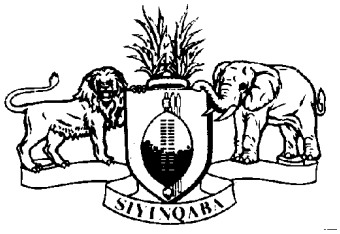

IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO.1105/98

In the matter between:

MICHAEL W. CORNWELL		**PLAINTIFF**
AND		
SWAZILAND TELEVISION AUTHORITY		**DEFENDANT**
CORAM	**:**	**ANNANDALE J**
FOR PLAINTIFF	**:**	**MR. P.R. DUNSEITH**
FOR DEFENDANT	**:**	**MS. VAN DER WALT**
		(instructed by Zwane, Kubheka and Associates)

JUDGMENT I.R.O. ABSOLUTION

11th December 2001

Plaintiff in this action was appointed by defendant as its business manager from the 1st April 1996 in terms of a written contract of employment. The appointment at STAR (Swaziland Television Authority Rentals) was followed by a period during which the plaintiff was appointed as acting manager of STVA by the Minister for Public Service and Information, as from the 17th March 1997.

Part of the remuneration package applicable to the STAR appointment was a “licence collection incentive scheme”. It is the different interpretations of this scheme which gave rise to the present matter. When the defendants interpretation is used to calculate the amount earned through

the licence collection incentive scheme, no monies are due by it to plaintiff whereas the plaintiffs interpretation results in an amount of E139 678.62 due to him under the scheme. This amount is to be offset against advances made to him totalling E26 750.00 leaving a net claim of E112 988.62.

In his amended particulars of claim plaintiff prays for the following relief:-

"1. An order declaring that:
   1.1. Messrs Delloite and Touche are the external auditors of the defendant;
   1.2. In their capacity as external auditors, they have certified the amount of the television licence fees collected;
   1.3. In terms of the licence collection incentive scheme, the Plaintiff is entitled to an amount equivalent to 10% of the licence fees so collected.
2. Payment of the amount of E112,988.62.
3. Interest at 9% per annum a *tempore morae* from 1st April 1997 to date of payment.
4. In the alternative, an order directing the Defendant to have the television licence fees collected, certified by their external auditor within one month of the finalisation of this matter, debatement of the above so certified, payment of the amount found to be owing forthwith, less the above E26,750 00.
5. Interest on the amount determined in prayer 4 (*supra*) at the rate of 9% per annum a *tempore morae*, from 1st April 1997 to date of payment.
6. Costs of suit.
7. Further and/or alternative relief."

It is common cause that plaintiff was appointed by defendant as its business manager of STAR on the terms and conditions of an agreement entered into between the parties, a copy of which is enclosed with the pleadings. This agreement provided for monthly remuneration of E6 500 and other benefits associated with an executive appointment, like housing, transport, leave, gratuity etcetera. The total package cannot be said to be excessive at all and from plaintiff's perspective, it was very modest indeed. His evidence is that this being so, he was induced to accept the offer because although he considered the monthly gross salary and benefits to be below par, it was not all there was to it. The carrot that

enticed him was the incentive scheme by way of which he would be able to make the effort worth his while.

Paragraph 4 of the letter offering him the appointment reads thus:-

> "4. You will also be entitled to a licence collection incentive scheme as per annexure".

It is the details and particulars of this scheme which lies at the root of the matter.

Mr. Cornwell received the written offer by fax in Benoni, South Africa, in the early hours of 12th March 1996, according to him) with reliance on the date and time routinely imprinted on faxes received. He said that the annexure referred to in paragraph 4 of the offer was enclosed with the initial fax. The annexure pertains to details of the licence collections incentive scheme. In a manuscript note he made on the letter and faxed back to the Chief Executive Officer of Swazi Television, Mr. Dlamini, he stated that:

> "This offer is accepted subject to viewing the agreement which was not attached nor received as per subsequent fax today. I will be able to start on 1st April 1996 as requested and look forward to receiving the agreement to (number) at your earliest convenience".

This agreement he refers to are the terms and conditions of employment, setting out his salary etcetera.

Ex facie the papers filed, it appears that his evidence is correct insofar as the contract of employment and the schedule of conditions of service were signed in Benoni, in acceptance of the terms, on the 14th March 1996. It is this contract and conditions that were referred to in the manuscript note plaintiff endorsed on the officer of employment, which he received two days later, on the 14th March.

According to plaintiff, what he also received on the 12th March, was a document which is headed:-

"Annexure Star Business Manager. Licence Collection Incentive Scheme".

The latter document sets out various figures and percentages for different years. It is reproduced *in extenso*:-

"

1996/7	REWARD	FIG (OR EG-illegible) REVENUE
2500 – 3250	5%	37 500
3251 – 4000	7 1/2%	54 375
4001 – above	10%	(blank space)

1997/8	REWARD	
3250 – 4000	5%	(blank space)
4001 – 4750	7 1/2%	
4751 – above	10%	

1998/9		
4000 – 4750	5%	(blank space)
4751 - 550	7 1/2%	
5501 – above	10%	

PAYABLE AT END OF FINANCIAL YEAR AFTER CERTIFICATION BY EXTERNAL AUDITORS

YEAR 1996/7	% REWARD	COMMISSION
2.5 - 3 250	5%	37 500
3.25 – 4.0	7 1/2%	54 375
4.001 – above	10%	(blank space)

1997/8	% REWARD	
3.25 – 4.	5%	(blank space)
4.751 – 5.5	2 1/2%	
5.501 – above	10%	

1998/99	% REWARD	
4 - 4.75	5%	(blank space)
4.751 – 5.5	$7^{1/2}$%	
5.5 - above	10%	

Initially the pleadings reflected this document to have been the one omitted with the transmission faxed on the 12th March. This was corrected, during the course of the trial, by consent, to rather refer to the contract of employment and schedule of conditions of service.

The document quoted *in extenso* above contains a number of patent errors. For instance, the figures for the year 1997-98 on the lower half of the page differ in that on top, 4751 – 550 are required to earn a reward of $7^{1/2}$%, while the lower part has it that 4.751 – 5.5 are needed for a reward of $2^{1/2}$%. Both figures and percentages seem to be at odds. Apart from this and other obvious mistakes, the figures for the respective years are not identified as number of licences processed or as monetary sums. Simple arithmetic shows the "Fig. Revenue" or "Commission" of 5% on 2 500 to 3 250 reflected as 37 500 to be inconsistent with an assumption that the first column of figures are Emalangeni but rather some different units. There is also is not an indication as to why the information on the top half has to the greater extent been repeated on the lower half, with its errors and all. A most serious omission is a proper reference to the units of the figures in the first column, under the different years. Plaintiff sees it as a number of licences while defendant sees it as thousands of Emalangeni revenue collected.

The evidence of plaintiff is that on receipt of this document pertaining to "Licence Collection Incentive Scheme" (and also as "Payable at the end of the financial year after certification of external auditors"), it was his first encounter with the actual details and figures of the scheme. Neither during his initial interview nor during a "semi-final" interview in Swaziland

did he receive precise details of the targets and rewards. What he did receive was confirmation that the total package would include such an incentive scheme to which reference was also made in the "offer of appointment" letter sent to him. He also said that though he did not get the details of the scheme initially, at the second interview he was shown some financial statements of STV from which he established that less than one million Emalangeni was collected as licence revenue and he felt confident that there was room for improvement.

On receipt of the details of the incentive scheme, he phoned the Chief Executive Officer in Swaziland and clarified it with him. His pertinent evidence is that Mr. Dan Dlamini confirmed to him by telephone that he was correct to understand the first column of figures to refer to the number of licences, and not to Emalangeni, or to thousands. Also, that on the same day, 14th March 1996, Mr. Dlamini further confirmed to him over the telephone that the second column refers to the percentage of commission to be earned on reaching the levels referred to in the first, i.e. that on collection of licence fees due in respect of 4001 licences and above, a collection commission of 10% would be earned in the first year. What he was unable to clarify with Dlamini was meaning of the last column, headed "Fig. Revenue" or "Commission". Also very pertinent is his evidence that Dlamini confirmed to him that the target to earn commission was not E2 500 000.

The latter aspect features strongly in the defendant's case where it is said that the arrangement was that commission would only be earned on collections above E2 500 000. This would have been communicated and confirmed to plaintiff by the Chief Executive Officer, Mr. Dan Dlamini, during a meeting on the 1st April 1996, the first day of service. Mr. Cornwell disputes it strongly, saying that the meeting on the 1st April, consisting of the management committee of STV, did not at all discuss or referred to his terms of employment. He has it that it would be unusual to have it discussed in such a meeting, which was of short duration (10 to 15

minutes) and which was convened to discuss the STV budget that would be presented in Parliament later that day.

Central to the main issue in dispute are the terms of the incentive scheme. Plaintiff's evidence is that on receipt of the document he called Dlamini to seek clarification and confirmation of his own interpretation. This he got and also an undertaking to get it all in writing. Plaintiff has it that in order to earn 10% commission on gross collections in the first year more than 4001 TV licences had to be processed a threshold of 2500 licences would set the scheme into operation, whereby 5% commission of the money would be earned. According to defendants' pleadings and their counsel's instructions, it was conveyed orally by Dlamini on the 1st April that E2 500 000 had to be collected before 5% commission would be payable and that to earn 10% commission in the first year, above four (4) million Emalangeni had to be collected. This latter version would have acceded to. The two versions differ materially.

Plaintiff's further evidence is that since he had not received the written clarification of his interpretation of the incentive scheme, he again discussed it with the CEO, Mr. Dlamini, soon after the Parliamentary budget, within the first week of his service. It was then that he says he was asked by Dlamini to draft the letter himself, which he promptly did and printed two copies, of which one was backdated to the 1st April 1996. Neither of these was however signed by Dlamini although he confirmed the contents as correct to plaintiff. This did not upset Cornwell as he applied for an advance around October 1996, in excess of his fixed income, which was granted. He felt that the rationale behind the loan approval, which was far in excess of his gross fixed income, was that STV realised that he would achieve far beyond the target levels of licence fee collections and that his commission advances were not allowed to exceed earned income.

This continuance of affairs came to an end on the 14th March 1997 when the local press announced the imminent suspension of Mr. Dlamini. Plaintiff recalled the absence of Dlamini's signature on the draft letter he said he prepared almost one year earlier and reprinted a further copy on his computer backdated to the 1st April 1996. This he says he took to Dlamini soon after 08h00, who read it through, signed it and returned it to himself. At that stage Dlamini had not yet been suspended. The suspension followed later that day, in the afternoon after plaintiff was notified that he was to take over the position of CEO after the weekend.

This letter dated the 1st April 1996 which was drafted by plaintiff and signed by Mr. Dan Dlamini about a year later is very much in dispute.

Defendant contests the authority of Dlamini to have signed it at all – firstly because it says he was not authorised to do so, especially after he had already been suspended, as contented, further that he was bamboozled into doing it, misled by plaintiff, also that the contents is not correct. The document is alleged to be the product of fraud by plaintiff.

Because of its importance to the factual dispute between the parties it is worth quoting its contents in full.

Produced on a letterhead of the Television Authority of Swaziland, dated 1st April 1996 it reads:-

> "STAR Business Manager
>
> Licence Collection Incentive Scheme"
>
> "The STAR business Manager shall be paid a commission on the gross monies collected for licence fees in the period 1st April to 31st March of each year.
>
> The percentage commission paid will be determined by the actual number of licence fees processed.
>
> This percentage will escalate from 5% through 7.5% at various levels indicated on the table with a minimum level to be achieved before any commission is earned.

> For example, if in the year 1996/97, 3000 licence fees are processed generating an income of E420 000, the commission to be paid shall be 5% i.e. E21 000.
>
> These levels will move upwards in each year of the contract period as shown.
>
> The payment of this commission shall be in April of the following year after certification by external auditors.
>
> SIGNED: DAN S. DLAMINI
>
> CHIEF EXECUTIVE OFFICER"

Understandably, defendant wants to have this document done away with as far as it can. Its contents goes against the grain of its own case, which is that commission only becomes due once a licence fee collection of E2 500 000 has been reached. It is not a disputed document in the sense that the authenticity of the signature of the reputed author is challenged but the contents itself is the dispute. It is common cause that Mr. Dan Dlamini who signed the letter as Chief Executive Officer is not the actual author – the letter was drafted by plaintiff. Plaintiff says that at least on two occasions the contents was approved by Dlamini, the first time early in April 1996 when the letter was fresh and again nearly a year later, the day he signed it.

To evaluate the contents of the letter it is useful to compare it against the original details of the incentive scheme, which was faxed by defendant to Cornwell in Benoni, and which the latter sought to have clarified.

According to faxed annexure ("B2"), the year 1996/7 required "2 500 – 3 250" or "2.5 – 3,250" to warrant a 5% reward. The next level of $7^{1/2}$% reward would require "3 251 – 4000" or "3.25 – 4.0". The top notch of 10% requires above "4 001" or "4.001" and above.

These figures clearly demonstrate what in my view the letter correctly states as “This percentage will escalate from 5% through 7.5% to 10% at various levels indicated on the table with a minimum level to be achieved before any omission is earned”.

Annexure “B2” sets out different figures or levels to be attained in the subsequent years of 1997/8 and 1998/9. The first year requires “2 500” or “2.5”, the second year requires “3 250” or “3.25” and the last year “4 000” or “4”. to qualify for the corresponding three levels of reward, 5%, $7^{1/2}$% and 10%.

Again the letter (“B1”) correctly reflects, in my view, the position as “These levels will move upwards in each year of the contract period as shown”.

The last paragraph of the letter is also in line with the annexure.

Plaintiffs version in the letter that “The percentage commission paid will be determined by the actual number of licence fees processed” does not readily seem to be at odds with the annexure. The figures “2 500 – 3 500” and “2.5” – 3 250”, pertaining to the first year and which defendant regards as E2 500 000 is the main dispute. I do not want to prejudice the matter and draw any firm conclusions at present. There is however a clear indication on the annexure that a figure of either 2 500 or 2.5 is the starting point to earn commission. The “2.5” may be seen as referring to 2.5 million, but most of the four digit figures in the top half of the annexure are reduced to decimals in the lower half, such as that 2 500 becomes 2.5; 3 250 becomes 3,250; 3 251 becomes 3.25, and so on. It may be a novel approach to reflect the figures as such but to interpret the amounts as millions instead of thousands will require more than a bald statement that it is indeed so. *Prima facie* the letter thus does not seem to be totally at odds with the annexure, as said above.

The main real difficulty with the contents of the letter is the way in which the example in it is calculated. Simple straightforward arithmetic applied to the wording of "For example, if in the year 1996/7, 3 000 licence fees are processed generating an income of E420 000, the commission to be paid shall be 5% i.e. E21 000" means that E140 is used as the average licence fee. The calculation of the example is correct but is at variance with the "Revenue" or "Commission" component set out in the annexure. On the same basis of calculation, the stated figure of "37 500" cannot be obtained on this basis.

As a whole, the letter is not so much at odds with the annexure that it has to be summarily rejected on that basis alone. As already said, it is more on the basis of how it came into existence that irks the defendant and forms its basis to have it rejected. Certainly it is correct to contend that the manner in which it was done is questionable. It is a fine line whether Dlamini was or was not the incumbent CEO at the moment when he signed it. By all accounts he would have been disturbed by his imminent suspension. The document was backdated by almost a year when he signed it. Plaintiff was hard pressed to have it signed in a great hurry when he learned of the suspension reports in the press, or though he had let almost a year pass without the document being signed. And yes, it may even almost have the smack of fraud tainting the procedure.

I will again refer to this letter further down in the judgment.

Briefly, the further evidence of Cornwell is that he took up the post acting CEO of defendant from the 17th April following the suspension of Mr. Dan Dlamini. At the financial year-end some fortnight later he presented his own invoice to STV, claiming his collection bonus, based on his interpretation of the scheme and the authority's revenue figure. The matter was referred to the external auditors for verification. Plaintiff's interpretation of the scheme as well as that of defendant was conveyed to the auditors at different times. Following various delays and queries,

recalculations and meetings, the upshot of it all was that the view formed by defendant prevailed, i.e. that no commission was due to him, as the claimed target minimum figure of E2 500 000 collected revenue had not been reached.

Defendant's case, as per the pleadings, discovered documents and instructions to its counsel, is well known at his stage of the trial. Defendant does not contest that the licence collection incentive scheme entitles its STAR business manager, the position held by plaintiff during the relevant period, to commission earnings on a sliding scale. The percentages are almost the same. In a letter dated 29th July 1998, (document 42 b, c & d) written by the Acting Financial Controller of defendant to the external auditors, the maximum percentage of the scheme is reflected as 10.5% whereas the initial annexure faxed to plaintiff at the time the offer of employment was made, had it as 10%. In a reworked version of the initial annexure, enclosed with this letter, the maximum percentage is again reduced to 10%.

Most importantly, both the letter and annexure now quantifies the figures of each year as Emalangeni, be it in thousands per the top half or millions in the lower half. The further notable difference is that E2 500 000 is the minimum required target from which onwards commission becomes earnable.

It is these differing interpretations of the scheme which gave rise to the different outcomes of the auditors reports – on the method of plaintiff the first draft reports by the auditors would have had him earn E139 738.62 commission. On the interpretation by the Board of defendant, he earns nothing.

Various advances were made to Cornwell by STV, monies which he expected to offset against his commission. Most of this formed the basis of a counterclaim, which was later abandoned as an irregular step.

At a pre-trial conference the parties agreed that the main issues to be decided are the exact terms of the employment contract relating to commission *vis-à-vis* the scheme and the coming into existence of annexure B1, the letter dated the 1st April 1996 detailed above.

Mr. Cornwell was intensively cross-examined by Advocate van der Walt and defendant's version was put to him comprehensively. I do not now propose to detail further the evidence or remark on the impression he made as witness, save to state that he was not shown to be totally unreliable nor that his evidence is tainted with grave suspicion. He was not discredited and cannot be found a person sparingly with the truth. He conceded outright that the letter he relies on for the interpretation of the incentive scheme was created under questionable circumstances, backdated and drafted by himself, signed by the outgoing CEO on the last day he held office. This letter with his interpretation of the scheme caused the auditors to take a totally different view of the scheme in their draft reports than the final report based on the interpretation by the Board of STV. Further, that his pleadings are based to a great extent on the letter he drafted and caused Dlamini to sign.

It is on this evidence that plaintiffs case was closed and on which defendants counsel seeks absolution from the instance.

The motivation is in the main part that plaintiff sues on written agreements setting out the terms and conditions of his employment and not on an oral agreement. The argument is that he materially contradicts his particulars of claim as it is not his case that he verbally agreed on the terms of the licence collection incentive scheme which was later, at his own instance, reduced to writing, by himself, embodied in the controversial letter dated the 1st April 1991.

In his particulars of claim, plaintiff states that defendant furnished him with *inter alia* an explanatory letter dated 1st April 1996, a copy of which he attached as annexure “B1”. Further, that he commenced duties shortly after the 1st April 1996, by implication after the letter was furnished to him.

Defendant argues that by his own version, he commenced employment before the letter “B1” came into existence and that he could not have sued on the basis of a written contract of employment, embodied in a letter that did not exist at the time.

The further argument is that he relies on a preliminary or draft auditors report to quantify his claim, whereas that report is not only based on the interpretation contained in the letter he drafted himself but also that payment depends on a formal certification. The further point is that the letter he relies on was backdated almost a year, a fact he knew of but did not disclose in his pleadings, as such not coming to court with clean hands. Defendant’s counsel wants an only inference to be drawn from these factors that the entire action is based on a fraudulent document, which has to be disregarded, leaving his case without substance and justifying absolution.

Much of this argument does hold water. Plaintiff did not disclose the detours taken to get the signed letter, “B1”, into existence. He does use it to substantiate and justify his claim. He did furnish it to the auditors for use in the draft reports. He did not commence duty after the letter he relies on was signed and furnished to him. The question to find an answer to is whether on the whole of the evidence that was heard and on the pleadings as amended up to this stage, there is or is not a *prima facie* case made for the plaintiff on which a reasonable man may find in his favour.

The *locus classicus* in this regard is GASCOYNE V PAUL & HUNTER 1917 TPD 170 which has been approved of in numerous subsequent cases. De Villiers JP held at 173 that:-

> "At the close of the case for the plaintiff, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff? The question therefore is, at the close of the case for the plaintiff, was there a *prima facie* case against the defendant Hunter; in other words, was there such evidence before the Court upon which a reasonable man might, not should, give judgment against Hunter?"

In the instant matter, there is a reasonable possibility that it may be found that plaintiffs interpretation of the terms of the incentive scheme is as he set it out in the contested letter of the 1st April 1996, which in conjunction with the original annexure to the offer of employment, albeit with all of its imperfections, does not exclude a finding in his favour. It is also a possibility that defendant may be able to prove that such an interpretation is inherently wrong, that plaintiff undertook service on the proviso that he was first to have collected E2 500 000 before he could claim commission. Perhaps the figure of 2 500 does not mean 2 500 licence fees collected but two and a half million Emalangeni to set the incentive scheme into operation.

In any event, there are two differing possible conclusions that may perhaps be drawn at the end of defendant's case, the one or the other. The pleadings may not be the most elegantly drawn and instructions may have not been noted as comprehensively as possible whereby any and all disparity with the particulars of claim should have been eliminated. Fact of the matter is that neither of the two diametrically opposed versions are so inherently so improbable that there is no possibility that it could reasonably foreseeable be found to be correct. With all of its incongruities and questionability of propriety, plaintiff's version can well possibly be true, if not dispelled. It cannot in my view be found at this stage to be of such improbability, despite the pleadings, that it does not at least *prima facie* establish his case.

Earlier in this judgment I took pains to show the correlation between the disputed letter dated the 1st April 1996 and the contents of the annexure that accompanied the offer of employment. That annexure *per se* is a bad example of inaccuracies and ambiguity. It is that same document that was sought to be clarified, at first verbally and later on in writing. Plaintiff relies on the document to prove his case, as pleaded, but he also relies to an equal extent on the context of the original annexure which was proposed to him by his employer. The foundationstone of the disputed letter is the annexure ("B2"). The letter ("B1") sought to clarify the former.

Defendant's reworked version of this original annexure, which much later caused the auditors to arrive at an opposite conclusion, (document 42 (d)) differs vastly from its parent. Many previously undisclosed details have been added which jointly places a whole new perspective on it. It remains to be seen how this is to be reconciled with the first version that was faxed to plaintiff before he took up the offer, which according to his version, was founded on his interpretation of the first generation document. His case is not, as argued, based on an oral agreement, later to be reduced to writing, in the disputed document. His case is based on a written offer, accompanied by an unclear document, which on his own interpretation and evidence, was classified in the disputed letter of clarification, which accompanied his particulars of claim.

With reliance on GAFOOR V UNIE VERSEKERINGSADVISEURS (EDMS) BPK 1961(1) SA 335 (A) at 340, Herbstein & van Winsen (4th Ed) in the Civil Practise of the Supreme Court of South Africa (Juta 1997) remark at 683:-

> "If the plaintiff's evidence consists of the production of a document on which he sues and the sole question is the proper interpretation of the document, the distinction between the interpretation that a reasonable man might give to the document and the interpretation that he ought to give to it tends to disappear. Nevertheless, even in such cases the trial court should normally refuse absolution unless the proper interpretation appears to be beyond question".

The learned authors continue in this vein, referring as authority to ATLANTIC CONTINENTAL ASSURANCE CO. OF SOUTH AFRICA V VERMAAK 1973(2) SA 525 (E) at 526 – 7:-

> "In view of the principles set out above, it is clear that a trial court should be extremely chary of granting absolution at the close of the plaintiff's case. In deciding whether or not absolution should be granted, the court must assume that in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true. The court should not at this stage evaluate and reject the plaintiff's evidence".

It is on these principles that I already said at the close of argument that a date for continuation of the matter must be sought within the forthcoming session. I do not find that plaintiff's case is so inherently unacceptable that it cannot reasonably possibly be true or that he failed to establish his case or that his evidence is irreconcilable with his pleadings. When one considers the relief he seeks, especially in view of the evidence adduced, I tend to hold a view that it would be contrary to justiciable equity to dismiss his case at this stage of the proceedings by granting absolution of the instance.

Accordingly, the application for absolution stands to be dismissed. The matter is to follow its normal course. At the pre-trial conference counsel for the litigants envisaged that two days would be sufficient to deal with the matter during normal court hours. To date, three days have already been utilised, with no time taken to hear defendant. The Registrar may well be requested to allocate a similar duration in the forthcoming session to allow for a finalisation of this matter without further delay.

Costs remain costs in the cause.

JACOBUS P. ANNANDALE
Judge