BETWEEN

CASE NO. 4526/08

USUTHU PULP COMPANY LIMITED... T/ASAPPI **USUTHU** **APPLICANT**

AND

THE PRESIDENT OF THE INDUSTRIAL COURT **FIRST RESPONDENT**

OF SWAZILAND... DEREK CHARLES MCMILLAN... PIETER JACOBUS VAN DER MERWE... **SECOND RESPONDENT** **THIRD RESPONDENT**

CORAM **AGYEMANG J**

FOR THE APPLICANT: FDR **THE FIRST RESPONDENT FOR THE SECOND AND THIRD RESPONDENTS:**

ADV. P. FLYNN (INSTRUCTED BY ROBINSON BERTRAM) NO APPEARANCE

M. SIBANDZE ESQ.

DATED THE 1st DAY OF SEPTEMBER 2009

UDGMENT

: rCoKi ation,, the applicant has made the following prayers, being an

1 Reviewing and/or setting aside the first respondent's decision under industrial Court Case No. 187/2006 delivered on 12th September 2008;

2, Costs of suit against the second and third respondents in the event of opposition of this application.

3. Further and/or alternative relief

The applicant herein is a company incorporated under the laws of Swaziland and respondent in the suit described as Industrial Court Case No. 187/2006.

The first respondent has been cited in his capacity as the presiding judge in Case No. 187/06, in respect of its decision regarding which a review is being sought.

The second and third respondents were the applicants in the suit 187/06 the subject of this application.

The matters that are common cause are these:

In January 2004, the second and third respondents began work in the applicant company as Commercial Manager and Forest Manager respectively.

This is how their relationship with the applicant started:

On December 3, 2003, the second respondent accepted an offer contained in a letter written under the hand of the Managing Director of

Sappi Kraft, In the said letter dated 21 November 2003, the second respondent was offered employment with Sappi Management Services (Pty) Ltd (SMS), from January 1 2004. By that letter, the second respondent was also informed that he was to be seconded to the applicant company as its Commercial Manager and that he would be accountable to the applicant's General Manager in the execution of his

duties. The terms and conditions of the employment with SMS were set out in the said letter. On December 12, 2003, the second respondent signed another document described as an "Employment Agreement". This was an agreement between the applicant company and himself. In it, the second respondent was described as "the employee".

This agreement set out comprehensive terms and conditions of the second respondent's employment with the applicant.

The second respondent following these matters, worked in the applicant company.

On June 2, 2005, the applicant per letter headed "Termination of Secondment to Usutu Pulp Company Ltd", informed the second respondent that by reason of its decision to localise the position occupied by the second respondent, his secondment to the applicant company was being terminated. He was given three months' notice of the termination and was told that the termination meant that he would revert to Sappi Management Services which would "attempt to find a suitable alternative position" for him.

..- -i respondent also received a letter from the applicant couched in similar terms and dated June 2, 2005.

This was how the third respondent's relationship with the applicant began: The third respondent signed a document described as an "Employment Agreement" between himself and the applicant herein. This document had the same wording and import as the one signed by the first respondent. But before this relationship began, the third respondent had worked for Sappi Forests in various capacities, having been employed in 1989, as its Forestry Manager - Melmoth, in 1993 as Area Manager North, Sabie office, and in 1998 as Regional Manager. It was after this that he received the offered employment with the applicant following an interview. He then went to work for the applicant from January 2 2004. Although the third respondent did not enter into an agreement with SMS by which he was said to be seconded to

the applicant (such as the second respondent did), the third respondent as aforesaid, also received a letter dated June 2, 2005 informing him that his secondment to the applicant had been terminated and that he was to revert to SMS which would seek alternative employment for him.

Being aggrieved by the matter of termination contained in the letters of June 2 2005, the second and third respondents began proceedings for the resolution of a dispute between themselves and the applicant, before the Labour Commissioner. The dispute not having been resolved, the matter was heard by the Industrial Court.

The Industrial Court presided over by the first respondent, made orders in favour of the second and third respondents. In the determination of the suit the court a quo resolved as its main issue, the question of whether the applicants therein (the second and third respondents herein) were employees of the applicant herein having regard to their relations with SMS. The court a quo held that such was the position. It then resolved the issue of whether or not the termination of their services, or of their secondment contracts (as the case may be), for localisation amounted to automatically unfair dismissal. Having held this to be so, the court a quo made orders for compensation in monetary terms. This was said to include sum as *solatium* for alleged hardship caused to the said gentlemen by reason of the alleged unfair dismissal, as well as a penalty. It is regarding the findings of employment, automatically unfair dismissal, and the compensation awarded that the present review is being sought. The present application invokes the review jurisdiction of this court on common law grounds, provided for in S. 19 (5) of the Industrial Relations Act, 2000.

The grounds upon which the review is sought are that the court a quo made findings that were against the weight of evidence, and thus unreasonable, and also, errors of law.

In support of these, the following matters were canvassed in argument on behalf of the applicant:

Learned counsel averred, (expounding on the applicant's heads of argument filed in this court), with regard to the finding of employment that the evidence led was inconsistent with that finding and thus unreasonable. With regard to the second respondent, learned counsel sought to demonstrate the unreasonableness of the court's finding by recounting these: that evidence was led that the second respondent's relationship with the applicant commenced after he signed a contract of employment with SMS by which contract he was seconded to the applicant. The said contract set out his benefits package, and furthermore, that after the said secondment was terminated, the second respondent was paid terminal benefits and severance pay by SMS. He contended that in face of these, the court unreasonably held that his relationship with SMS was not one of employment, but "a technical one".

Unreasonable also, and unsupported by the evidence he argued, was the finding (in apparent justification of the payment by SMS of the second respondent's terminal benefits and severance package), that an employment relationship resumed between the second respondent and the applicant once the secondment contract had been terminated, thus entitling him to that package.

Learned counsel contended also that the court failed to take into account the applicant's pleading on the termination for localisation as one agreed upon contractually, and thus unreasonably found automatically unfair dismissal.

Regarding the third respondent, learned counsel argued that the finding that there was no basis for implying an employment relationship between SMS and that gentieman was also unreasonable, given evidence led to

the contrary.

He contended that the court unreasonably held that the receipt by the third respondent's terminal benefits and severance pay from SMS was attributable to that gentleman's "relationship with Sappi Group as a whole rather than any direct relationship he had with SMS". Furthermore, that the court, ignoring evidence of

significant indicators of an employment relationship between SMS and the respondents, being: the payment of terminal benefits and severance allowance by SMS (evidenced by exhibits R1- R5), relied on, the fact of the payment of salaries, control of the performance of work, and the right to discipline, as the only indicia of an employment relationship. He contended that by so doing, the court unreasonably found an employment relationship between the applicant herein and the second and third respondents, (hereafter alternately described as the gentlemen) rather than between the SMS and the gentlemen although such finding was unsupportable from the evidence.

Learned counsel also averred that the court made an error of law when it failed to consider the definition of "automatically unfair dismissal" (which by definition under S. 2 of the Industrial Relations Act (the Act), does not include dismissal on grounds of nationality), in holding that the second and third respondents had been automatically unfairly dismissed. He argued that the legislature in Swaziland must have intended that nationality not be a ground for unfair discrimination in labour matters, for unlike the Convention 158 of the ILO Convention which includes nationality in its definition of unfair dismissal, the Industrial Relations Act 2000 does not.

For this reason, and also because Ss 20 (2) and (3) of the Constitution of Swaziland which provide for equality before the law, do not contain any reference to nationality, he contended that a finding of automatically unfair dismissal upon the fact of termination of the applicant's relationship with the respondents for localisation of their positions, was an erroneous interpretation of "automatically unfair dismissal" as defined under the Act and against the spirit of the Constitution of Swaziland.

The award of compensation also he argued, was an error of law and that the court

failed to understand the nature and limitation of its remedial powers in accordance with S. 16 of the Act.

He argued that the award which was made in categories: patrimonial loss, *solatium* and penalty, was not in accordance with the provisions of S. 16 of the Industrial Relations Act that empowered the court a quo to make
awards.

Regarding the computation for patrimonial loss, it was his contention that no reason was set out in the court's judgment justifying the quantum thereof. He added that the court's assertion that the localisation for which the contracts of the gentlemen were terminated was a "handy excuse", was not supported by the evidence.

In respect of the award for *solatium,* counsel contended that the court was not empowered to grant such in the present suit when no *injuria* had been proven.

Regarding the penalty, counsel argued that it could not be supported as there was no provision in S. 16 of the Act for a penalty as a distinct award besides the provision for compensation twenty-four months instead of twelve months in other circumstances.

For all these reasons, learned counsel contended that this court was
empowered to review the decision of the court a quo.

The question of the reviewability of the decision of the court a quo was
addressed as a preliminary matter by learned counsel.

As aforesaid, the applicant invoked S. 19 (5) of the Industrial Relations Act
which grounds jurisdiction in the High Court for review on grounds
permissible at common law.

Regarding the standard to be applied on review, he contended, relying on such cases as ***Councillor Mandla Dlamini v. Musa Nxumalo Appeal Case No. 10/2002*** (where an assertion was made that "in the light of modern approach to judicial review, the time has arrived in Swaziland to jettison the narrow approach of gross unreasonableness ..."); and *Takhona* ***Diam'mi*** *v,* ***President of the Industrial***

Court and Anor Case *No, 23/1997* applying ***Hira and Anor v Booysen and Anor 1992 (4) SA*** *69* ***(AD)*** *at 84 B, 93 A-I* (where it was held that an error of law may give rise to review by this court), that the court ought to review the decision of the Industrial Court in the present instance on the grounds of the unreasonableness of the decision rather than on the requirement of the demonstration of gross unreasonableness.

The application has been vehemently opposed by the second and third respondents herein. The position of the said gentlemen as canvassed by their counsel shall be referred to and considered in the resolution of the issues before this court.

Having read all the papers filed in support of, and against this application and having heard counsel on both sides, it is my view that this application for review ought to succeed in part, that is, in respect of the award of compensation only, and I say so for reasons appearing hereafter. What are the common law grounds for the exercise of the review jurisdiction?

Traditionally the review jurisdiction has been exercisable at common law with regard to lower court decisions, in respect of matters regarding the absence of jurisdiction, illegalities caused by bias and other interest in the cause, gross irregularity in the proceedings, the mis-reception of inadmissible evidence and the wrongful rejection of admissible evidence.

In short, it has been concerned with the questioning of the method of adjudication and not its result, see: per Innes CJ in ***Johannesburg*** *Consolidated* ***Investment Co. v. Johannesburg Town Council 1903***

TS 111 at 114-116.

The court in *Takhona Dlamini's case* (supra) set out the common law grounds for review succinctly thus: "...those grounds embrace *inter alia* the fact that the decision in question was arrived at arbitrarily or capriciously or *mala fide,* or as a result of

unwarranted adherence to a fixed principle, or in order to further an ulterior or improper purpose, or that the court misconceived its function or took into account irrelevant considerations or ignored relevant ones, or that the decision was so grossly unreasonable as to warrant the inference that the court had failed to apply its mind to the matter...those grounds are however not exhaustive".

I must at this point note that this traditional view seems to have been altered somewhat in Swaziland in *Councillor Mandla Dlamini's case (supra)* where the court appeared to be in favour of the application of unreasonableness as a test standard for when a court should interfere with findings of fact made by the court a quo on a review, rather than gross unreasonableness.

in the light of the common law grounds set out before now, the duty of this court in the present instance is two-fold. First, it is to examine the

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evidence led and the legal principles invoked before the court a quo, and then to determine whether or not the findings, application of the law and

the orders of the court in face of these, are so unsupportable (with regard to findings) and erroneous (regarding the law applicable) that they amount to an irregularity in the proceedings before the court a quo vesting this court with jurisdiction at common law to interfere with same upon review.

Does this court have jurisdiction on a review application to disturb the findings of fact in the present instance?

Having read the record of proceedings and noted the evidence led before the court a quo and also its findings with regard thereto, it seems to me that the argument of unreasonableness (or gross unreasonableness as the case may be), does not arise.

It seems to me that the complaint of the applicant with regard to the findings of the court a quo in relation to the pleadings and evidence led, is one regarding the Tightness or otherwise of the court's finding although same has been clothed in the garb of a complaint of unreasonableness amounting to an irregularity. In short, the applicant is urging this court to declare that the court a quo was wrong in its evaluation of the evidence led before it.

Regarding this, it is my view that the question of whether the court a quo evaluated the evidence led properly or correctly, is a ground for appeal and not for review by this court.

Doubtless, there are those circumstances where the decision in relation to the evidence available to the court, is at such variance with it, or the exercise or refusal to exercise discretion, becomes such that the court must D6 held to have failed to appreciate the import of the matters placed before it or its powers regarding same.

In such a circumstance, the decision is said to be grossly unreasonable and thus warrants review. The standard by which this is measured must however be carefully measured when the decision is that of a court such as the Industrial Court. I say these, mindful of the stance taken and expressed by the court in *Councillor Mandla's* case that the time has arrived for this country to jettison the requirement of gross unreasonableness (which is a higher standard), for unreasonableness, a point that has been canvassed by learned counsel for the applicant. With regard to this canvassed standard of unreasonableness in *Councillor Mandla Dlamini's* case, I venture to say that the said statement was not the *ratio decidendi* of the case, which would be binding on this court as a legal precedent, but was rather the expression of a sentiment *obiter,* urging the courts of this country having regard to current trends, to adopt same.

I must also add that in that *Councillor Mandla Dlamini's case,* the adjudicatory body whose decision was the subject of the review, was not a court such as obtains in the present instance, but an administrative body exercising quasi-judicial functions

and under a duty to act fairly.

The comments of that court must be placed in their proper setting. It was after the learned judge Leon JP delivering that judgment cited various cases ai! concerned with the decisions of quasi-judicial and administrative bodies, including ***Administrator Transvaal and Ors v. Traub and Ors*** *1989* ***(4)SA 731*** *(A),* ***Schmidt and Anor*** *v.* ***Secretary of State for Home Affairs [1969] 1 All ER 904 CA*** that he concluded that the modern approach to judicial review was in favour of jettisoning the standard of gross unreasonableness for that of reasonableness. I am reinforced in my opinion that the judge comments were with regard to the decisions of adjudicatory bodies other than the courts, by the dicta of the learned judge (at page 19 of the judgment) which I hereby reproduce: "With regard to the test of gross unreasonableness in reviewing *the decisions of statutory bodies,* I am fully conscious of the weight of the aforesaid decisions...However it is necessary to decide whether in this day and age the narrow approach should be maintained...! am driven to the conclusion that it should not..." (my emphasis). Then, at pages 22 and 23, the learned judge, further concerning himself with the findings in another case concerned with the decision of a quasi-judicial body: ***Du Preez and Anor*** *v.* ***Truth and Reconciliation Commission 1997 (3) SA 204 (A,)*** continued thus: "...in that case it was held ...that the principle of *audi alteram partem* is but one facet... of the general requirement of natural justice that a public body will act fairly...In the present case, the deliberations of the subcommittee and its findings could have gravely serious consequences to the applicant...In all these circumstances I am of opinion that there was a duty upon the sub-committee to act fairly. *Furthermore, i am of the view that in the light of modern approach to judicial review, the time has arrived in Swaziland to jettison the narrow approach of gross unreasonableness".*

I say these in order to demonstrate that while the courts of Swaziland may be somewhat inclined (upon urgent urging) to jettison the standard of gross unreasonableness with respect to the decisions of administrative and quasi-judicial

bodies, the decisions of a court such as the Industrial Court (which traditionally has been treated differently from those of other adjudicatory bodies), may not have been affected by the position postulated in *Councillor Mandla Dlamini's* case. It seems to me that there was good reason for the application of the higher standard of gross unreasonableness as the test and that a blanket application of the lower standard to include decisions of courts such as the Industrial Court, may unnecessarily blur the line between the appellate and review jurisdictions of the court.

Having said this I must say that out of circumspection, I have *in casu* chosen to apply the lower standard of unreasonableness canvassed by teamed counsel for the applicant.

By the application of this standard, I decline to disturb the findings of the court a quo regarding the employment status of the second and third respondents. This is because I do not find in the decision of the court a quo unreasonableness in that finding such as will move my hand to interfere with same. Rather, I consider the finding of the court a quo, supportable from the evidence led. This piece of evidence is regarding circumstances serving as various indicia of employment such as the payment of salaries, control and supervision of the work performed, right to discipline among others that were considered by the court in the evaluation of the evidence as the court laboured to resolve that fact in issue. I also recognise that the court did not by this finding close the door to a possible employment relationship between the gentlemen and SMS as well. I find nothing unreasonable about the finding which was borne out thus by the evidence.

I will also for this same reason, not venture into an analysis of whether the termination was a dismissal at all, in face of the contracts of employment tendered in evidence, a point urged on this court in the applicant's heads of argument. That is in effect an allegation that the decision of the court a quo was not supported by the weight of the evidence. I reiterate that that remains an assertion challenging the

correctness of the finding which ought not to be the subject of a review.

The applicant has also alleged errors of law including, that the court a quo failed to consider the definition of "automatically unfair dismissal" contained in S. 2 of the Act in arriving at its finding of automatically unfair dismissal and furthermore, gave an award of compensation which was not

in accordance with S, 16 of the Act for it allegedly failed to appreciate its remedial powers set out in that provision. I have said before now that I am inclined to grant the applicant relief in respect of the award of compensation only, and I give the reasons.

Regarding review in respect of errors of law, Corbett CJ in *Hira's* case (supra) postulated that there was an error of law that may give rise to the invocation of the review jurisdiction in the following terms: "...the courts have often relied upon a distinction between (a) an error of law on the merits and (b) one which causes the decision maker to fail to appreciate the nature of the discretion or power conferred upon him and as a result not to exercise the discretion or power or to refuse to do so. A category (a) has been held not to be reviewable whereas a category (b) error has been held to be a good ground for review at common law". It must be noted that although Corbett CJ was on the occasion of *Hira's* case, dealing with the decision of an administrative body and not a court, the Court of Appeal of Swaziland in *Takhona Dlamini's* case (supra) appeared to have adopted it wholesale without making any distinction between decisions from a lower court and those from other adjudicatory bodies even though traditionally, there has been a distinction, see: *Herbstein and Van Winsen's The Civil Practice of the Supreme Court of South Africa 929-932 at paras, B and C*

Being thus bound by the position adopted in *Takhona Dlamini's* case, I must go ahead to examine the reviewability of the alleged errors of law canvassed in the

present instance using the dictum of Corbett CJ as adopted in *Takhona Dlamini's* case as a guide. Concerning the matters of the court a quo's finding of employment of the gentlemen with the applicant, in disregard of the aforesaid indicia of employment with SMS canvassed, the alleged failure of the court to apprise itself of the definition of "automatically unfair dismissal" contained in the Industrial Relations Act regarding its finding, and the finding of dismissal in face of alleged contractual stipulations, it seems to me that such errors (if indeed they were such), bring about a proper circumstance for recourse to an appeal and ought not to be the subject of a review application.

With regard to the award of compensation however, I must say that while I did not appreciate the argument of learned counsel that the court a quo had no power to make an award in categories at all, I find the award of a *solatium* in an unfair dismissal case where no *injuria* caused by such was proven, unsupportable, given the powers placed in that court in the award of compensation. The unsuccessful search of alternative employment and its inconvenience without proof of the intent to injure and the effect of such could hardly qualify as injuria in the instant case. The question of whether such an award is proper in a labour case was addressed somewhat in ***Ellerine Holdings Ltd v. Du Randt (1992) 13***

ILJ 611 LAC. In that case compensation was awarded that included an award for the ill- treatment of an employee of fifteen years whose position was abolished and who was informed of this not privately, but at a general meeting, Granted that the justification for this, was the finding that the conduct of the employer was cavalier, high-handed and grossly insensitive and that it caused the employee Du Randt "much extra pain, indignity and embarrassment", it was not described as a *solatium* but was couched in such terms as to suggest an injuria (on which evidence was led) for which the applicant therein was compensated. Even so this hardly qualifies for a blanket statement of the law justifying such an award. ***In Harmony Furnishers (Pty) Ltd v. Prinsloo (1993) 14 ILJ 1466 (LAC)*** the situation of awarding

compensation for non-patrimonial loss was further clarified thus: for compensation to be awarded for non-patrimonial loss in a labour dispute, while there may not be a place for a solatium, where facts which may ordinarily be considered in a solatium award are proven to establish an injuria, that circumstance may be compensated as a non-patrimonial loss. I am inclined to go with this position in the light of the weight of legal authority and venture to say, that there is no place for awarding a *solatium* in a labour dispute when no circumstances capable of amounting to an injuria have been established. *In casLL* I do not find any evidence that the termination of the labour relations between the applicant and the second and third respondents

■jm' ;r crcumstances surrounding same caused an *injuria* for which a non-patrimonial compensation should have been awarded. Furthermore, there does not appear to be any place for the award of a penalty in S, 16 beyond the punitive award of up to 24 months salary for automatically unfair dismissal.

8. 16 (7) of the Act which provides: "The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all circumstances but not more than the equivalent of twenty-four months remuneration..." was adverted to by the court a quo. Having justified the award of compensation for automatically unfair dismissal using the multiplier of up to twenty-four months' remuneration for automatically unfair dismissal, there was no justification for the further categories of compensation.

I noted that the court a quo justified the superfluous category of a *solatium* and then a penalty by an alleged reliance on S. 16 (9) of the Act although that provision hardly justifies the matters canvassed in alleged reliance thereon.

The said award of a *solatium* by which the court a quo exceeded its powers of compensation reveals a fundamental lack of appreciation of the powers vested in it in a dispute such as the present one. It is for these reasons that I grant the review sought in part, and in consequence, disturb the award of compensation of the court a quo, but not with respect to the quantum awarded as compensation, but the

expressed categories. In so doing, I adopt the sums stated as the total awards, but expressed as compensation for patrimonial loss for the automatic unfair dismissal of the gentlemen, (as it remains within the twenty-four months salary multiplier), and exclude the other categories of a *solatium* "for the loss of other unquantifiable employment benefits and for the hardship and inconvenience caused" to the second and third respondents and the penalty.

Review succeeds in part.

Costs awarded to the applicant on the ordinary scale.

MABELAGYEMANG (MRS)

HIGH COURT JUDGE