IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1448/2010

In the matter between

KENNETH B. NGCAMPHALALA **Plaintiff**

And

CENTRAL BANK OF SWAZILAND **Defendant**

Neutral Citation: ***Kenneth B. Ngcamphalala v Central Bank of Swaziland (1448/2010) [2014] SZSC233 (23rd September 2014)***

Coram: **Dlamini J:**

Heard: **16th September 2014**

Delivered: **23rdSeptember 2014**

Application for absolution from the instance – prima facie case – conception of a reasonable man – evidence upon which he might or could find for the plaintiff – plaintiff claiming defendant exercised its duties unlawfully – however at the same time complying with defendant's orders – plaintiff cannot approbate and reprobate - previous court cases not indicating that termination of contract of employment was based on defendant's inducement but that employer terminated services – such later version to be viewed as an afterthought –application for absolution allowed -

Summary: By means of combined summons, the plaintiff demands the sum of E49,858,157.57 from the defendant. The basis of his claim is that the defendant using "*its management position*"induced his employer, the Swaziland Development and Savings bank *(*the bank*)* "*to breach its contract*" with him.

The Pleadings

Plaintiff's Particulars

[1] The particulars of claim reflect the following:

> *"4. In March 1998 the defendant unlawfully took over the management of the Swaziland Development and Savings Bank;*
>
> *5. The defendant used its management position to wrongfully, intentionally or negligently induce the Swaziland Development and Savings Bank to breach its contract with the plaintiff;*
>
> *6. As a result of the aforesaid actions of the defendant the Swaziland Development and Savings Bank stopped paying the plaintiff's salary and benefits with effect from end of February 2001.*
>
> *7. Plaintiff has accordingly suffered damages due to defendant's aforesaid wrongful acts in the sum of E49,858,157.57[Forty-nine million eight hundred and fifty eight thousand one hundred and fifty seven emalangeni and fifty seven cents] calculated as shown in annexed "A" hereto."*

Defendant's Plea

[2] The defendant denied every material allegation and put plaintiff to strict proof thereon.

Viva voce evidence

[3] The plaintiff identified himself as **Kenneth BhekizweNgcamphalala** and gave evidence on oath. He informed the court that he was last under the employ ofthebank in 2001. His employment by the bank was in pursuant to

a newspaper advertisement for a Senior Manager in the Risk Management department. Having applied for the said position, he was invited for an interview. At the end of the said interview, his eligibility was found to be beyond that of a Risk Management head. He was then offered the position of a personal assistance to the Managing Director (MD) of the bank. He reported direct to the Managing Director. He then handed two correspondences confirming his appointment to the said positions. These were marked exhibit A and B. He also handed to court minutes of the board of directors of the bank approving his appointment in November 1996 as exhibit C.

[4] Plaintiff proceeded to inform the court that immediately after his appointment, the bank restructured. He was given a new position together with new responsibilities. He was reporting direct to the Managing Director and the board of directors. A power of attorney was registered indicating delegation of duties to his new position. This appointment was on six months probation. He successfully completed the period of probation and was confirmed by the board of directors in terms of exhibit D which he handed to court.

[5] In March 1999 following an examination of the bank by the defendant, he was informed that management was taken over by defendant. In support thereof, plaintiff referred the court to a correspondence by defendant dated 2nd February 1999 addressed to the Minister of Finance. He read the contents thereof as follows:

> "*Minister, I recall that when you appointed the Central Bank you had indicated that we must find a Swazi manager who has qualifications for the post of Chief Executive. I have personally had discussions with potential Swazi managers whom, I believe, could have been ideal to take over Swazibank. However, on two occasions, I am disappointed to report, my approaches were rejected on the grounds that the bank has no future in terms of stability and outside interferences.*

> *I was requested to consider restructuring the institution first, and then make future approaches. I am happy to report that the Board of Swazibank has now made arrangements to engage an external consultant to proceed with the arrangement of recruiting two or more Swazis who would be trained,with the best being appointed as Chief Executive. This is a very satisfactory approach, which, I believe that rather than appointing one individual who may not perform, we have two from whom we can choose for the post.*

[6] The above statement by defendant violated the provisions of the bank Act as in terms of that legislation, the bank, through its board of directors was to engage and employ its own employees and not defendant, plaintiff pointed out. Plaintiff further read:

> "*In March 1999 you appointed the Central Bank as manager to Swazibank following the expiry of AMSCO's contract. The Central Bank is not equipped with personnel on stand-by to rescue banks which are in trouble. Instead, Section 36(b) of the Financial Institution Order, 1975 allows the Central Bank to appoint a person who, in the Bank's opinion, has had proper training and experience to advise a financial institution on measure to be taken to rectify the situation."*

[7] It was plaintiff's evidence that defendant failed to appoint a person but opted to take over management of the bank before engaging IDI. Defendant only relinquished their managerial position at the bank in 2001. His view was that from 1999 to 2001 defendant unlawfully managed the bank. In fact, he saw a letter to the effect that after the appointment of Mr. Matsebula as Managing Director (MD), the defendant was ready to give back its powers to the board.

[8] Upon defendant taking over management of thebank, a new organizational chart-structure was introduced. He was immediately then hauled before a disciplinary hearing chaired by one of the employees of defendant *viz*. **Mrs.VinahNkambule**. The result of that hearing was that he was found

guilty of failing to take instructions from **Mr. Peter McNie**, an officer he considered his junior. The penalty was a warning.

[9] The organizational chart-structure was introduced by defendant's agent, in consultation with **Mrs. VinahNkambule**. In this chart, his position and name did not feature. He was not offered another position. He remained at the bank without a position for two years until he was forced out, a matter that was never denied by both defendant and the bank according to plaintiff.

[10] Part of the management's duties were later delegated to IDI. During this period, he was slapped with ten charges. He was acquitted on all the ten charges. He was, however, asked to leave the bank on full pay and benefits. On 9th March 2001 he received a letter terminating his services. He referred the court to a judgment by **Nkonyane J** of the Industrial Court and stated that Mr. Matsebula in evidence stated that he was instructed by defendant to terminate his services with the bank. As a result of this, he lost his employment. At all material times as evidenced by exhibit B, the bank was satisfied with his performance until defendant took over management at this juncture, plaintiff's learned Counsel, **Mr. S.C. Dlamini** on behalf of plaintiff informed the court that he was through with the examination of plaintiff in chief.

[11] He was cross examined at length by learned Counsel for defendant**, Mr. P. Flynn**. In order not to burden this judgment, I shall refer to the cross examination of this witness under adjudication.

[12] At the end of his cross examination the plaintiff closed its case. The defendant applied for absolution from the instance.

[13] Principle of law

Rule 39(6) reads:

> "*At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, …"*

[14] Adjudicating on a similar application, **De Villiers JP** in **Gascoyne v Paul and Hunter 1917 TPD 170** at 173 stated:

> *"At the close of the case for the plaintiff, therefore, 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?*

[15] In **Myburgh v Kelly 1942 EDL 202** at 206 the principle was articulated that the court:

> "*must bring to bear upon the evidence not his own but the judgment of a reasonable man. Renouncing for the time being any tendency to exercise a judgment of his own, he is bound to speculate on the conclusion at which the reasonable man of his conception not should, but might, or could, arrive. This is the process of reasoning which, however difficult its exercise, the law enjoins upon the judicial officer."*

Adjudication

Common cause

[16] Cross examination revealed the following as the factual matrix of this case:

- In 2003 under case number 26/2003 the plaintiff instituted legal proceedings against the bank for re-instatement following his dismissal on 9th March 2001 alternatively compensation calculated at twenty four months.

- He was granted the alternative order but at twelve months compensation on the basis that the bank failed to consult plaintiff before declaring his post redundant.

- In 2010 under case number Industrial court 186/2010, the plaintiff claimed from the bank, monthly salary from the date of termination of contract (March 2001) to date of payment being at that time the sum of E13,488,611.57.

- This claim was based on the agreement of January 2001 where the plaintiff and the bank agreed that plaintiff remained at home on full pay and benefits until finalization of his matter.

- The Industrial court dismissed his action. He applied for a review before the Industrial Court of Appeal. His order of salary payment was not granted. He lodged an appeal to the Supreme Court. He was unsuccessful.

- Plaintiff is now seeking payment for damages against defendant on the basis that defendant induced the bank to breach a contract of employment between him and the bank.

Ad merits

[17] The plaintiff attested in chief as evidence that defendant induced the bank to breach its contract of employment between him and the bank. He stated:

> "*Sometime in December 2001, I was called by the Managing Director Mr. Stanley Matsebula who informed me that the defendant said he should dismiss me.*"

[18] Mr. Flynn on behalf of defendant quickly jumped up to object to such evidence as hearsay. The defendant's attorney in reply submitted such evidence was not hearsay. The court enquired on what basis such evidence was not hearsay. No explanation was tendered on behalf of plaintiff. Such evidence remains expunged from the record by reason of inadmissibility based on hearsay. The defendant *meromotu*, without the examination of his Counsel, then introduced a judgment under Industrial Court Case No.26/2003 and pointed out that the evidence that Mr. Matsebula was instructed by defendant to dismiss him was so stated before the said court by Mr. Matsebula and is reflected in that judgment. At that juncture, his Counsel led him on another evidence without pursuing this piece of evidence, I consider his case to be based on Mr. Matsebula's communication as found on the judgment of Industrial Court Case No. 26/2003. It remains for me to ascertain whether Mr. Matsebula so divulged as per the judgment.

[19] The case of plaintiff came out succinctly under cross examination. This on its own does not augur well for the plaintiff in view of the application at hand. The cross-examination revealed:

"Mr. Flynn:	*"On 9th March you received a letter from Mr. Matsebula?"*
Plaintiff:	*"Yes"*
Mr. Flynn:	*"Saying your position is redundant?"*
Plaintiff:	*"Yes"*
Mr. Flynn:	*"On 9th March 2001 the decision was made by Mr. Matsebula?"*
Plaintiff:	*"Yes, the decision to declare the post redundant was made way before and that is when the chart was drawn".*
Mr. Flynn:	*"Mr. Matsebula didn't have to carry instruction from defendant. He was a vibrant and forceful Managing Director?"*
Plaintiff:	*"The decision to declare the position redundant was when defendant was in charge, way back before Mr. Matsebula came in and this can be seen from evidence dating back in 1999."*
Mr. Flynn:	*"Mr. Matsebula made the decision to declare the position redundant on 9th March 2001?He accepted that the Managing Director's personal assistance was unnecessary?*
Plaintiff:	*"He was given instructions by defendant".*
Mr. Flynn:	*"He couldn't as the defendant relinquished its powers then?"*
Plaintiff:	*"Not totally as there were members of defendant."*

[20] From the above cross-examination and responses, plaintiff impressed upon this court that at all material times, despite the presence of Mr. Matsebula as MD, the defendant was in full control.Is there evidence supporting plaintiff's version, besides his say so?

[21] Plaintiff referred to the restructuring at the instance of defendant. Suppose one accepts that defendant did restructure in 1999 and eliminated the post held by plaintiff. There is however evidence which came out during cross-examination which is as follows:

"Mr. Flynn: "You were put on leave before 2001?"

Plaintiff: "I went on leave and there was an agreement signed to coverthat period of time".
Mr. Flynn: "When did you go on leave?"
Plaintiff: "December 2000"
Mr. Flynn: "On full pay?"
Plaintiff: "Yes"

The cross examination revealed further:

Mr. Flynn: "Who sent you on leave?"

Plaintiff: "I applied for it"

Mr. Flynn: "Who approved it?"

Plaintiff: "Mrs. VinahNkambule"

[22] The said **Mrs. VinahNkambule** was described by plaintiff as a person who had been unlawfully appointed by defendant. She was, according to plaintiff, defendant's employee who reported direct to defendant.

[23] It is common cause that during **Mrs. Nkambule's** tenure of office at the bank as MD, the plaintiff was attending work, paid full salary and benefits which accrued to him before restructuring. In other words, the supposed restructuring by plaintiff was carried out by defendant which abolished his post and excluded his name from the list of management did not affect him in any way. One may infer that this is the reason plaintiff remained at work

until his leave fell due without challenging defendant or the bank for abolishing his post, if the version of restructuring is anything to go by. I appreciate that the restructuring chart by defendant was not handed to court by reason that it was not discovered. However, as already shown, if plaintiff's position was excluded in the chart, this only existed on paper as on the ground, plaintiff attended work and was paid accordingly until he himself applied to proceed on leave when it fell due and was so granted by **Mrs. Nkambule**. Needless to point out that during this period, plaintiff enjoyed his employment as otherwise he would have instituted legal action for constructive dismissal. His actions must speak louder than his words.

[24] Plaintiff informed the court that **Mr. Matsebula** as MD merely implemented a decision already taken by defendant and was so instructed by defendant. However, we learn as follows under cross examination:

> "*Mr. Flynn:* *"Mr. Matsebula makes the decision to declare your position redundant on 9th March 2001?"*
>
> *Plaintiff:* *"No, when Mr. Matsebula got to the bank, he introduced his own restructuring chart which didn't include me."*

[25] From the plaintiff's response, it is clear that **Mr. Matsebula** put aside the restructuring chart by **Mrs. Nkambule** and mapped his own organizational restructuring chart. How then can it be said that **Mr. Matsebula** merely carried out **Mrs. Nkambule's** or defendant's decision? This position was very much appreciated by plaintiff as under case No.26/2003, the plaintiff successfully sued the bank wherein he cited **Mr. Matsebula** as having unlawfully terminated his services. For this reason alone, the version by plaintiff that **Mr. Matsebula** merely implemented defendant's decision stands to fail.

[26] The plaintiff pointed out further that under case number 26/2003**Mr**. **Matsebula** did inform the court that he was instructed by defendant to terminate his services. As correctly pointed out by learned Counsel for defendant, the judgment of his **Lordship Nkonyane J** reads at page 5 paragraph 3:

> *"RW2 Stanley Matsebula told the court that when he came in as the Managing Director of the Respondent bank, he was tasked to finalize the pending issue of the applicant's position at the bank.*"

[27] A further reading of the judgment reveals that plaintiff had initiated an exit package negotiations. From this circumstance, it is not surprising therefore, for **Mr. Matsebula** to be "*tasked to finalize*" plaintiff's position. That the negotiations failed is neither here nor there. **Mr. Matsebula**, as MD had to attend to the matter initiated by the plaintiff. He thus came to a decision,albeit unlawful, by reason of his failure to consult plaintiff. This, however, does not detract from the fact that he had to attend to the matter.This was appreciated by the learned **JudgeNkonyane J** when he dismissed the prayer for reinstatement and granted the alternative prayer for compensation by reason of failure to consult plaintiff prior to declaring his post redundant. The version by plaintiff that **Mr. Matsebula** was instructed by defendant to terminate his services,is for these reasons without basis and therefore cannot stand.

[28] Plaintiff challenged defendant for having played a role in the bank. Plaintiff informed the court in chief that it was contrary to the Swaziland Development and Savings Bank Act for defendant to take over management of the bank. Management ought to be appointed and approved by the board of directors of the bank and not defendant. A power of

attorney had to be registered thereafter. In support hereof, plaintiff referred the court to a correspondence authored by defendant and addressed to the then Honourable Minister for Finance, **Mr. J. P. Carmichael** which was as follows:

> "*In March 1999 you appointed the Central Bank as managers to Swazibank following the expiry of AMSCO's contract."*

[29] The correspondence was dated February 1999. I must point out from the on set that the defendant pointed out on the following sentence that the defendant was "*not equipped with personnel on stand-by to rescue banks which are in trouble. However, as per Section 36 (b) of the Financial Institution Order 1975 the defendant may appoint a person who, in the Bank's (defendant) opinion, has had proper training and experience to advise a financial institution on measures to be taken to rectify the situation.*" The defendant duly appointed IDI. This correspondence therefore, does not support plaintiff's version. It merely points out that although the Honourable Minister had requested the defendant to take over management at the bank, defendant declined but exercised its powers in terms of Section 36 (b) of the Financial Institution Order 1975.

[30] Further both in chief and under cross examination plaintiff informed the court that no sooner had defendant taken over management, defendant caused him to appear before a disciplinary hearing headed by **Mrs. VinahNkambule**, defendant's employee. He attended to the hearing fully. He was given a warning letter. Again later defendant slapped him with ten charges. Defendant appointed a university lecturer **MsNomceboSimelane** as Chair. He attended the said hearing and was acquitted on all charges. One wonders as to the basis plaintiff attended to such disciplinary hearing

at the instance of defendant, in view of the attestation that defendant's presence at the bank was unlawful. The only answer is that plaintiff himself must have appreciated that those discharging management duties at the bank were legal and thus the compliance with their orders to appear for disciplinary hearing. The evidence by plaintiff that it was unlawful for defendant to be at the bank is an afterthought. Or should I say, plaintiff cannot approbate and reprobate.

[31] I also accept, as ably pointed out by learned Counsel for defendant by means of different correspondences, that whatever role played by defendant in the bank was in accordance with the law. In fact this point was appreciated by plaintiff under cross examination when he informed the court that defendant plays a regulatory role of all financial institutions in the Kingdom. I find that the correspondences submitted in court point to one direction and that is at all material times there was a board of directors at the bank which was duly active.

[32] The defendant under cross examination interrogated as follows:

> "*Mr. Flynn:* *"You conducted a great deal of litigation against Swazi Bank?"*
> *Plaintiff:* *"Yes"*
> *Mr. Flynn:* *"You sought reinstatement, alternatively compensation?"*
> *Plaintiff:* *"Yes"*
>
> *Mr. Flynn:* *"You sought that against Swazi Bank?"*
> *Plaintiff:* *"Yes"*
>
> *Mr. Flynn:* *"You did in fact obtain compensationagainst Swazi Bank?"*
> *Plaintiff:* *"Yes but not against loss of income"*

[33] It is common cause, as already pointed out, that the plaintiff was paid compensation for rendering his position with the bank redundant without

consulting him prior. This was calculated at twelve months salary. The said amount was for E264,516.00 under case 26/2003. In that application which was heard before the Industrial Court, the plaintiff had averred that the bank unfairly dismissed him. Mr. Flynn correctly so, in my view, enquired from plaintiff as to why he failed to inform the court that defendant instructed or influenced the bank to terminate his services unfairly. This question was repeated to plaintiff several times. However, plaintiff failed to come out with a direct, clear answer to this question despite that he was given ample opportunity to do so by defendant's Counsel repeating the said question over and over.

[34] Again by case No. 186/2010, the plaintiff claimed against the bank the sum of E13,488,611.57 being income from date of termination of contract to date of payment. The Industrial Court dismissed the plaintiff's cause of action. Plaintiff appealed. Her Lordship **Mabuza J** held on merits:

> "*21. Turning to the merits of the matter, there is substance in respect of some of the concerns raised by the Applicant but this is due to the fact that the cause of action was not properly articulated. The arrangement to stay home on full pay and benefits was merely an arrangement for convenience of both parties and nothing more should be read on to it. It was not a new contract nor was it a variation of the employment contract that existed between the parties. It merely served to remove the Applicant from the 2nd Respondent's premises to his own home because they could no longer tolerate nor work with one another. It did not create or give rise to any new obligations on the 1stRespondent's part, it merely stated that the applicant should stay at home with full pay. The arrangement merely changed venues, instead of reporting at the offices of the 1stRespondent he remained at home.*
>
> *22. **Any claim for** specific performance **or payment of damages for breach of contract must flow from the breach of the contract of employment that existed between the parties from the 1st of January 1997 to the date of the breach by the 1st Respondent on the 9th March 2001. The door for payment of any monthly salary plus full benefits was firmly***

(unlawfully) closed by the 1st Respondent on the 9th March 2001.*"(*my emphasis*)*

[35] The matter went to the Supreme Court where their Lordships under the able hand of his **Lordship B. J. Odoki JA** held:

> "*12. The 1st respondent maintains that the appellant's claim to be paid a salary and full benefit into perpetuity when he himself by his conduct accepted that his services had been terminated and acted upon such termination is spurious and the appellant's interpretation of the agreement that he remains at home indefinitely on full benefits is as absurd."*

[36] I agree with the submission by learned Counsel on behalf of defendant and upon failure by plaintiff under cross examination as to the reason for his failure to inform the court on two previous cases at the Industrial Court that plaintiff was suing the bank for termination of his contract upon being induced by defendant to do so, that the plaintiff has decided to sue defendant because he was unsuccessful against the bank.

[37] It was contended on behalf of plaintiff by learned Counsel that under case No. 186/2010, the plaintiff was suing for loss of income while in the presentcase, the plaintiff is suing for damages arising out of "*breach of contract*". However, looking at the particulars of claim and the annexure thereto, it is clear that the plaintiff's computation is based on future loss of income and benefits. The claim, although not the cause of action, is the same. The only difference herein is that the plaintiff has set a cut-off date being 65 years of his age while under 186/2010 the cut off date was date of payment. To find a dichotomy in the present claim and that under case No.186/2010 would be tantamount to splitting of hairs. For that reason one

can only revert to the wise words of his**LordshipOdoki JA** under case No. 81/2012.

> *"13. I entirely agree with the submissions of 1st respondent that the appellant's claim is spurious and borders on an abuse of the Court process. The appellant has had his claim considered on three occasions and did succeed in the court a quo. In my view, the appellant has no more claims against the 1st respondent (or defendant) and he is not entitled to reopen matters which are already decided in the name of seeking for more compensation or benefits for unfair dismissal. There must be an end to litigation."*(underlined, my emphasis).

[38] One bears in mind that the contract said to have been breached *in casu*is the contract of employment concluded between plaintiff and the bank in 1997. Her Ladyship **Justice MabuzaJ** in the *court a quo* on the same claim for loss of future earnings and subject of appeal under case 81/2012 eloquently stated on this contract:

> "*Any claim for specific performance* ***or payment of damages*** *for breach of contract must flow from the breach of contract of employment that existed between the parties from 1st January 1997…."*

[39] The learned judge (**Mabuza J**) then wisely held:

> "*The door for payment of any monthly salary plus full benefits was firmly (albeit unlawfully) closed by the 1st respondent (*the bank *in casu) on the 9th March 2001."*(wordsunderlined, my own)

I understand the learned judge to be saying that any claim including a claim on the ground of damages based on the contract between plaintiff and the bank must first be computed within the period 1st January 1997 and 9th March 2001. Secondly, any claim outside this period cannot sustain by reason that this contract of employment no longer subsists by reason that the bank terminated it on 9th March 2001.Now, suppose for a second, one

accepts plaintiff's version that the bank terminated his services of employment on the inducement by defendant, in other words as pointed out by plaintiff in his particulars of claim *viz.,*"*defendant's aforesaid wrongful act."* We know that plaintiff was compensated for the "*wrongful act*", by the bank under case number 26/2003. He cannot be compensated again for the same "*wrongful act*" in the name of semantics. The findings by her **LadyshipMabuza J** and confirmed by his **Lordship Odoki JA** that, "*appellant's* (plaintiff's herein) *claim is spurious and borders on an abuse of the Court process,"* and that "*there must be an end to litigation,"* still applies with equal force even today in the present case and cannot change just because plaintiff has decided to bark at a different tree. The reasons were well advanced under case number 186/2010 *inter alia* that he had been compensated as stated by the honourable judge, his **Lordship Odoki JA** that, "*The appellant has had his claim considered on three occasions and did succeed in the court a quo*."

[40] I must point out at a glaring point from plaintiff's *viva voce* evidence that plaintiff did not inform the court as to the orders to be issued and the amount sought. Not an iota of evidence was led on the *quantum*. It was submitted on behalf of plaintiff that the omission to state in evidence the amount claim is because the defendant in its plea did not dispute the amount claimed except that it was not liable. However, paragraph 11 of the plea reads:

> *"11.2 The Defendant denies that it is liable to pay to the Plaintiff the aforesaid sum of E49,855,157.57 or any amount at all."*

and this flies in the face of plaintiff's Counsel. This is therefore a flaw on plaintiff's evidence.

[41] In the totality of the above, the application by defendant stands to succeed by reason that there is no evidence upon which a "*reasonable man might or could"* (as per **Myburgh** v **Kelly***supra*)find for the plaintiff.

Costs

[42] Learned Counsel for defendant urged this court to met out plaintiff with costs above the ordinary scale. He stated that the defendant was justified in seeking the costs of Senior Counsel because the claim by plaintiff was of a high magnitude. Further, the Supreme Court warned the plaintiff to stop litigating as his claim for payment of income on perpetual basis was absurd following that he was paid compensation for unfair dismissal. However, this has obviously fallen into deaf ears.

[43] I agree with the submission by learned Counsel for defendant. However, I am duty bound to consider the totality of the circumstances of both plaintiff and defendant. Plaintiff informed the court that he has been out of work for the past fourteen years and is unable to secure further employment. Obviously from this circumstance, plaintiff is a man of lesser means, if not of straw. It is the duty of the court to issue orders that will be effective. In the circumstance in the exercise of my duty which I am called upon to exercise judiciously, I am not inclined to grant costs at a high scale.

[44] In the foregoing, I enter the following orders:

1. Defendant's application for absolution from the instance is upheld.
2. Plaintiff's cause of action is dismissed.
3. Plaintiff is ordered to pay costs of suit.

M. DLAMINI
JUDGE

For Plaintiff: **S. C. Dlamini of S.C. Dlamini& Company**

For Defendant: **P. Flynn instructed by M. P. Simelane Attorneys**