IN THE HIGH COURT OF SWAZILAND

(HELD AT MBABANE)

CIVIL CASE NO.: 3995/05

In the matter between

D.P. MANGO	First Applicant
J.M. YENDE	Second Applicant
N.R. MAN ANA	Third Respondent
G.N. NDZINISA	Fourth Respondent

and

MINISTER FOR ENTERPRISE & EMPLOYMENT	First Respondent
SWAZILAND GOVERNMENT	Second Respondent
LAW SOCIETY OF SWAZILAND	Intervening Party

HEARD ON: 7th DECEMBER 2005

JUDGMENT DELIVERED ON: 23rd JANUARY 2006

CORAM:
J.P. ANNANDALE ACJ

J.M. MATSEBULA J.
P.Z. EBERSOHN J.

FOR APPLICANT: **MR. P.R. DUNSEITH**
MBABANE

FOR RESPONDENT: **J.M. DLAMINI**
ATTORNEY-GENERAL
MBABANE

FOR INTERVENING PARTY: **ADV. L. MAZIYA**

FULL BENCH JUDGMENT

EBERSOHN J.

[1] This matter came before this Court as a matter of urgency and in view of the fact that it involved the coming into operation of the new Constitution of Swaziland the Acting Chief Justice directed that it be heard by a Full Bench of his Court. The Full Bench was constituted and heard the matter.

[2] The prayers set out in the notice of motion (quoted verbatim) reads as follows:

> **"(a) Condoning any non-compliance with the rules of Court with regard to notice and service in view of urgency.**
>
> **(b) Declaring that the applicants are entitled to the Car Mileage Allowance provided in terms of Section 3 of the Legal Notice No.68 of 1999.**
>
> **(c) In so far as Section 3 of Legal Notice No. 152 of 2005 purports to substitute a Commuted Car Allowance instead of the Car Mileage Allowance provided in terms of Section 3 of Legal Notice No.68 of 1999, declaring that Section 3 of Legal Notice No.152 of 2005 shall not apply with respect to the applicants.**
> **(d) Directing the respondents to pay the applicants claims for Car Mileage Allowance as prescribed by Government Circulars from time to time.**
>
> **(e) Directing that the retainer and sitting fees and all allowances payable to the applicants shall be a charge on and paid out of the Consolidated Fund.**
>
> **(f) Costs.**
>
> **(g) Further and/or alternative relief."**

[3] The four applicants were all duly appointed as Nominated Members of the Industrial Court of Swaziland by the President of the Industrial Court in terms of the provisions of

the Industrial Relations Act, 1996, and their appointments were subsequently extended for a fixed period of three years with effect from the 3rd July 2003.

[4] At the hearing of the matter the Law Society of Swaziland was granted leave by this Court to intervene in the matter.

[5] At all material times, prior to the 6th October 2005, the terms and conditions of service applicable to the applicants as Nominated Members of the Industrial Court were prescribed by Legal Notice No. 68 of 1999, which was issued by the first respondent in terms of the powers vested in him by section 90 of the Industrial Relations Act, 1996. When the appointment of the applicants was extended for a fixed period of three years with effect from the 3rd July 2003, the terms and conditions of their appointment were those contained in Legal Notice No, 68 of 1999.

[6] The said Legal Notice provided as follows with regard to their Car Mileage Allowance:-

> **"Where a member uses the member's car to travel between the member's normal place of residence and the Industrial Court or such other businesses of the Court, the member shall be entitled to claim a mileage allowance for each trip as prescribed by Government Circulars from time to time."**

[7] The applicable Government Circular prior to 6th October 2005 is Finance Circular No. 2 of 2005.

[8] It is common cause that since their appointments the applicants have claimed a mileage allowance for the use of their own cars as prescribed in Legal Notice No. 68 of 1996 and that the respondents paid those claims.

[9] According to the applicants they reside a considerable distance from the Industrial Court and their mileage claims averaged between E6,000.00-E8,000.00 per month. These claims catered for fuel, vehicle maintenance and depreciation, and formed a substantial proportion of their monthly income.

[10] During 2004 the applicants approached the Ministry of Justice on a number of occasions requesting that the terms and conditions of their appointments be reviewed. It is clear that what they had in mind was an increase in their remuneration and of the Car Mileage Allowance. As a consequence thereof the Principal Secretary of Justice addressed a lengthy memorandum to the Principal Secretary of the Ministry of Public Service and Information wherein suggestions were made to improve the terms and conditions of the applicants which letter appears as annexure "E" to the founding affidavit.

[11] The first respondent, however, thereafter published Legal Notice No. 152 of 2005. Paragraph 3 thereof deals with the applicants' car allowance and reads as follows:

> **"A nominated member of the Industrial Court shall be entitled to be paid a fixed monthly Commuted Car Allowance of Three Thousand Five Hundred Emalangeni (E3,500.00)."**

[12] It is clear that some unknown person caused the first respondent to reduce the car allowance of the applicants. The identity of this person was not disclosed in the respondents' answering affidavit and why and on which grounds it was reduced was also not disclosed.

[13] It will be observed that this Legal Notice removed the entitlement of the applicants to a mileage allowance and replaced it with a "commuted car allowance" of E3.500,00.

[14] It is the case of the applicants that they neither agreed to nor accepted the change in their terms and conditions of service as contained in Legal Notice No. 152 of 2005 which was issued without their prior knowledge or their consent and that they repudiated the unilateral withdrawal of their former entitlement to a mileage allowance.

[15] It is also the case of the applicants that the respondents did not have the right to unilaterally vary or amend their terms and conditions of service to their disadvantage and without their consent.

[16] It is clear that the withdrawal of the mileage allowance will occasion substantial financial disadvantages for the applicants and that the Commuted Car Allowance is

insufficient to compensate the applicants for their fuel, maintenance and depreciation costs. The end result of the respondents' conduct in this regard is that the applicants are effectively financing and subsidizing the Government. This is clearly unacceptable.

[17] As a result the applicants deny that they are bound by paragraph 4 of Legal Notice No. 152 of 2005.

[18] Nominated members of the Industrial Court are an integral constituent of the Industrial Court. They are appointed to hear and try cases in the Industrial Court and they have the function, duty and power to adjudicate on and decide issues and give reasoned judgments and make awards. Their position is clearly unlike that of assessors in criminal or civil cases.

[19] It is the case of the applicants that the conduct of the respondents amounted to a breach of contract.

[20] Mr. Dlamini, the Attorney-General, argued on behalf of the respondents that the first respondent properly revoked Legal Notice No. 68 of 1999 when he issued Legal Notice No. 152 of 2005 and that that was the end of the matter. He did not advance any authorities in this regard.

[21] The principles of the common and the labour law must now be examined.

[22] In the matter of **Zodwa Kingsley and 10 Others v. Swaziland Industrial Development Company Limited,** case no. 11/2003 of the Industrial Court of Appeal I ruled that the conventions and recommendations of the International Labour Organisation apply in Swaziland in the workplace. In the matter of **Phineas Mancele Dlamini and 16 Other v S.S. Dlamini and 9 Other** (High Court Case No. 1885/03) **Annandale ACJ** accepted with approval this to be the legal position in Swaziland. That matter went on appeal to the Court of Appeal (Case No. 19/2005) and the Court

of Appeal confirmed the decision and dismissed the appeal. There is thus now no doubt that the conventions and recommendations of the International Labour Organisation apply in Swaziland. It is also clear that the Government, where it employs employees like the applicants, is also bound thereby.

[23] In deciding this matter the applicable conventions and recommendations of the International Labour Organisation will have to be taken into consideration and be applied.

[24] The relationship between employer and employee according to the dictates of labour and common law, entail at least the following:

1. it is in the public interest that employees be paid their correct dues such being salary, allowances and even pensions (see **Scally v Southern Health and Social Services Board** [1992] 1 AC 294; **Barber v Guardian Royal Exchange Society** [1990] ICR 616);

2. the principles of good faith and trust between employer and employee apply also with regard to pensions (see **Lorentz v Tek Corporation Provident Fund** 1998 (1) SA 192 (W) at 229B-C; **Schuldes v Compressor Valves Pension Fund** 1980 (4) SA 576 (W); **Wayne Field: "Employees Pension and Provident Fund Rights: A Renewed interest Develops"** in (1991) 12 ILJ 965 at 969; **Michael Duggan: Wrongful Dismissal & Breach of Contract,** published in 2003 by Emis Professional Publishing Ltd., 31-35 Stonehills House, Welwyn Garden City, Hertfordshire; the judgment of **Browne-Wilkenson J.** in **Imperial Group Pension Trust Ltd. v Imperial Tobacco Ltd.** [1991] WLR 589; **IRLR** (Industrial Relations Law Reports) **Highlights,** February 1991,
UK Edition);

3. the employer and employee must honestly and in good faith deal with each other;

4. the unilateral vast reduction of an employee's remuneration amounts to a constructive dismissal and in this regard two pertinent questions then arise pertaining to this particular matter:-

    i) **firstly,** whether the respondents in this matter ever considered this consequence assuming mat it was not actually the intention of the Government to remove all the assessors of the Industrial Court;

and

ii) **secondly,** whether they realised the effect of the reduction on the applicants' financial position.

It unequivocally seems that the respondents did not consider these adverse aspects which means that they did not properly apply their minds to the matter.

[25] The principles enunciated by A.S. Matthews in his book **"FREEDOM, STATE SECURITY AND THE RULE OF LAW"** (1986) and by Blaauw in his article **"THE REGSTAAT IDEA COMPARED WITH THE RULE OF LAW & A PARADIGMA FOR THE PROTECTING OF RIGHTS"** (1990 SA Law Journal p. 80 et seq.) namely that a law should be prospective and clear and be reconcilable with legality principles, were put by me during argument to the State Attorney. He did not appear to have problems with the contents of these principles but he had problems to justify and explain the respondents' conduct and defence in this matter.

[26] It was also put to the State Attorney that the applicants, who were duly appointed officers of the Government, were not afforded the right of audi alteram partem in the matter. This aspect also gave him problems. I find that they were not afforded the right of audi alteram partem and on this basis alone the applicants should succeed.

[27] It is clear that in view of the above the applicants should succeed on the merits of the application.

[28] Mr. Dunseith, in paragraph 16.5 of his heads filed on behalf of the applicants, suggested that this Court should amend prayer 4 of the notice of motion to read as follows:

> **"Directing the Respondents to pay the Applicants monthly claims for Car Mileage Allowance as prescribed by Government Circulars from time to time or the Commuted Car Allowance, whichever may be the greater."**

[29] There is merit in the suggestion but this Court is not a party to the contract and cannot do as suggested . This Court will not interfere with the formulation of the contract

between the applicants and the Government and cannot prescribe terms to them and/or draw up terms of their agreement on their behalf. The terms and conditions of service of the applicants gua assessors must be properly negotiated between the contracting parties themselves, by consensus. The court is not a contracting party that may impose the suggested option upon the parties.

[30] The applicants also approached this court on an alternative basis namely that the new Constitution of the Kingdom of Swaziland, on the face of it, came into operation on the date of publication thereof in the Gazette namely the 26th July 2005 and that being so, so went the argument, section 208 thereof is applicable to the matter. Section 208 reads as follows:

> **"(1) There shall be paid to the holders of the offices to which this section applies such salaries and such allowances as may be prescribed.**
>
> 5. **The salaries and any allowances payable to holders of the office to which the section applies shall be a charge on and paid out of the Consolidated Fund.**
>
> 6. **The salary and the terms of office of the holder of any office to which this section applies shall not be altered to the disadvantage of the holder of that office after that holder has been appointed to that office.**
>
> 7. **This section applies to the office of judge of the superior courts, appointed member of a Board, Commission or service commission, Attorney-General, Director of Public Prosecutions, Auditor-General, Secretary to Cabinet and such other office as may be prescribed."**

[31] It will be noted that section 208 merely records the dictates of the common and labour law.

[32] Mr. Dunseith argued that this Court should find that the Constitution, 2005, did, in fact, come into operation on the 26th July 2005 and invoke on behalf of the applicants the protection afforded them by section 208 as quoted above.

[33] As I have already stated the application will succeed in terms of the provisions of the common and labour law and it is not necessary to adjudicate whether the Constitution came into operation on the 26th July 2005 or not. As such, the provisions of common and labour law, as is set out in section 208(4) of the Constitution, is in consonance with the ratio and outcome of this application as recorded in paragraph 27 supra.

[34] This Court, in any case, is of the opinion that in order to decide whether the

Constitution came into operation on the 26th July 2005, or not, the necessary parties will at lease have to include the Prime Minister and the relevant Minister of the Government and affidavits specifically addressing the situation and putting all the facts before the Court, will have to be filed. Thereafter the particular point can be argued and decided.

[35] It is distressing to note that there appears to be confusion with regard to the date of coming into operation of the Constitution. Why it is so this Court does not know and the relevant answers inexplicably were not supplied in the answering papers filed by the respondents. According to Mr. Dunseith the problem apparently lies with the 1973 Proclamation, Decree No. 1 of 1982 and Decree No. 1 of 1987 referred to in paragraph 11 of the applicants' heads of argument.

[36] Mr. Dunseith argued that the original 1973 Proclamation did not contain a paragraph 14A and it did not provide that the 1973 Proclamation could only be amended or repealed by a King's Decree published in the Gazette.

[37] He further argued that paragraph 14A was introduced by Decree No. 1 of 1982 and Decree No. 1 of 1987, which purported to amend the (1973) Proclamation.

[38] Mr. Dunseith also referred to the case of **Ray Gwebu and another v Rex** (Criminal Appeal Cases Nos. 19 and 20/2002), where the Swaziland Court of Appeal expressly held that the 1973 Proclamation could only be amended or repealed after 1978 by a King's Decree issued after a new Constitution for the Kingdom of Swaziland had been accepted by the King and the people of Swaziland and brought into force and effect. (Ray Gwebu supra at 20)

[39] He further argued that the Appeal Court's judgement was based on section 80 of **The Establishment of the Parliament of Swaziland Order, 1978.** The relevant subsections read as follows:

> "**Repeal and Savings**
>
> **80. (1) Nothing in this Order shall affect the validity of any prior law save as hereby amended or repealed, but all existing laws shall continue to operate with full force and effect but shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Order as read with any subsequent law amending it.**

> **(2) Save in so far as is hereby expressly repealed or amended the King's Proclamation of the 12th April 1973 shall continue to be of full force and effect:**
>
> **Provided that the King may by Decree published in the Gazette amend or repeal the said Proclamation after a new Constitution for the Kingdom of Swaziland has been accepted by the King and the people of Swaziland and brought into force and effect".**

[40] Mr. Dunseith argued further that **The Establishment of the Parliament of Swaziland Order, 1978,** was repealed by **The Establishment of the Parliament of Swaziland Order, 1992** (K.O.I.C. No. 1 of 1992) and that K.O.I.C. No. 1 of 1992 did not re-enact section 80(2) and the proviso to section 80 of the 1978 Order, and that these provisions have fallen away in 1992.

[41] As indicated above this Court need not and will not decide this alternative ground Mr. Dunseith relied upon at this stage.

[42] Due to the outcome of the application, in which the applicants succeed, there is no reason why the respondents should not be ordered to pay the costs of the applicants and the intervening party.bothlt is obvious that the respondents must pay the costs of the applicants and of the intervening party.

[43] I accordingly make the following order:

> 1. The applicants' non-compliance with the rules of Court with regard to notice and service is condoned.
>
> 2. It is declared that the applicants are entitled to the Car Mileage Allowance provided in terms of Section 3 of the Legal Notice No.68 of 1999 during their existing contract of service as Nominated Members of the Industrial Court.
>
> 3. In so far as section 3 of Legal Notice No. 152 of 2005 purports to substitute a Commuted Car Allowance instead of the Car Mileage Allowance provided for in terms of section 3 of Legal Notice No.68 of 1999, it is declared that section 3 of Legal Notice No. 152 of 2005 shall not apply with respect to the applicants during their current service contract.

4. The respondents are ordered to pay the applicants' claims for Car Mileage Allowances as prescribed by Government Circulars from time to time provided that the tariff prescribed from time to time is not lower than that which was payable to the applicants on the 5th October 2005.

5. The respondents are ordered to pay the costs of the applicants and of the intervening party and the fees of counsel is certified as per rule 68(2).

P.Z. EBERSOHN
JUDGE OF THE HIGH COURT

I AGREE:

J.P. ANN AND ALE

ACTING CHIEF JUSTICE OF THE HIGH COURT