applicant that when they were behind schedule everyone should get involved.
- 4.3.136 According Mr. Jackson, the reference he made to Applicant's salary was that as an agronomist he had responsibilities and was being paid a salary to meet certain deliverables. RW3 stated he also mentioned that if the company was to employ supervisors at lower salaries then it would have to manage them. RW3 said he further told the Applicant that he (Applicant) was at a level where he needed to work without supervision.
- 4.3.137 RW3 testified that even though he had initially requested the Applicant to be on standby to take guests to view demos, he told Ms. Clarice Khumalo at 10:00am that the Applicant was no longer required. The Applicant could have gone to Nhlangano to try to get the field ready, but he

did not. Instead, he took Ms. Khumalo Mbabane to fix her computer when that was not urgent.

4.3.138 It was Mr. Jackson's evidence that while Applicant took Ms. Khumalo to Mbabane to fix the computer and ferried her back, he then spent the rest of the day in Matsapha.

4.3.139 RW3 was also referred to the Applicant's fourth grievance where the latter alleged that the former discussed his salary with Ms. Clarice Khumalo. Mr. Jackson disputed that he said the Applicant should buy his own trousers because he was earning too much money.

4.3.140 According to Mr. Jackson before the field day, he had a meeting with the Swaziland staff, one of the issues discussed was the dress code. Every year at field days, the company supplied employees with shirts. RW3 stated that he told the workers that the company would supply them with shirts, but everyone should wear khaki trousers. He stated that he requested Mr. Cowin Vilakati to supply khaki trousers to the warehouse employees, but salaried staff was expected to dress themselves.

4.3.141 It was RW3's evidence that the company policy stated that employees should dress themselves in an attire that fit the occasion. Mr. Jackson mentioned that he never received a call from the Applicant requesting khaki trousers. RW3 said Ms. Khumalo stated that the Applicant requested him (RW3) to bring khaki trousers from the company's shop in Grey town.

- 4.3.142 Mr. Jackson stated that he told Ms. Clarisse that it was fine, but it would be deducted from the Applicant's salary. RW3 further testified that he told Ms. Khumalo that the Applicant was expected to dress himself for the field day. According to RW3, he instructed Ms. Khumalo to remind the Applicant that it was discussed in the meeting that if an employee earned above a certain level, he was required to buy his own khaki trousers. He never mentioned the level or amount earned by the Applicant.
- 4.3.143 RW3 testified that whereas in South Africa a wage earner received uniform and salaried employees do not, in Swaziland that categorization did not exist, every employee received a monthly salary. Therefore, he differentiated by mentioning that if an employer earns above a certain salary level he or she has to buy his or her own attire.
- 4.3.144 According to RW3, he even told Ms. Clarice that she would also have to buy her own khaki skirt and she did buy it without any protest.
- 4.3.145 Mr. Jackson further disputed the words used by Ms. Khumalo in her statements, in particular RW3 denied that he said the Applicant earned more money.
- 4.3.146 RW3 denied that since he was employed in 2007, the company had given khaki trousers to its employees free of charge. However, he admitted at one point Pannar Seed branded

trousers were given to everyone, but it was once off thing.

- 4.3.147 It was RW3's evidence that if the Applicant was be effective in the position of Sales Representative in charge of three employees, it was mandatory for him to know the company policy.
- 4.3.148 RW3also referred to the Applicant's fifth grievance. The Applicant alleged that Mr. Jackson shouted at him in front of farmers, labourers, and guests. RW3 denied that he shouted at the highest of his voice. He stated that even though he was upset and emotional, he spoke at a very level pitch.
- 4.3.149 According to Mr. Jackson, on the field day, they arrived on the field and found that the field was not prepared; the grass was not cut and everyone's trousers got wet. RW3 stated that he told the Applicant that the condition of the field was unacceptable and they would have to talk about it the following day. Mr. Jackson said he kept a level tone in his voice.
- 4.3.150 According to Mr. Jackson, an immaculately prepared field was top priority for the company because very important guests who included the Principal Secretary in the Ministry of Agriculture would be attending the field day. By maintaining good standards, the Respondent portrayed itself as a leading seed company in Swaziland.

- 4.3.151 RW3 testified that when he found the Applicant asleep in his car the same week of the field day, he emphasized to him the importance of the field day and they talked about what needed to be done on the field. When he found the field unprepared, it was obvious that the tasks were not done according to what had been agreed. According to RW3, the Applicant promised to remove stumps, make walkways, even and cut the grass, none of that was done.
- 4.3.152 Mr. Jackson stated that ultimately he would shoulder the responsibility for failing to meet company standards. At management meetings, he would be in the firing line for protecting the Applicant and his colleagues.
- 4.3.153 It was RW3's evidence that when he spoke to the Applicant they were in a corner of the field where vehicles were parked. They were not close to the farmers, only Ms. Clarice Khumalo and Mr. Cowin Vilakati within earshot.
- 4.3.154 RW3 testified that the Applicant never took the initiative to show the seriousness of the situation by approaching him to report that the field was not ready.
- 4.3.155 According to RW3, the Applicant never challenged him about the events of the field day because he realized that he did not deliver on one of his main functions.
- 4.3.156 RW3 confirmed that Mr. Biljon gave a verbal ruling at the grievance hearing and that he

(RW3) received the grievance report from him (RW2). According to Mr. Jackson, the report was similar to the verbal outcome. Mr. Jackson also confirmed that Mr. Biljon recommended that he (RW3) should meet the Applicant in Swaziland to try to address their problems.

- 4.3.157 Mr. Jackson testified that immediately after the grievance hearing, Mr. Nick Goble met with the Applicant and he (RW3) separately to emphasize that they needed to meet and iron out all the issues because the problems were minor.
- 4.3.158 It was RW3's evidence that the Applicant's allegations depicted an incorrect picture; that conditions were unbearable for him since he became an agronomist. According to the witness, he believed that the Applicant and he had a good working relationship and in their private time inspecting demos around Swaziland, they used to discuss many personal matters.
- 4.3.159 Mr. Jackson stated that if their working relationship were that bad, the Applicant would not have discussed such subjects as investing money, women, and marriage. The witness stated that even Mr. Nick Goble was aware that he (RW3) had a good relationship with the Applicant; so he (Mr. Goble) thought the "little fire" that had erupted should be cooled down so that everyone can continue with their work.
- 4.3.160 According to RW3, he was not aware if a date for his meeting with the Applicant was set, but Mr. Goble said the three of them would meet in

Swaziland; however, the Applicant resigned before the meeting could be convened.

- 4.3.161 RW3 testified that he first realized that the relationship between him and the Applicant had changed when he (RW3) complimented Mr. Modupe while they were driving in Lesotho. The following day the Applicant was very negative towards him (RW3); Mr. Jackson stated that the Applicant said by complimenting Mr. Modupe's performance he was implied that he (RW3) was unhappy with his (Applicant) performance.
- 4.3.162 It was Mr. Jackson's evidence that there were often situations where he would say something and the Applicant would misinterpret it; he (RW3) would have to address the issue. However, he generally had a good relationship with the Applicant; the latter actually thanked him for the opportunities he had especially the move to the position of agronomist.
- 4.3.163 Ms. Jackson testified that the Applicant thanked him for the trip to Ghana and for his (RW3) support in his work especially on good road site demos. He stated that he also assisted the Applicant with his presentation during a meeting of African agronomists.
- 4.3.164 RW3 referred to photographs taken in Mozambique and Lesotho where the Applicant had gone to make presentation and the farmers were extremely happy about the Applicant's presentation. Other photographs showed the Applicant receiving a long service award and in

Mozambique where the Managing Director of Pannar Seed Mozambique attended. In that event, he (RW3) gave a speech about the Applicant's good work. The event was held on the 20th July 2010.

- 4.3.165 According to RW3, at the function in Mozambique, the Applicant reciprocated and stated that it was a privilege to work for Pannar Seed and he was very happy to be part of the company. Another photograph was taken in Lesotho, where he (RW3) had taken the Applicant to a game farm and later they went fishing, this all happened in 2010.
- 4.3.166 Mr. Jackson testified that he believe that if the meeting that was recommended by the grievance hearing chairperson had taken place, the problems that were causing the conflict could have been resolved. According to RW3, the Applicant was an asset to the company and did a good job.
- 4.3.167 RW3 stated that he assisted the Applicant with a power point presentation in June 2011 and this happened after the field day where the latter had alleged that he (RW3) verbally assaulted him in public. He asserted that if he disliked the Applicant he would not have assisted him in his work or offered him a nice place to stay whenever he was in Grey Town.
- 4.3.168 According to RW3, the Applicant did not exhaust all channels to try to resolve the complaints he

had against him (RW3). He stated that the Applicant never sent an email to Mr. Goble.

- 4.3.169 Mr. Jackson stated that after the grievance hearing, the Applicant and he (RW3) actually shook hands and he offered the Applicant a place to stay overnight but the Applicant declined and said he was returning to Swaziland.

CROSS EXAMINATION

- 4.3.170 RW3 stated that although he started working for the Respondent as Export Marketing Officer and was currently the Business Development manager, but was no longer involved with Pannar Seed Swaziland.
- 4.3.171 Mr. Jackson stated that he was not sure if the Applicant received the minutes of the grievance meeting. However, RW3 maintained that the Applicant received the verbal outcome and the written version was similar to the verbal outcome.
- 4.3.172 It was put to RW3 that the Applicant never received the minutes of the grievance hearing. Mr. Jackson said he could not comment because he did not receive the minutes too and did not believe that the minutes were circulated to everyone.
- 4.3.173 When it was put to RW3 that the Applicant asked for the minutes of the grievance hearing, he said he had no comment because he never asked for the minutes.

- 4.3.174 According to Mr. Jackson, a demotion occurred where an employee is moved to a job with less responsibilities and his salary and benefits are reduced.
- 4.3.175 Mr. Jackson testified that the Applicant planted demos even before he was moved to the agronomist position. Since the position had not been created, the Sales Representative had to plant demonstrations in addition to other duties such as attending to customers, visiting retailers and sales.
- 4.3.176 When RW3 was asked if the Applicant qualified to be a Sales Representative, Mr. Jackson stated the one cannot qualify to be a sales representative, because sales had to do with a person's character and personality, consequently, the Applicant did not the right character and personality to be in sales.
- 4.3.177 Mr. Jackson elucidated that a Sales Representative must be able to talk to people and hold talk shows. He added that a Sales Representative was also in charge of the company's supply chain, which is the warehouse invoicing and sales to the customers. Moreover, RW3 asserted that the Sales Representative should be someone that has skills of managing employees and stock.
- 4.3.178 RW3 stated that he was not sure how long the Applicant worked as a Sales Representative because he (RW3) started working for the Respondent in 2007.

- 4.3.179 It was put to RW3 that since it was his evidence that the Applicant did not have the qualities of a salesperson, then it meant Mr. Ndzabukelwako had been misplaced within the company structure. Mr. Jackson averred that he could not comment much because he (RW3) was not around when the Applicant was appointed. However, he could attest to the fact that the Applicant's strengths were in managing the fields.
- 4.3.180 Mr. Jackson testified that a job description was merely a guide because a business place is a dynamic environment and not everything is in black and white. According to RW3, what happens on the actual job cannot be expected to be 100% what the job description provided. A performance appraisal looks at certain deliverable that the employee has to achieve. For example, an Agronomist's deliverable is preparing for a field day.
- 4.3.181 It was Mr. Jackson's evidence that an Agronomist's job description stipulates that on field days, the field should be neat and the grass should be cut. RW3 added that the job description does not necessarily provide that the Agronomist should cut the grass himself, but he or she may employ people to do that work.
- 4.3.182 Mr. Jackson testified that he implemented the management decision to redeploy the Applicant to the agronomy unit. He first held meeting with him and explained the decision. The Applicant

stated working as an Agronomist in October 2009.

- 4.3.183 It was RW3's evidence that he never participated in the recruitment of the Applicant's replacement in the position of Sales Representative; that was handled by the Human Resources department. However, Mr. Jackson stated that the job advertisement was placed in the newspaper early in the year.
- 4.3.184 It was put to RW3 that the job advertisement was taken out in July 2009 and that was prior to the discussion he had with the Applicant concerning the redeployment. Mr. Jackson stated that there were two job advertisements. One was issued in anticipation of the retirement of Mr. Phumuza Gama, but later the company decided that it did not need two sales representatives.
- 4.3.185 It was put to Mr. Jackson that the Applicant never said he thanked him for deploying him to the agronomist position. RW3 stated that the Applicant did not mention the issue probably because he was not asked about it.
- 4.3.186 Mr. Jackson could not confirm if the company manual that contained the grievance procedure was part of the package Applicant received when he was employed.
- 4.3.187 It was put to RW3 that the reason for Applicant's delay to raise a grievance on the alleged demotion was that he did not know how and

where to get the company procedure until he was advised by Mr. Brian Hayes, the IR manager. RW3 maintained that on certain issues, the Applicant was able to raise grievances instantly.

- 4.3.188 According to RW3, the expression to “*kill a hybrid*” was used often in seed production industry. The expression simply meant that an employee had only talked about the negative attributes of a seed.
- 4.3.189 RW3 confirmed that the Applicant was the one assigned to talk about PAN 63. Mr. Jackson also admitted that the Applicant killed PAN 63. Moreover, RW3 stated that when he said “*personal bias killed the hybrid*” he was referring to the Applicant because he used to tell him (RW3) that he did not like PAN 63.
- 4.3.190 Mr. Jackson testified that if an employee is given an opportunity to talk about a product he does not like, he should focus on the positive aspects of that product. RW3 stated that he had no choice but to assign the Applicant to talk about the hybrids because Mr. Cowin Vilakati was still new in the company.
- 4.3.191 RW3 stated that he did not present on PAN 63 himself because his own presentation (trial results) had graphs and was complicated to present. In any event, the Applicant was an expert on varieties; everyone had a portion to present, and he (RW3) could not have presented on everything.

- 4.3.192 RW3 denied that he did showed the Applicant the organogram when they discussed the move, but he (RW3) gave it to Ms. Clarice Khumalo later to put it up on the notice board.
- 4.3.193 Mr. Jackson testified that the organogram did not strictly conform to hierarchy in the organization. RW3 added that just because someone was above you in the structure did not mean that you report to him. For example, the Applicant never submitted reports nor received instructions from Mr. Cowin Vilakati; the Applicant submitted reports and took instructions from him (RW3).
- 4.3.194 When it was put to RW3 that the Applicant had given evidence that after he assumed the agronomist position he reported to Mr. Vilakati directly, Mr. Jackson denied the Applicant's version.
- 4.3.195 According to RW3, reporting meant giving feedback that would go through the chain of command; however, Mr. Vilakati never gave him feedback on anything that the Applicant was doing, he (Vilakati) did not know the status of the agronomy unit.
- 4.3.196 RW3 testified that constructive criticism of the employees at Pannar Seed Swaziland, especially with the Applicant, did bear positive results. For example, he (RW3) advised the Applicant on how to plant demos; such advice eventually benefited the company.

- 4.3.197 Mr. Jackson stated that the emails on the sunflower order were exchanged between the 9th and 11th November 2009; this was before the Applicant lodged a grievance.
- 4.3.198 It was put to Mr. Jackson that the Applicant was not upset when he wrote the email. It was pointing out to RW3 that he (Applicant) was being assertive. RW3 maintained that judging by the words used in Applicant's email, it was obvious that he was upset.
- 4.3.199 According to RW3, he understood why the Applicant was unhappy about the sunflower issue because he was wrongfully implicated. Mr. Jackson added that he came to Swaziland to meet with the staff on the 12th November 2009. The Applicant, Mr. Cowin Vilakati, Ms. Clarice Khumalo, and he (RW3) attended the meeting.
- 4.3.200 It was put to RW3 that the Monday meetings of the Pannar Swaziland staff were chaired by Mr. Cowin Vilakati, Mr. Jackson denied these allegations and stated that Monday meetings were not structured because it was just a platform for communication.
- 4.3.201 Mr. Jackson testified that he did not find anything objectionable about his PAN 63 email because the Applicant was not hauled to a disciplinary hearing for talking negatively about the hybrid at the extension officer day in October 2009.
- 4.3.202 RW3 asserted that the Applicant assumed the Agronomist position in August 2009; the

extension officer day and the sunflower seed order emails were sent in October and November 2009 respectively.

- 4.3.203 Mr. Jackson denied that the fact that working conditions for the Applicant became intolerable after he was appointed Agronomist.
- 4.3.204 RW3 maintained that the Respondent had a procedure for adjusting salaries; hence, a manager had no power to even effect salary increases.
- 4.3.205 Mr. Jackson was asked why the Applicant would allege that he (RW3) threatened to cut his (Applicant) salary. RW3 denied threatening to cut the Applicant's salary; he stated that he said the following: *"Thami you have a position of responsibility in the company. The company is paying you a salary which warrants that you will be able to work without somebody monitoring and supervising you all the time."*
- 4.3.206 RW3 stated that he regarded employees as the greatest assets of the company. RW3 was asked what action he took after he learnt that the Applicant was sleeping in the car because he was sick. The witness stated that the Applicant never reported to him that he was sick.
- 4.3.207 According to RW3, when he told the Applicant that when the company was behind schedule everyone should work, he did not mean that the Applicant should cut grass every day.

- 4.3.208 RW3 stated that he never took any formal action against the Applicant after the Nhlangano field day. However, they had a meeting where he (RW3) spoke to the Applicant and reminded him that he was capable of delivering at a certain level and had done so before; but the Nhlangano field day was far below the required standard.
- 4.3.209 Mr. Jackson asserted that although he signed the conditions of service and agreed to adhere to company policies, he was not given a company manual. However, it was put him that in his evidence-in-chief he said he was he was given the company policy. RW3 denied that his evidence was full of contradictions.
- 4.3.210 According to RW3, at Pannar Seed Swaziland, it was the employees' responsibility to ensure that they acquainted themselves with company policy. In any event, the conditions of service that they sign, states that employees agree that they were familiar with the company policy. Mr. Jackson asserted that an employee should not sign the conditions of service until he or she was familiar with the company policy.
- 4.3.211 Mr. Jackson stated that the company policy had nothing to do with an agronomist's job profile, but addressed issues like dress code, timekeeping, drugs and alcohol use, for example.
- 4.3.212 RW3 denied that he shouted at the Applicant during the Nhlangano field day. He maintained that he spoke sternly and seriously in a level

tone and said the following: *“Thami why is the grass not cut, this is not acceptable. We’ll have to have a meeting in the office tomorrow.”*

- 4.3.213 It was put to RW3 that during his examination-in-chief he confirmed that the grievance report was emailed to him, but under cross-examination he said he did not know. Mr. Jackson said he was not aware. Mr. Jackson said Mr. Biljon told him that the report was emailed to the Applicant.
- 4.3.214 RW3 clarified that immediately after the hearing, Mr. Nick Goble met with the Applicant and him (RW3) on separately. Mr. Jackson said Mr. Goble told him (RW3) that he must understand that the Applicant had had different managers in his career, so he should understand his (Applicant) point of view. Mr. Goble told him that he had told Applicant that he should also understand that he (Jackson) management style was different from Mr. Bester’s(RW3’s predecessor) style.
- 4.3.215 It was put to RW3 that the Applicant posed for the photographs that were exhibited by the Respondent’s attorney during arbitration and nothing should be read from those postures. Mr. Jackson stated that he produced the photographs to show that the Applicant was happy. The photos were meant to refute the version that Applicant’s working conditions were appalling such that he had no option but to leave the company.
- 4.3.216 RW3 admitted that it was not recorded in the grievance hearing minutes that Mr. Goble was to

convene a meeting between the Applicant and he (RW3). However, RW3 maintained that Mr. Goble told him that he would convene the meeting in Swaziland. Mr. Jackson admitted though that Mr. Goble did not make the offer to him (RW3) in the presence of the Applicant.

- 4.3.217 According to RW3, the Respondent correctly handled and resolved the grievance. RW3 was asked whether it was reasonable for the grievance hearing chairperson to recommend that the Applicant as complainant should meet with the him (RW3) as the accused. Mr. Jackson stated that even though the company had suggested that Mr. Goble convene the meeting, it was important that both of them to communicate because they would still worked together.
- 4.3.218 RW3 stated that the Applicant should have waited for the written outcome from Mr. Biljon and thereafter follow the reconciliatory processes. However, the Applicant left without following the recommendations.
- 4.3.219 Mr. Jackson stated that since the grievance hearing chairperson viewed the problem as a conflict in personality, the company could not have sent the Applicant to work in Botswana, for instance or him (RW3) to another country. They had to learn to understand that they had different personalities.

- 4.3.220 When it was put to RW3 that the Applicant did not shake hands with him after the grievance hearing he maintained that it did occur.
- 4.3.221 According to RW3, the Applicant was wrong in claiming that he was constructively dismissed because he did not allow the company to sort out the problem in the manner recommended by the grievance-hearing chairperson.
- 4.3.222 RW3 stated that he was disappointed that the Applicant had dug up issues from the past, which he thought had been resolved. It was put to RW3 that the issues had accumulated because of the problems between him (RW3) and the Applicant; and the latter had lodged a grievance with the hope that the procedure would prevent possible conflict between them, but the chairperson ruled that he (RW3) should resolve the issues himself.
- 4.3.223 RW3 denied that the company and he had forced the Applicant to resign. Mr. Jackson pointed out that, firstly, the Applicant wanted to be reinstated to the position of Sales Representative, but someone else had been employed in that position. On the other grievances the Applicant had demanded that he (RW3) should stop doing certain things, but it was difficult for the company to determine the truth about the incident, consequently, it was resolved that a meeting be held to sort out these issues.
- 4.3.24 It was put to Mr. Jackson that AW2, Makhosazane Mdluli had confirmed that he (RW3) verbally

assaulted the Applicant. RW3 stated that he believed AW2's evidence did not give a true account of what transpired on the field day.

RE-EXAMINATION

4.3.25 RW3 clarified that it was common that employees worked with people they did not like. In any job in the world there is never going to be a perfect situation where employees were always happy.

4.3.26 RW3 stated that even the Applicant could not say with conviction that the meeting that Mr. Biljon recommended would not have resolved the conflict.

4.4 APPLICANT'S SUBMISSIONS

4.4.1 Mr. Gcina Mhlanga, the Applicant's attorney submitted that **Section 37 of the Employment Act of 1980** provides that constructive dismissal occurs: "*when the conduct of an employer towards an employee is proved by the employee to have been such that the employee to continue in his employment and accordingly leaves his employment, whether with or without notice*".

4.4.2 It was Mr. Mhlanga's contention that whereas in some cases a single act or omission by an employer may justify an employee's resignation on grounds of constructive dismissal, however in the majority of cases, a series of such acts or omissions suffices.

4.4.3 The Applicant's counsel referred to a passage in the case of **Pretoria Society for the case of the Regarded v Loots (1997) 18 ILJ 981 (LAC) at 985** where the test for determining whether or not an employee was constructively dismissal was enumerated. The court remarked thus:

"...the enquiry [is] whether the [employer], without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is not necessary that the employer intended any repudiation of a contract, the Court's function is to look at the employer's conduct as a whole and determine whether...its effect, judged reasonably and sensibly is such that the employee cannot be expected to put up with it."

4.4.4 Mr. Mhlanga also referred to the case of **Strategic Liquor Services v Mvumbi NO and Others (2009) 30 ILJ1526 (CC)** where the South African Constitutional Court remarked that, the test for constructive dismissal does not require that the employee should have no choice before he or she resigns. The test is that the employer should have made continued employment intolerable.

4.4.5 Furthermore, the Applicant's attorney referred to the case of **Eagleton and Others v You Asked Services (Pty) Ltd (2009) 30 ILJ 320 (LC)**

where the Court held that there are three requirements that have to be proved by the employee in order to claim constructive dismissal. These are that the employee terminated the contract of employment, that the continued employment had become intolerable for the employee, that the employer must have made continued employment intolerable.

- 4.4.6 According to Mr. Mhlanga, the Applicant had met all requirements for establishing a case for constructive dismissal. Counsel for the Applicant argued that the Applicant's five pillars should not be treated separately because the Applicant based the constructive dismissal on the cumulative effect of the Respondent's conduct over a period.
- 4.4.7 The Applicant's attorney submitted that the correct approach for determining the matter is to consider the last event alleged by the Applicant prior to his resignation and move backwards to connect the other incidents.
- 4.4.8 It was Mr. Mhlanga's contention that the Respondent's argument that the Applicant's delay of eighteen (18) months in lodging a grievance proved that his working conditions were in fact tolerable was misplaced. Counsel submitted that the Respondent's argument was misdirected because it failed to produce the company policy during arbitration to show that the grievance was time barred. Accordingly,

counsel argued that it would be a fatal flaw to assume that the policy exists.

4.4.9 Mr. Mhlanga further submitted that even if it could be found that the company policy existed, the Applicant could not be faulted for the delay in lodging a grievance because the Respondent never gave him the policy, as he was not a manager.

4.4.10 The Applicant's attorney pointed out that in any event the Applicant's delay in lodging the grievance internally was rectified by him reporting a dispute to the Commission within eighteen (18) months.

4.4.11 Now, regarding the alleged demotion as one of the pillar, the Applicant's counsel contended that the Applicant's case was on all fours with the case of **Timothy Mfanimpela Vilakati v Anti-corruption Commission and two Others IC Case No. 232/2002**). According to Mr. Mhlanga, just like in the **Timothy case (supra)**, the Respondent in this case unilaterally and materially changed the Applicant's conditions of employment without consultation and /or informing him of the changes.

4.4.12 According to Mr Mhlanga, in the **Timothy case (supra)**, the Court commented as follows:

"The case for Applicant is therefore very simple . He only has to show the court the letter of appointment and his terms and conditions of service. The Court's duty will then be to establish

for itself that indeed these terms and conditions were altered and that the consent of the Applicant was not sought. The Court will consequently have to make a finding that such conditions amount to constructive dismissal.”

- 4.4.13 The Applicant’s attorney submitted that the Respondent’s case was based on hearsay evidence, and that evidence was inadmissible. Mr Mhlanga argued that so long as the grievance procedure to which the Respondent witnesses refer to was not produced during the arbitration, the relevance of that document was wanting.
- 4.4.14 Mr. Mhlanga contended that RW3’s (Mr. Mike Jackson) evidence relating to the field day standards should also be rejected because the policy which he referred to as settling those standards was not produced.
- 4.4.15 Furthermore, counsel submitted that RW3 also relied on the policy by alleging that the Applicant was not entitled to be supplied with uniform for free because his income status required that he buy uniform for himself.
- 4.4.16 The Applicant’s attorney also referred to an extract in the **South African Law of Evidence 2003 (formerly Hoffmann and Zeffertt)** where hearsay evidence was defined. The Learned authors defined hearsay as follows: *“evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence....hearsay evidence will be*

admissible where the person upon whose credibility, the probative value of such evidence depends himself testified at such proceedings.”

4.4.17 According to the Applicant’s counsel, the Applicant’s version that he was never consulted before he was demoted remained uncontroverted for the entire course of the arbitration hearing. Counsel argued that what worsened the matter is the fact that the Respondent advertised the Applicant’s position while the latter was the incumbent.

4.4.18 Mr. Mhlanga also referred to the case of **The Minister for Public Service and Administration and Another against Gayle Shery Kaylor, CA 1842**. Counsel argued it was also on all fours with the present matter. According to Mr. Mhlanga, in that case, the Court stated thus:

“It is not permissible in terms of the LRA for an employer, such as the first and second appellant, to decide to place an employee in a new post without any meaningful consultation. See: Nxele v Chief Deputy Commissioner, Corporate Service and Others (2008) 29 ILJ 2708 (LAC) at para 61 and 69, where Zondo JP (as he then was) said: ‘A decision to transfer an employee that is made before the employee can be heard is generally speaking unlawful and invalid in law.’”

4.4.19 Mr. Mhlanga submitted that the Court in **Kaylor case (supra)** further opined that:

“In short, there was no consultation which was sufficient to justify the conclusion that the appellant had acted fairly and in a manner which is permissible in law, which term incorporates the right to procedural fairness and the concomitant right to be consulted in such circumstances.”

- 4.4.20 It was the Applicant attorney’s contention on that the organogram that was produced demonstrated that the position of Agronomist was lower than that of the Sales Representative.
- 4.4.21 According to Mr. Mhlanga, in the case of **Solidarity Obo Kearns v Madau & Others (2010) 6 BLLR 566, para 69**, ‘demotion’ was defined as *“...a reduction or diminution of dignity, importance, responsibilities, power or status even if the salary, benefits and rank have been retained.”*
- 4.4.22 Moreover, Mr. Mhlanga referred to the case of **Moqhaka Local Municipality v SA Local Government Bargaining Council and Others (JR 991/12 (2013) ZALCJHB 218**, where the Court stated thus: *“Financial loss is not the only criterion as demotion can consist of diminution of status even where the employee’s salary was not reduced.”*
- 4.4.23 Mr. Mhlanga also referred to the case of **Attorney General v Nhlanhla M.K. Vilakati ICA case no 8/1998**). In the **Vilakati case (supra)** the Court stated as follows:

“We hold that upon the totality of the evidence presented to us the unjustified variation of the applicant’s post from that of Senior Magistrate (a judicial office) to that of Assistant Judicial Commissioner was a demotion which resulted in a loss of status, loss of job satisfaction and an entirely different kind of work.”

- 4.4.24 The Applicant’s attorney submitted that the evidence of RW1 and RW3 concerning the events of the field day (verbal assaulted allegations) was contradictory and inconsistent therefore ought to be rejected. According to Mr. Mhlanga, the discrepancies in the evidence of these witnesses regarding the date of the field day and the people who were present at the time of the incident were fatal to the Respondent’s case. Conversely, Mr. Mhlanga argued that the Applicant’s version was corroborated by AW2 in all material respects.
- 4.4.25 Mr. Mhlanga also contended that the Applicant’s evidence regarding the false allegations was also uncontroverted.
- 4.4.26 The Applicant’s attorney argued that the grievance hearing chairperson Mr. Jan Van Biljon was not a competent witness since he never issued a written decision on the issues that came before him as required by law yet he had the audacity to testify against the Applicant at the arbitration.
- 4.4.27 According to Mr. Mhlanga, Mr. Biljon made an unreasonable oral determination of the

grievance hearing by recommending that the Applicant should meet Mr. Jackson in absence of a mediator when the complaint was against him.

4.4.28 Moreover, the Applicant's attorney submitted that the written ruling that was promised by Mr. Biljon was not issued on the said date, despite reminders from the Applicant.

4.4.29 Mr. Mhlanga contended that Mr. Biljon's assertion that his oral and written ruling carried the same weight was contrary to the law. According to the Applicant's counsel such as exposition was prohibited in terms of **Section 33 (f) of Constitution of Swaziland. Section 33** provides thus:

"A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirement imposed by law including the requirement of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved."

4.4.30 The Applicant's counsel also submitted that **Section 33(2) of the Constitution of Swaziland** reads as follows:

"A person appearing before an administrative authority has a right to be given reasons in writing for the decision of that authority."

4.4.31 Mr. Mhlanga argued that the Applicant had every reason to fear and take Mr. Jackson's threats of

reducing his salary seriously more so because the latter had previously discussed his Applicant) salary with his colleague in flagrant disregard of its confidential nature.

4.4.32 It was contended by Mr. Mhlanga that what was puzzling was why Ms. Clarice Khumalo would lie against Mr. Jackson. Moreover, Mr. Mhlanga argued that it was quite strange that Mr. Jackson chose to communicate with Ms. Khumalo about the uniform instead of talking to the Applicant directly.

4.4.33 Finally, the Applicant's attorney submitted that the Applicant had proved on a balance of probabilities that Respondent constructively dismissed him; consequently, Mr. Mhlanga prayed for an award in Applicant's favour.

4.5 **RESPONDENT'S SUBMISSIONS**

4.5.1 The Respondent's attorney, Mrs. Sarah Jane Thomson submitted that the Respondent led evidence to prove that the Applicant was voluntarily moved to the position of Agronomist in 2009 and he signed a new job description.

4.5.2 Mrs. Thomson argued that there was clear evidence that was led by the Respondent that showed that the Applicant was happy with the deployment and raised no objection, written or oral to indicate otherwise.

4.5.3 It was Mrs. Thomson's contention that the Applicant lodged a grievance almost two years later, claiming that the move to the position of

Agronomist was a demotion. According to the Respondent's counsel, not only did the Applicant take almost two years to lodge a grievance internally, he waited a further year to report the dispute to CMAC. Consequently, the dilatory manner in which Applicant raised the issue should affect the validity of his claim that he was constructively dismissed.

- 4.5.5 The Respondent's attorney submitted that the oral outcome of the grievance hearing was that there was no merit in the complaint in respect of demotion and that the other complaints should be resolved between the Applicant and his manager. However, the Applicant never attempted to pursue the possibility of remedying his conflict with his manager, and instead he resigned before the written report was given to him.
- 4.5.6 According to the Respondent's counsel, it was clear from the outcome of the hearing that the Respondent dealt with the Applicant's grievances and even offered a solution, which the latter elected not to follow.
- 4.5.7 Mrs. Thomson argued that **Section 37 of the Employment Act 1980** laid down three principles concerning constructive dismissal, which are that the onus of proof is on the employee; that the test whether the employer's conduct is such that the employee cannot remain in employment is an objective one; and

that the employee must have exhausted internal remedies.

- 4.5.8 In support of the above principles, the Respondent's counsel referred to four cases which are: **Timothy Vilakati v Anti-Corruption Commission and Others (supra); Jameson Thwala v Neopac (SWD) Limited (IC case no:18/1998); Samuel S. Dlamini v Fairdeal Furnishers (Pty) Ltd IC case no: 145/2000)** and **Mkhwanazi v Gridlock Security Services (PTY) Ltd (IC case 302/2011).**
- 4.5.9 Mrs. Thomson also contended that during arbitration the Respondent dealt satisfactorily with each pillar that Applicant relied on for the alleged constructive dismissal claim. Mr. Jackson denied demoting the Applicant and the latter never provided evidence to prove that the former had said he would demote him.
- 4.5.10 Furthermore, the Respondent's counsel submitted that the Applicant could not give a reasonable reason for signing the new job description and could not provide evidence of coercion even though Mr. Jackson led evidence that the Applicant was happy with the move.
- 4.5.11 According to Mrs. Thomson, the Applicant admitted that there was a grievance procedure, but said he did not follow it because he did not have it on hand and only got it almost two years later. Counsel argued that since the Applicant was in a senior position at the time and there

were people working under him, it was not conceivable that it took him eighteen (18) month to consider how to get the company policy. Such conduct did not objectively reflect a person in an intolerable employment position.

- 4.5.12 Mrs. Thomson further submitted that the false accusations issues were also raised almost two (2) years after the incidents occurred. In any event, Mr. Jackson had led evidence that a meeting was held with all staff to discuss the issues and the matters were put to rest.
- 4.5.13 It was the Respondent attorney's contention that the Applicant's version that Mr. Jackson discussed his salary with his (Applicant's) colleague was dealt with at the grievance hearing. According to Mrs. Thomson, the Applicant failed to call Ms. Clarice Khumalo to give evidence at the grievance hearing and arbitration to corroborate his version that his salary discussed.
- 4.5.14 The Respondent's attorney argued that regarding the verbal assault, the Applicant's version was corroborated by a disgruntled ex-employee. However, Mr. Modupe, who was a reliable witness, rebutted her evidence. Mrs. Thomson submitted that, in any event the Respondent denied the alleged verbal assault.
- 4.5.15 Mrs. Thomson submitted that the alleged threat of reduction of Applicant's salary should not have formed part of the claim for constructive dismissal because the Applicant salary was

never reduced. Moreover, counsel argued that this allegation was not corroborated.

- 4.5.16 It was Mrs. Thomson's contention that it was common at the workplace for employees to encounter unpleasant situations, but it was up to that employee to deal with these through the required company procedures.
- 4.5.17 The Respondent's attorneys referred to the case of **Pretoria Society of the Care for the Retarded v Loots (1997) 18 ILJ 981 (LAC)** where the Court held that for an employer's conduct to constitute constructive dismissal, the employer must "*without reasonable or proper cause, conduct itself in a manner which is calculated to destroy or seriously damage*" the employment relationship.
- 4.5.18 Mrs. Thomson further submitted that the Applicant had failed to establish that the Respondent's conduct was calculated to destroy or seriously damage the employment relationship.
- 4.5.19 According to Mrs. Thomson, it is trite that the subjective state of mind of the employee is not the determining factor in constructive dismissal, but the test was whether a reasonable employee in the same circumstances would have resigned.
- 4.5.20 The Respondent's attorney submitted that the difficulty the Applicant had in the circumstances was that he continued to work for the employer for almost two years after the alleged demotion

which he claimed his main reason for his resignation.

- 4.5.21 Mrs. Thomson contended that the Applicant's explanation for the delay was not satisfactory; more so because he was in a senior position.
- 4.5.22 According to Respondent's counsel, in the recent case of **Van Greunen v Jhb Fresh Produce Market (Pty) Ltd (2010)**, the employer had changed an employee's terms and conditions of employment, which could be a ground for constructive dismissal, however the Court held that the conduct of the employer must be unjustified and the working conditions intolerable.
- 4.5.23 Respondent's counsel contended that the Applicant failed to prove the Respondent's conduct was unjustified and the working conditions intolerable, because the Respondent showed that the change of job description was a structural change and the Applicant's working conditions were not changed.
- 4.5.24 Mrs. Thomson submitted that mere unreasonable or illegitimate demands on the part of the employer do not amount to constructive dismissal as long as the employee retains a remedy short of terminating the employment relationship.
- 4.5.25 The Respondent's attorney referred to the Learned author **Andre Van Niekerk's** statement, who opined thus: " *the nature and*

extent of the right to claim unfair dismissal in these circumstances (i.e. constructive dismissal), is often misunderstood and that the law reports are littered with cases in which employees have resigned in arduous but not intolerable circumstances, seeking vengeance on their erstwhile employers.....it is not the employees say so or perception that establishes intolerability, or even the employers state of mind, it is the conduct of the employer in the objective sense. This implies not only that the test should be objective but it should be an act of final resort when no alternatives remain.”

4.5.26 Mrs. Thomson also referred to the case of **Kruger v CCMA & Another (2002) 11 BLLR 1081 (LC)** where the Court held thus: *“When there are remedies available to an employee which had not been exhausted...the employee has not discharged the onus that she as constructively dismissed. An employee may not choose constructive dismissal while other options are available.”*

4.5.27 It was Respondent attorney’s argument that the Applicant resigns before two very important events occurred. He ignored the recommendation of the HR manager and resigned before attempting to resolve his issues with his manager. Secondly, the Applicant resigned two days after the grievance hearing and before the written findings were available.

- 4.5.28 According to Mrs. Thomson, the Applicant's conduct proved that he intended to leave his employment no matter what the contents the findings report revealed. Moreover, the Applicant and Mr. Jackson confirmed that Mr. Nick Goble, their superior met them separately after the grievance hearing and confirmed that the three of would meet to try to resolve the issues.
- 4.5.29 Finally, Mrs. Thomson submitted that based on the relevant facts, the law and case law the Respondent advanced, it must be fairly concluded that the Applicant had failed to meet the criteria for constructive dismissal as claimed.

5. ANALYSIS OF EVIDENCE AND ARGUMENTS

- 5.1 **Section 37 of the Employment Act No: 5 of1980** reads thus:

“When the conduct of an employer towards an employee is proved by that employee to have been such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves his employment, whether with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by his employer”.

- 5.2 In the case of **Timothy Mfanimpela Vilakati v Anti-Corruption Commission and Other (IC case no: 232/02 at page 5)** the Court stated as follows:

“The burden of proof in constructive dismissal cases is therefore on the employee to show that the conduct of the employer was such that the employee could no longer reasonably be expected to continue in his employment. It is an objective test.”

- 5.3 Then in the case of **Nana Mdluli v Conco Swaziland Limited (IC case no: 12/2004 at page 2)**, the Court quoted with approval a passage from **Pretoria South Society for the Care of the Retarded v Loots (1997) 18 ILJ 981 (LAC)** where the Court stated thus:

“When an employee resigns or terminates the contract as a result of constructive dismissal, such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee’s most important function, namely to work. The employee is in fact saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she in fact resigned.” (Emphasis added).

- 5.4 It is common cause that the Applicant relies on what he called five pillars for his constructive dismissal

claim. These pillars are captured in detail above; it is would be superfluous to reproduce them extensively at this stage, suffice to mention that they are demotion, false accusations, discussion of salary, verbal public assault, and threat to reduce salary.

- 5.5 The Applicant's counsel urged me to consider the pillars entirely, as a series of events that cumulatively caused continued employment intolerable for the Applicant.
- 5.6 Now, three events complained of occurred in September, October, and November 2009 respectively. The other three incidents occurred in March and April 2011 respectively and the Applicant resigned on the 27th June 2011 after a grievance hearing on the 24th June 2011.
- 5.7 Since the claim for constructive dismissal is premised on intolerability of working conditions, this Commission cannot be oblivious of the period that lapsed between September 2009 (date of the alleged demotion) and the Applicant's resignation in June 2011. The said period is instrumental in objectively evaluating the Applicant's state of mind as the incidents unfolded. I propose to deal with each incident chronologically.
- 5.8 Now, the Applicant alleged that he was unilaterally demoted in September 2009, but could not lodge a grievance because he did not have the grievance policy. On the contrary, the Respondent denied that the Applicant was unilaterally demoted or demoted of all, but consented to the move and benefited in terms of career growth; hence he was happy about the

deployment. It is for that reason that he never lodged a grievance.

- 5.9 There is no dispute that as Sales Representative, the Applicant was head of Pannar Seed Swaziland. He ranked below Mr. Jackson, who was the Export Marketing Officer in 2009. The Sales Representative supervised permanent administrative and warehouse staff and was accountable to the Pannar head office for all operations of the Swazi company.
- 5.10 The Respondent argued that the Applicant was deployed to a position of strength, which was the Agronomy unit where he was responsible for fields and seasonal or seasonal employees. Moreover, the Respondent contended that the Applicant's salary and benefits were not reduced.
- 5.11 In **Steward Wrightson (Pty) Ltd v Thorpe 1977(2) SA 943 (A)**, the Court recognized that the unilateral degrading of an employee's status amounted to a fundamental breach of the service contract, which does not perse end the contract, but serves to vest the employee with an election to either stand by the contract or to terminate it.
- 5.12 In **Van Wyk v Albany Bakeries Ltd (2003) 12 BLLR 12 74 (LC)**, the Court held that a unilateral demotion that only affects the employee's status is a form of repudiation of the contract of employment, amounting to a constructive dismissal.
- 5.13 In **Solidary Obo Kearns v Madau & Others (supra)** the Court defined "*demotion*" as "*a reduction or diminution of dignity, importance, responsibilities,*

power or status even if the salary, benefits and rank have been retained”.

- 5.14 There was a controversy whether Mr. Cowin Vilakati supervised the Applicant or the latter reported to the former. The Applicant alleged that he did make weekly reports to Mr. Vilakati, but the Respondent’s RW3 denied that and averred that the Applicant reported to him (RW3) directly.
- 5.15 I hold that the dispute can be resolved by simply examining the Applicant’s Job Description Form that he signed on the 3rd September 2009. According to the form the job title is ‘Agronomist’, and the incumbent is ‘Thami Ndzabukelwako’, the name of the supervisor is: ‘Mike Jackson’. However, just below the above information the form provides that the Applicant’s first level superior is the Swaziland Sales Representative and his second level superior is the Export Marketing Officer.
- 5.16 At page 2 of the Job description form is **Clause 4**. This clause titled ‘**DEGREE OF SUPERVISION RECEIVED (HOW OFTEN, HOW, BY WHOM)**’. Under that heading, it reads thus: “*Weekly by Export Marketing Officer. Weekly by Swaziland Sales Representative.*”
- 5.17 In fact, in **Clause 1**, which reads: ‘**PURPOSE OF THE JOB**’, it states thus: “*To cover all agronomic facets of the operations at Pannar Seed Swaziland, which included trial and demos and technical backup to the Sales representative.*” (Emphasis added). Moreover, in Clause 2 titled ‘**Major Task Headings,**’ the form

provides that one of the Applicant's responsibilities is to assist the Sales Representative.

5.18 The 'Major tasks' are reflected in detailed from pages 2 to 3 of the job description form, Under the '**Assistance to Sales Representative**' task, the following is stated.

"-Assist in all farmers meetings and shows with technical advice.

-Visit top farmers from database

-Assist in general administration if required".

5.19 I find that the terms and conditions specified in the Agronomist's job description are consistent with the Applicant's version in particular that he was required to make weekly reports to Mr. Vilakati and the latter supervised him. Moreover, the form provides that the Agronomists assisted the Sales Representative in certain functions.

5.20 It was not in dispute that the Applicant no longer supervised permanent employees. The Respondent tried to counter this by arguing that the Applicant now supervised seasonal employees. Well that may be so, but the very fact that he changed from overseeing permanent staff to supervise seasonal employees proves that his job status was reduced. None of the parties challenged the contents of the Job Description. In fact, the Respondent heavily relied on it to prove that the Applicant consented to the new job description.

5.21 Taking into account the above factors, I accordingly find that the Applicant was demoted notwithstanding the fact that his salary and benefits remained unchanged. However, this is not the end of the inquiry because the Applicant signed that job description and continued to work for eighteen (18) months as if nothing had happened.

5.22 In **Bandat v De Kock & Another (2015) 36 ILJ 979 (LC)**, the applicant had a close personal relationship with her manager and the two shared intimate details of their personal likes, including details of the applicant's private life and failed marriage. The manager was very generous to the applicant; he assisted her financially, and allowed her to work flexible hours. However, two years into her employment, the applicant neglected part of her duties resulting in the manager issuing a warning letter. The applicant took offence and raised a complaint that her performance was affected by the manager's sexual harassment and failure to provide her with protective clothing. An unpleasant altercation ensued which eventually led to the applicant resigning on grounds of constructive dismissal and cited the alleged sexual harassment as one of her reasons.

5.23 **At 1003 of the Bandat case (supra)**, the Court stated thus:

"The fact that the Applicant never once complained about the manner in which she was being treated, and only did so for the first time when issued with the warning, cements my view

that objectively no intolerability existed. The Applicant's allegation of an intolerable working environment came at the very end and in my view it was nothing more than retribution for having received the warning." (Emphasis added).

5.24 In **Pinky Toi Mngadi v Conco (Pty) Ltd t/a Coca Cola Swaziland (Pty) Ltd (IC case no:199/2008)** at **paragraph 18**, the Court made the following observation:

"Another difficulty for the Applicant in respect of these four grounds above is that they occurred a year before she manifested her decision to resign. In Western Excavation (ECC) Ltd v Sharp 19781 ALLER 713 at page 717 D-F Lord Denning MR had to say this: If an employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he will be leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains for, if he

continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”(Emphasis added).

See: **Nicholas Motsa v Ok Bazaars (Pty) Ltd T/A Shoprite (IC case no. 55/2012).**

5.25 It is apposite at this stage to compare the opinions of the Courts in the above cases with an earlier Industrial Court of Appeal of Swaziland decision in the case of **Attorney General v Nhlanhla M.K. Vilakati (ICA case no.8/98).**

5.26 The brief facts of the **Nhlanhla Vilakati case(supra)** are that, the Vilakati who was the Applicant at the Court *aquo*, was employed by the Swaziland Government as Magistrate from 1st June 1988. He was promoted in February 1991 to the position of Senior Magistrate. In February 1994, he was suspended pending his trial on a charge of theft of a motor vehicle. Vilakati was subsequently acquitted of the charge in September 1994. However, the Judicial Service Commission extended his suspension pending a disciplinary enquiry. The enquiry found Vilakati innocent and dismissed the disciplinary charges.

5.27 Vilakati's suspension was revoked in September 1994; however, he was firstly assigned to work under the supervision of another Senior Magistrate. Between February 1995 and January 1996, Vilakati was transferred twice. However in view of the repeated transfers, which he viewed as disruptive to

his family, Vilakati wrote a letter of protest on the 31st December 1995. The JSC rejected Vilakati's letter of protest. Instead, the Commission varied his appointment from Senior Magistrate to the position of Assistant Judicial Commissioner and subsequently withdrew the transfer. Vilakati accordingly resigned on the 2nd January 1996 claiming constructive dismissal.

5.28 The Industrial Court found in Vilakati's favour and awarded him compensation. However, the Attorney General appealed against the award. At the Industrial Court of Appeal, the Attorney General argued that because Vilakati did not resign after any of the earlier incidents, he had waived his right to rely on the previous incidents for his constructive dismissal claim.

5.29 At page 6 of the **Vilakati case (supra)**, the Court made the following statement:

"Mr. Wise submitted that because he did not resign after any of the earlier incidents he waived his right to rely on them as a basis for alleging a repudiation by the appellant of the contract. There seems to me to be no substance in that submission. A person who suffers in silence over a period of time because he needs to retain his job for the sake of his family but who ultimately reaches the end of his tether and resigns because he can take no more humiliating treatment, cannot in my judgement, be said to have waived his right to rely on the summation of all the acts of the employer as constituting a

manifestation of an intention to end the contract". (Emphasis added).

5.30 The **Vilakati case (supra)** is distinguishable from the facts of the present case in the following respects. Although, Vilakati made a summation of the facts that manifested an intention by his employer to terminate his contract of employment, these incidents occurred within one year, and during that time Vilakati lodged a complaint, which was rejected out of hand by the Swaziland Government. In *casu*, Mr. Ndzabukelwako never complained about his demotion and false accusation for almost two years.

5.31 Furthermore, even though Vilakati made a summation of the facts, it is clear from the facts of that case that to Vilakati intolerability of employment was triggered by the unilateral variation of the terms and conditions of Vilakati's employment. In the present case, Mr. Ndzabukelwako tolerated the variation of the conditions of employment and only lodged a grievance after the three events that occurred in March and April 2011 (discussion of salary, verbal assault, and threat to cut salary). Later in the award, I shall deal with the question whether these three incidents were sufficiently intolerable in themselves to warrant Applicant's resignation later in the award.

5.32 It is evident from the facts of the Vilakati case that Vilakati tolerated the other incidents and may not have resigned, but the last straw was the unilateral variation of his job. However, there was not break in the sequence of events that eventually led to Vilakati resigning. The *ratio* of the **Vilakati case (supra)** is

not that all the incidents constituted intolerable conduct, but that the unilateral variation did establish constructive dismissal. The unbroken chain between the previous incidents and the last event only proved the Swaziland Government's intention to end the contract.

5.33 In the present case however, in 2010, it was proven that the Applicant and Mr. Jackson never clashed. This is significant because if there was an intention by the Respondent to repudiate the contract, one reasonably expects that the alleged hostilities should have continued unabated into 2010 right up to April 2011. In fact 2010 as a peaceful year interrupted the impetus and chain between the 2009 and 2011 events. Consequently, I hold that only the 2011 incidents should be considered in determining whether employment was intolerable for the Applicant at the beginning of 2011.

5.34 Now, the Applicant alleged that he could not raise a grievance because of he did not have the grievance procedure. This allegation is rejected outright; the Applicant appeared to be a sophisticated, intelligent, and strong willed individual. Moreover, he was the head of Pannar Seed Swaziland at that time; he was reasonably expected to know the procedure. It is improbable that an employee of eight (8) years' service at that time (2001-2009), part of which was served at senior level was not aware of the structure for lodging grievances.

5.35 Even if it is probably true that he was not given the grievance procedure, he could have indicated his

objection in several ways. He could have refusal to sign the new job description or he could have written an email or letter objecting to the changes. Those methods did not require knowledge of a grievance procedure. The formalities of a grievance policy would have followed later. The claim that he could have been fired has no basis.

5.36 It should be remembered that the demotion was the first event that occurred; the false accusations, threat, and verbal assaults had not yet occurred. So, there was no foundation for an apprehension that the Applicant might be dismissed if he refused to sign the job description.

5.37 Having found that the Applicant was demoted, I however find that he elected to continue with contract of employment.

5.38 I now turn to the other events. The false accusations that were made in 2009. I have held that these ought to be treated similarly as the demotion. However, it is vital to make a few observations. It was proven that the Applicant protested instantly against the accusations and these were discussed with one month at a subsequent staff meeting. After these discussions, the Applicant did not escalate the complaints.

5.39 If he was dissatisfied with the outcome of the meeting, one would have expected the Applicant to have communicated through email to his manager or next level.

5.40 Regarding the events of 2011, I propose to first deal with the alleged discussion of the Applicant's salary.

5.41 The Applicant relies on a statement recorded by Ms. Clarice Khumalo. Ms. Khumalo was never called during arbitration to give the details of the conversation between her and Mr. Mike Jackson. There is no dispute that the remarks about the Applicant's earning capacity were not made to him direct but to Ms. Khumalo.

5.42 Ms. Khumalo's statement reads thus:

"26th March 2011

To whom it may concern

I Clarice Khumalo-Dlamini do confirm that, Mr. Mike Jackson sent me to respond to Thami's request for a uniform which was needed by him for the King's field day. This was communicated telephonically on the week before King's field day. He mentioned that I should let Thami know that he will have to buy the uniform (pair of trousers) himself as he earns more money.

Clarice Khumalo-Dlamini

Signed"

5.43RW3 Mr. Mike Jackson denied that he discussed the Applicant's salary with Ms. Khumalo. According to him, he said that the Applicant earns a salary at a certain level where employees are required to buy their own trousers.

5.44 **The Oxford Advanced Learners Dictionary of Current English** defines the verb “*discuss*” as “*to write or talk about something in detail, showing the different ideas and opinions about it.*” The noun “*discussion*” is defined as “*a speech or piece of writing that discusses many different aspects of a subject*”. (Emphasis added).

5.45 In terms of **Section 61 of the Employment Act of 1980**, details of a salary include the following information: wage rate of the employee, period of which the wage is paid, number of hours paid for at ordinary time and/or overtime; the nature and amount of any bonuses or allowances paid; the gross wages earned; the amounts and reasons for any deductions made from the gross wages; and the amount of the net wage paid.

5.46 No evidence was led that all or any of the above information was discussed between Ms. Khumalo and Mr. Mike Jackson. Applying the above law, I find that to say that someone “earns more” does not constitute a discussion of the details. I find no substance in this allegation. It is likely that the real cause of the conflict on this issue was Mr. Jackson’s refusal to give the Applicant uniform free of charge. However, this is not one of the grounds for his claims.

5.47 The last two incidents are alleged to have arisen during and after the Nhlanguano field day between March and April 2011. The Applicant alleged that Mr. Jackson shouted at him at the highest of his voice in full view of staff and guests. Mr. Jackson disputed these allegations. Witnesses on both sides

corroborated the different version about the same event.

- 5.48 Mrs. Thomson argued that the Applicant witness' evidence should be rejected because she was disgruntled after she was not retained as a seasonal employee when the Applicant left the company. Counsel submitted that instead I should believe Mr. Modupe whom she referred to as a reputable witness.
- 5.49 While it was proven that the Applicant knew AW2 having engaged her on a seasonal basis, it also cannot be ruled out that RW1 (Mr. Modupe) could have sided with his colleague (Mr. Jackson) to protect the company against the Applicant's claim.
- 5.50 However, the onus rested on the Applicant to prove that he was verbally assaulted in public. Even without making an adverse finding on the credibility and demeanour of both Applicant and Mr. Jackson, it is not farfetched that the latter could have raised his voice when talking to former about the condition of the field.
- 5.51 Mr. Jackson admitted that he was angry that the Applicant had not delivered the field to the appropriate standard, namely that grass was not cut. It is probable that the condition of the field embarrassed the Respondent and its staff. It was proven that guests who came as far afield as Ghana and Botswana, not to mention the Principal Secretary in the Ministry of Agriculture, attended the event.
- 5.52 The conditions of the field with the background that a few days before the field day Mr. Jackson found the

Applicant sitting in the car while one casual employee was cutting grass could have easily triggered anger that could have climaxed into an outburst. To contend that the manager remained calm and spoke to the Applicant sternly belies the above circumstances.

5.53 In fact, the fact that Mr. Jackson could not wait to talk to the Applicant at a later stage is indicative of his mood at the time. Had the manager not spoken to the Applicant in the front of the guests and staff, he would have appeared to condone the condition of field, which would have compounded his embarrassment.

5.54 Given the above circumstances, I have no reason to doubt the Applicant's version, on this aspect. In fact the fact that RW1 (Mr. Modupe) also heard the manager when he spoke to the Applicant is another revelation. Under normal circumstances, Mr. Jackson should have called the Applicant aside and spoken to him privately; but if he had done that the guests and staff would have assumed that the company condoned such ineptitude.

5.55 It should be remembered that RW3 testified that the company used these events to portray itself as a leading seed company in Swaziland. I find that it is probably true that Mr. Jackson raised his voice in the heat of the moment.

5.56 In the case of **Visser and Amalgamated Roofing Technologies t/a Barloworld (2006) 27 ILJ 1567 (CCMA)**, the applicant resigned on the ground that he suffered depression as a result of management's aggressive conduct towards him.

5.57 At **page 1570** of the **Visser award (supra)**, the Learned Arbitrator observed thus:

“A modern world workplace is not a heavenly garden of smiling Budd has focused on the welfare of others. More often than not it presents the contrary picture of a highly stressful and robust environment in which the pressures and demands to perform placed on staff and even more so, members of management who carry the can, can on occasion contributed to managers conducting themselves in a manner that is less desirable, exhibiting, for instance a high degree of impatience with subordinates at times which might manifest in the manager raising his voice or shouting at a subordinate on occasion. While such conduct from a manager is never ‘right’ or acceptable, it can be understandable on occasion when one takes account of the stresses and demands under which he or she operates and the pressures placed on him to perform. Managers are after all not infallible. They are subject to human limitations like the rest of us, and cannot reasonably be expected to conform to the standards of a saint in their conduct towards staff. (Emphasis added).

5.58 The **Learned Arbitrator (supra)** continued to remark as follows:

“This is part of the reality of the modern working environment with which employees have to cope. Of course, in the context of constructive dismissal there are limits to what can be accepted as tolerable in the conduct of management towards employees. Mental or physical abuse of the employee, racial insults or the like, would generally fall within categories of conduct overstepping such limits and as such rightfully be categorized as a constructive dismissal. Each case has to be assessed on its own facts as to whether these limits have been overstepped, measured objectively with reference to the ‘reasonable employees’ reactions to the employer’s conduct. In assessing management conduct in this context, reasonable allowance must be made for management fallibility arising from their human limitations. Employees and arbitrators alike should not set the standards of conduct expected from management at an unrealistic level. To do so would be unfair and unreasonable to the employer in my view, and not in accordance with work place realities or those of human nature operating within the robust competitive environment that is the modern workplace.”(Emphasis added).

- 5.59 I associate with the Learned Arbitrator’s exposition. There is not dispute that the field was not properly prepared, consequently it was a poor performance issue. The Applicant’s attorney argued that the Respondent failed to produce the company policy relating to the field day’s standards.

- 5.60 I hold that in the circumstances proof of a written policy on field days' standards was unnecessary. The Applicant admitted that the field did not meet the appropriate standards; but his excuse was that he was sick and/or was assigned other duties. The fact that some days before the field day, the Applicant went to Nhlangano to supervise the cutting of grass around the field establishes the standard.
- 5.61 I now turn to examine the words used by Mr. Jackson to determine whether they were tolerable. The Applicant alleged that Mr. Jackson said "*Thami why is the grass not cut? I'm sorry this is not what I expect of a field day, tomorrow we will have a meeting.*" The above statement does not constitute abusive language at all. The words do not appear to have overstepped the boundary laid down by the Learned Arbitrator in the **Visser case (supra)**.
- 5.62 Even if the statement could be viewed as abusive, the Applicant did not resign instantly; he elected to use the grievance procedure. I will deal with the grievance hearing in due course, suffice to mention at this stage that having elected to report a grievance, the Applicant was then obliged to await the outcome.
- 5.63 The final incident is the alleged threat to reduce the Applicant's salary. The Applicant alleges that the day after the field day, Mr. Jackson said, "*What's wrong with your arms. We pay you too much money, I will have no option but to cut your salary down to that of a supervisor, if you fail to weed, cut grass and do general labour work*".

5.64 Mr. Jackson denied threatening to cut the Applicant's salary. It was the Respondent's version that when the company was behind schedule it was reasonable for a manager to join his subordinates to do manual work. Mr. Jackson said he had done it before. The Applicant's version must be considered in light of the proven facts that the Applicant was found by Mr. Jackson sitting in his car while one employee was cutting grass. In fact, Mr. Jackson said the point he was trying to communicate was that the time of supervisors who sit while other work was over.

5.65 In as much as it was Applicant's word against Mr. Jackson's, the above circumstances make likely. Why would the Applicant fabricate a story against his manager on this aspect? Mr. Jackson's character and management style was direct and stern. It is probable for a stern and direct manager who finds an employee idle when there is work to be done to make the above remarks.

5.66 **The Oxford Advanced Learners Dictionary of Current English** defines "*stern*" as "*serious and often disapproving; expecting somebody to obey you; to have a strong character and to be more determined in dealing with problems than other people*".

5.67 Nonetheless, this issue was also referred to the grievance procedure, which I shall now consider.

5.68 In objectively determining whether the grievance procedure reasonably addressed the Applicant's complaints, the grievance outcome has to be judged

against the proven facts and the outcome that the Applicant required on each of his complaints.

- 5.69 According to the grievance form, the Applicant proposed the following solution: firstly, he proposed reinstatement to the position of Sales Representative. For the false accusations, he suggested a retraction in the form of an apology; for the threat of salary cut he proposed that it should stop immediately. The same proposal was made concerning the discussion of his salary; and finally, he proposed an apology for the verbal assault.
- 5.70 The grievance hearing chairperson oral ruling on the demotion was that Applicant was not demoted and that even if he was demoted, he could not be reinstated because someone else was appointed to fill the position and he had unduly delayed in lodging this complaint. I have found that the Applicant was demoted. However nothing turn on this because, I have also found that he elected to continue in the contract.
- 5.71 On the false accusations, the chairperson orally ruled that the Applicant should have raised a grievance sooner. However, he saw all the other issues (threat of salary cut and verbal assault) as conflict in personality that was caused by poor performance issues. Mr. Biljon then recommended that both the Applicant and Mr. Jackson should meet to address the issues, failing which they would not be able to work together.
- 5.72 Regarding the last two grievances (verbal public assault and threat to cut salary), I found that these

probably occurred. On these, the Applicant proposed an apology for the verbal assault and an immediate stop to the threat of salary cut.

5.73 In **Smithkline Beecham (Pty) Ltd v CCMA (2000) 21 ILJ 988**, the Court held that where an employee is too impatient to await the outcome of the employer's attempt to find a solution to a perceived intolerable situation and resigns, constructive dismissal is out of the question.

See: **Pinky Mngadi (supra)**.

5.74 Mr. Mhlanga argued that the Applicant could not have been expected to meet the person whom he accused of unfair treatment. That maybe so, but Mr. Nick Goble offered to mediate. The Applicant cannot regard Mr. Biljon's verbal ruling in isolate because his constructive dismissal claim was directed against the company as a whole. If a senior manager outside the formal grievance procedure offered to mediate, this could not be disregarded.

5.75 In **NanaMdluli v Conco Swaziland Limited IC case no: 12/2004) at page 16 paragraph 49)** the Court held thus:

"In LM Wulfsohn Motors (Pty) t/a Lionel Motors v Dispute Resolution Centre and Others (2008) 29ILJ 356 (LC) Basson J added a qualification to this principle:

"Where it appears from the circumstances of a particular case that an employee could or should reasonable have channeled the dispute or cause of unhappiness through the grievance channels

available in the workplace, one would generally expect an employee to do so. Where however, it appears that objectively speaking such channels are ineffective or that the employer is so prejudged (sic) against the employee that it would be futile to use there channels, then it may well be concluded that it was not a reasonable option in the circumstances."

- 5.76 The question that begs an answer is, can it reasonably be concluded that the Respondent would never reform or abandon the pattern of creating an unbearable work environment if the Applicant had not resigned?
- 5.77 The Applicant did not wait for the written outcome. Granted that the written outcome was alleged to be similar to the oral outcome, the Applicant's state of mind after he resigned shows that he was still eager to get it. Consequently, it would amount to probating and reprobating for the Applicant to contend that the oral outcome was decisive in his decision to resign.
- 5.78 It would have been a different case if the Applicant had not resigned but waited for the outcome and the chairperson had failed to issue it as promised or within reasonable time or having received it, none of managers including Mr. Goble were willing to mediate. Furthermore, it would have been an entirely different story if Mr. Jackson had reduced his salary or continued to shout at the Applicant after the grievance hearing. Under those circumstances, intolerability might have been proved.

5.79 The Applicant's demand of the written grievance outcome was pointless because he had resigned. In **Sihleli Mafika v South African Broadcasting Corporation Ltd, LAC case no: 1700/2008**, the Court held thus:

“A resignation is a unilateral termination of a contract of employment by the employee. The courts have held that the employee must evince a clear and unambiguous intention not to go on with the contract of employment by words or conduct that will lead a reasonable person to believe that the employee harboured such an intention. Notice of termination of employment given by an employee is a final unilateral act which once given cannot be withdrawn without the employer's consent. In other words, it is not necessary for the employer to accept any resignation that is tendered by an employee or to concur with it, nor is the employer party entitled to refuse to accept a resignation or decline to act on it.”

5.80 I find that the Applicant has failed to prove that alleged verbal assault and threat to his salary cut were intolerable at the time of the grievance hearing. Put differently, the Applicant failed to prove that alleged verbal assault and threat to cut his salary would have continued had he not resigned.

5.81 Based on all of the above reasons, I find that the Respondent did not constructively dismiss the Applicant, but he resigned. In the premise, I make the following award.

6. AWARD

6.1 I find that the Respondent did not constructively dismiss the Applicant; consequently, the Applicant's claims are dismissed in their entirety.

6.2 I make no order as to costs.

DATED AT MANZINI THIS ____ DAY OF AUGUST 2017

VELAPHI Z. DLAMINI
CMAC ARBITRATOR