

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 77/94

In the matter between:

STEVEN KENNY LUE Applicant

And

CARSON WHEELS (PTY) LIMITED Respondent

CORAM:

MARTIN BANDA : PRESIDENT

JOSIAH YENDE : MEMBER

ALPHEUS SIBIYA : MEMBER

DUMISANI MAZIBUKO : FOR THE APPLICANT

MOSES M. FAKUDZE : FOR THE RESPONDENT

JUDGEMENT

The Applicant seeks compensation for his unfair dismissal by the Respondent from his employment.

It is common cause that the Applicant was employed by the Respondent in its sales department in January, 1991. His services were terminated in December, 1993. The Applicant in his opening address informed the Court that he would show that he was dismissed in a manner he considers unfair procedurally and substantially. The Respondent said the Applicant verbally resigned and was duly given his benefits.

The Applicant gave evidence that he was employed in January, 1991 to December, 1993. Initially he was responsible for the workshop as well as the sales for goods on the floor and the staff in the various departments. In 1993 when he

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left the Respondent he was the Sales Manager responsible for the sales team. He was the buyer of all goods in the company. He was the Marketing Manager for all advertising and press. He was also responsible for setting up the Mbabane branch and managing it. He has a business card supplied by the Respondent which gives his designation and letter from the administration. Applicant worked for about year and felt there was need for a card. His full pay was 4,100 rands. The basic salary was E2.700, housing allowance E1,000, Medical aid E150.00, electricity and telephone approximately E300.00. The additional allowance which was not in the form of cash was a company vehicle and transport. Housing allowance of E1,000 was paid directly to the Applicant by the Respondent. On a monthly basis the Applicant submitted his telephone, electricity, water, personal accounts and medical aid and these were paid directly by the Respondent.

The Applicant said a week before the company closed down for December, 1993 holidays, MR. DLAMINI the Headmaster of Mbekelweni High School entered the shop to purchase a hammer mill. He informed the Applicant that he wanted to pay for the hammer mill with a cheque. He produced a cheque which the Applicant submitted to the Cashier. The Cashier notified the Applicant that she was not supposed to accept the cheque. Applicant forced her to accept the cheque since he was the Sales Manager and the most senior person in the company at the time. He made the decision to accept the cheque. The goods were not leaving the premises. Applicant had not been informed of the new

company policy not to accept cheques and besides MR. DLAMINI was a customer of long standing having purchased many items previously from the company by cheque.

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The General Manager MRS. PAIVA called the Applicant into her office when she returned and questioned the Applicant why he had accepted this cheque and overruled the decision of the Cashier. The Applicant replied that MRS PAIVA should speak to the Cashier in advance before reprimanding him at least find out the details of the transaction. The Applicant also mentioned that he did not appreciate the manner in which he was being treated with regard to this cheque. After the Applicant had explained the circumstances relating to the cheque to MRS PAIVA she was unhappy and they had an argument over the matter. The Applicant asked leave to provide an explanation the following morning since he was very upset. MRS PAIVA was also upset. This was on the 16th December, 1993. On the 17th December, 1993 the Applicant returned to work as normal. The Applicant said he did not abuse or illtreat the Managing Director to his knowledge. He might have been upset and tired to stand up for his rights. The Applicant denied ill treating or using abusive language or threatening some employees with assault. At the beginning of 1993 the Applicant discussed with the Managing Director MR. CARLOS PAIVA that he didn't feel it was necessary for the Sales Manager to be present on full time basis on Saturday morning. Applicant said it was agreed that he would come in when need arose on a voluntary basis. The Applicant stated that he worked on Sundays on many occasions. This was voluntary work for the Respondent. The Respondent never complained to the Applicant formally that he was refusing to work on Saturday. The Applicant denied ever conducting private personal business on the company premises. He never abused company telephone or allow customer's friends or relatives to use company telephones without financial gain to the company. The Applicant denied ever disregarding instructions from the superior.

The Applicant said in the argument he had with MRS PAIVA concerning MR. DLAMINI's cheque MRS PAIVA addressed him in the manner of a child. It was at this point that he was

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upset and mentioned that he didn't think he would work under those conditions. This took place on the evening of 16th December, 1993. The Applicant said after this discussion with MRS. PAIVA he remained as an employee of the company for two or three days. On the 18th December, 1993 he received a letter stating that his services were no longer required with immediate effect. The letter was received on the closing day. On the 17th December, 1993 the Applicant had a discussion with MR. PAIVA the Director of the company and MRS PAIVA the Managing Director was present. MR. PAIVA asked the Applicant about the disagreement he had with the Managing Director the previous night concerning MR. DLAMINI's cheque. MR. PAIVA asked the Applicant for his version and wanted to verify some complaints that his wife had made to him at home. The Applicant explained to MR. PAIVA about the cheque and the details of the manner in which the meeting with the Managing Director was carried out because the Applicant felt that it was in his right concerning the cheque. The Applicant said they had time for him to explain himself.

The Applicant stated that MR. PAIVA asked him gently that he wanted to talk to him in his office. The Applicant was aware that this was in connection with his disagreement with MRS. PAIVA the previous evening.

Under cross examination the Applicant said he cannot recall if he joined the Respondent as a Sales Manager. The Applicant agreed that when he joined the Respondent he was working in the workshop and that a person working at the workshop is not a Sales Manager. The Applicant agreed that his basic salary was E2.700. The Applicant said he designed all the cards and letter heads. He never received a letter of appointment as Sales Manager from the Respondent. The Applicant denied seeing RENNIE CARRINGTON who was in control of data and creditors books crying as a result of the way he had treated her but said he proceeded to console

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her because he did not want her to be upset. He realized that she was upset. Thereafter the Applicant

was called by MRS PAIVA. This was on the 16th December, 1993. The Applicant recalls that his discussion with MRS. PAIVA was unpleasant. He recalls that he spoke loudly and clearly and that he was never seated. The Applicant recalls MR. MDLULI being nearby. The Applicant remembers intimating that he would rather resign than take that kind of treatment. He remembers telling MRS. PAIVA that he could not carry on the argument because he was too upset. The Applicant said he did not mean to frighten MRS. PAIVA. The Applicant said his conduct of shaking the desk of his woman employer could be threatening. The Applicant said he could not deny hitting WONDERBOY DLAMINI with a can of sprite on the head. The Applicant said he did not work all Saturdays.

The Applicant said he received his year end bonus of E5000, one month's pay, severance pay for two years and leave pay of E5000. He received a sum of E14,649.54. He used it because he had to get through his December holidays and he needed money and paid for his rentals. The Applicant said he is claiming for Christmas day, Boxing day, Incwala and new years days. The Applicant said for the 3 year period he spent at Carson Wheels he feels the one month notice handed to him in an envelope is not proper. He feels he should be compensated for being suddenly unemployed having served the company loyally. He did not have an opportunity to invest the money that he received from the Respondent because at the beginning of the year he was involved in a serious motor vehicle accident approximately two weeks after the termination of his work and he was hospitalised.

The Defence then lead the evidence of DW1 RENNIE CARRINGTON who stated that she is working for the Respondent. She started working for the Respondent in 1987. She said the Applicant joined the Respondent in 1991 and was working

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in the Workshop Department. DW1 is an Assistant Accountant She has a business card which was designed by the Applicant. She said on the 16th December, 1993 MR. DLAMINI a customer came into the shop. He went to the Applicant's office. He wanted to pay the balance on a hammer mill that he had deposited in 1992. The Applicant then came to DW1 to ask if she could help find a deposit slip since the customer had not come with one. DW1 went to the records but could not find the slip. DW1 saw the customer MR. DLAMINI making out a cheque for the balance. DW1 said they don't accept cheques it is company policy. The Applicant knew about the company policy. There was a sign in the reception area that no cheques were accepted.

The Applicant told the customer that he should not listen to her since she did not know what she was talking about and that DW1 had a big mouth that is why she was put in an office that is hidden. DW1 felt very insulted. She went to MR. MDLULI who is their Accountant to try and explain. She was very upset and close to tears. She tried to explain the whole story to MR. MDLULI but could not. She walked back to her office and closed it. She cried. She cried a lot because she was hurt. DW1 said the Applicant was very vulgar at work and used foul language most of the time. DW1 said their starting time is 7.30 a.m. but the Applicant used to come about 5 to 8 or a little after 8. He came on Saturdays but not for the whole morning for an hour or two. DW1 said one day she saw the Applicant hit WONDERBOY DLAMINI on the head. As he was hitting WONDERBOY Applicant was saying you fucking fool.

Under cross examination DW1 said the Applicant was in charge of the Department but not the Accounts Department. He was not senior to her. MR. DLAMINI's cheque was deposited in the bank and was paid out in favour of the Respondent. There was no problem with the cheque. The only reason why DW1 got upset was she felt the Applicant had insulted

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her in front of customers and staff. DW1 said she did not work every Saturday. She used to work alternative Saturdays.

The Respondent then lead the evidence of DW2 SONIA PAIVA the General Manager of the Respondent who stated that MR. PAIVA is the Director of the Respondent. DW2 said on the 16th December, 1993 she had been out the whole day with MR. PAIVA collecting cheques from companies that owed the Respondent. She got back between 4 and 4.30 and entered the Respondent and was

met by one of the workers MARIO who was standing at the gates and told her that she had just come in time. DW2 asked the member of staff why and was told to go inside and see what the problem was.

DW2 proceeded inside and went into the first office which was for MRS. CARRINGTON. DW2 found MRS. CARRINGTON crying. DW2 asked her what had happened and did not get a response. MRS. CARRINGTON continued crying. DW2 proceeded to MR. MDLULI's office and asked him what had happened. He was too reluctant to tell her anything. He told her to ask the Applicant. DW2 called the Applicant to find out what had happened. The Applicant came into her office sat down and related the story of a certain MR. DLAMINI that was purchasing a hammer mill and there seemed to have been a problem with the cheque because MRS. CARRINGTON refused to accept it. DW2 still could not understand what the problem was and why everybody was in the state they were in.

DW2 said the Applicant related the complete story. By that time he was not very happy and he was quite angry. When he related the story he used some foul language when referring to the people that he was talking about. DW2 said the Applicant said and we quote "How can you listen

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to that inferior stupid bitch because she knows fucko and I can make decisions" close quotation. DW2 told the Applicant that he should have explained that to DW1 and DW2 was sure that DW1 would have understood. The Applicant then turned round and said DW2 was taking sides as normal.

The Applicant then stood up and told DW2 that DW2 and her fucking systems are no good. He was tired of them. The Applicant said this is just a straight forward case. DW2 asked him to sit down so that they could continue with the conversation in a civil manner and he refused.

He continued standing and talking. By this time the Applicant was holding the desk of DW2 and talking over her because she was still seated referring to how stupid the whole thing was. The Applicant said who the hell did DW2 think she was. The Applicant said he was not prepared to stand there and listen to that bull shit because he was not prepared to lower himself to the standards of that thing, that thing being a reference to MRS. CARRINGTON DW2 told the Applicant that she was not prepared to change the system that they had been using for the past 8 years to suit him. The Applicant turned around and said if DW2 was not prepared to change the system he would rather resign than work under those conditions. By this time DW2 was very scared of the situation. As far as she was concerned the Applicant was out of order and she was afraid of what he might do and as he went on talking he was getting closer and closer to DW2 and still shouting at the top of his voice and said he would rather fuck off rather than tolerate the system. At this time MR. MDLULI came in together with MARIO. DW2 asked MR. MDLULI to listen to what the Applicant had said. DW2 asked the Applicant to repeat what he had told her. The Applicant then shouted that he would resign. He was not prepared to work under those conditions. DW2 asked the Applicant to put whatever he was saying in writing to avoid any further confrontation concerning the same matter. The Applicant told DW2 he would never do such a thing as he had already told her what his intentions were. The Applicant walked out and banged the door as he walked out. He did not ask for

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permission to be released to go out of the meeting. DW2 said she was afraid because she knew that when Applicant lost his temper he could become violent. According to DW2 Applicant resigned from work.

DW2 said after the Applicant resigned he was paid some money according to what was stipulated in law. Under cross examination DW2 said the Applicant was not given a warning letter for using bad language, he was told verbally on several occasions. In the letter of dismissal dated 17th December, 1993 DW2 concedes that bad language has not been cited as one of the reasons for dismissal. DW2 said besides the Applicant she and MR. PAIVA had a business card and whoever was responsible for a department was given that card. They also had cards which did not have names which were used by Sales Representatives and any other worker that is going to represent the company. DW2 said the Respondent paid for the printing of the business cards. DW2 said the Applicant was not dismissed for coming late to work. DW2 agreed that the Applicant was not dismissed for refusing to come to work on Saturdays, that he was dismissed because he did private business on regular basis during

company time, and because he left his friends and relatives to use company telephone as they liked, and because he only paid two visits to the Mbabane branch of the Respondent per year.

The Respondent then lead the evidence of DW3 BERNARD MDLULI the Accountant of the Respondent who stated that on the 16th December, 1993 at about noon there was a misunderstanding between KENNY LUE and MRS RENNIE CARRINGTON concerning a deal which had been concluded by MR. LUE. DW3 said it was company policy that cheques are normally not accepted and MRS. CARRINGTON as the bookkeeper had to make a decision whether to accept the cheque upon assessing the person who was making payment. MR. LUE approached MRS. CARRINGTON with the cheque from the customer.

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MRS. CARRINGTON asked MR. LUE why he accepted the cheque from this customer. MR. LUE stated that he was unable to work for an organisation such as CARSON WHEELS where his decision to accept a cheque from a customer would be questioned by a mere bookkeeper a person he regarded as below himself. DW3 stated that MR. LUE began using abusive language such the MRS CARRINGTON began to cry and threatened to leave work before knocking off time. As this was taking place the General Manager MRS. PAIVA together with MR. PAIVA arrived. MRS PAIVA went in to find out what the matter was. She approached DW3 and inquired what was going on. DW3 said there seems to be a misunderstanding between MRS CARRINGTON and MR. LUE. Thereupon MRS PAIVA called the Applicant into her office to find out what the misunderstanding was all about. They went into the office and had their discussion. DW3 heard the Applicant shouting. He went close to the office where the two were as his office is next to MRS PAIVA's. DW3 heard the Applicant complain bitterly about the system of work at the company and that he would rather resign. The Applicant at this time was standing up and banging at the table. MRS. PAIVA called DW3 to come in to be a witness to what Applicant was saying. Before MRS. PAIVA called DW3 to go in on his own because he realised the Applicant was about to harm her physically. Under normal circumstances the Applicant addresses the General Manager as MRS. PAIVA but during that encounter he was calling her by the first name SONIA and no longer respecting her as such. After insulting MRS. PAIVA repeatedly the Applicant decided to leave the office. The time was about 4.p.m. when the Applicant disappeared.

DW3 said the Applicant on many occasions did not come at the starting time of half past seven in the morning. He came late. He was supposed to come to work on Saturdays. He would come on some Saturdays and on others he wouldn't. He was given his money after leaving work. He kept the

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car that he was using for sometime about a month. The company paid his rent, electricity, water and telephone bills after he had left employment past the month of January realising that water and electricity bills usually come in arrears. Whenever the Applicant brought the bills they were paid. As far as DW3 is concerned the Applicant resigned from the Respondent but refused to commit his resignation in writing.

Under cross examination DW3said MR. PAIVA was not being disrespectful when he referred to the Applicant as KENNY in the letter dated 17th December, 1993. DW3 said after the quarrel between MR. LUE and MRS. CARRINGTON, MR. LUE continued to come late to work and to absent himself. DW3 also said he prepared the Applicant's final package which included notice pay in the sum of E2700.

It is not seriously in dispute that after the incident involving the Applicant and MRS PAIVA on the 16th December, 1993 no formal charge or accusation was made against the Applicant by the Respondent. The Respondent did not hold an inquiry to determine the circumstances leading to the termination or dismissal of the Applicant from his employment. It is also not in dispute that on the 17th December, 1993 MR. PAIVA the Director of the Respondent had a discussion with the Applicant. MRS PAIVA was present. MR. PAIVA asked the Applicant about the disagreement he had with MRS PAIVA the previous night concerning MR. DLAIMINI's cheque. MR. PAIVA asked the Applicant for his version and wanted to verify some complaints that MRS PAIVA had made to him. The Applicant explained to MR. PAIVA about the cheque and the details of the manner in which the meeting with MRS PAIVA was carried out. The Applicant said they had time for him to explain himself.

No one has suggested that this discussion constituted an inquiry of a charge or accusation laid against the

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Applicant. We have noted that the evidence surrounding the incident where the Applicant is alleged to have abused MRS PAIVA and threatened her with violence has not been challenged by the Applicant. Does this take the Respondent's case any further. It is not in dispute that the Applicant was calling MRS PAIVA by her first name, shouting at the top of his voice and banging MRS PAIVA's table and using abusive language. The Respondent submits that the Applicant's j conduct warranted a summary dismissal and that it was j a valid reason for dismissal.

It was submitted on behalf of the Applicant that no person shall be condemned without a hearing. It was further submitted that for the termination of employment to be fair an employee must be informed of the complaint or accusations and be given an opportunity to state his case. We have made the following findings of fact. When the Applicant was employed by the Respondent he was not employed as a Sales Manager. He was working in the workshop. He was never formally appointed by the Respondent as a Sales Manager. From the evidence before Court he became responsible for the Sales Department. He was the head of department. He was addressed and treated by the Respondent as a Sales Manager. He was responsible for advertising and press. He set up the Mbabane branch and managed it. He was supplied a business card by the Respondent in which his designation was referred to as Sales Manager for the Respondent. His basic salary was E2700. per month. He was also a recipient of a housing allowance, medical aid, electricity, water and telephone bill were settled by the Respondent. He used a company car whose operational costs were borne by the Respondent. He worked Mondays to Fridays. Saturdays and Sundays were voluntary.

On the 16th December, 1993 the Applicant had a misunderstanding with MRS RENNIE CARRINGTON concerning

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a cheque which had been presented by MR DLAMINI to pay for a hammer mill. The misunderstanding between the Applicant and MRS CARRINGTON left both of them upset. MRS CARRINGTON left for her office where she cried. MRS PAIVA then called the Applicant to her office for him to explain what the problem was. Their discussion became unpleasant as the Applicant became violent, abusive, was shouting at the top of his voice banging the desk of MRS PAIVA and moving in closer to her as he banged the desk. Applicant thereafter left the premises without permission of the Respondent. On the 17th December, 1993 MR. PAIVA called the Applicant to his office and asked him what had happened on the 16th December, 1993 when he had a misunderstanding with MRS PAIVA. MRS PAIVA was present and the Applicant gave his explanation. On the 18th December, 1993 the Applicant received a letter from the Respondent terminating his services. He was also paid a sum of E14,694.54 representing the salary for December, 1993, notice pay, severance pay, leave pay and bonus.

At no time during the course of his employment did the Applicant receive a written warning from the Respondent on allegations that he had abused the employees of the Respondent or that he had illtreated them. The Respondent had not at any time given the Applicant a written warning or a charge for using extremely abusive language or threatening some employees with assault. There was never a charge raised by the Respondent against the Applicant alleging that he did not work diligently or that he had refused in all manner to adhere to his working conditions. There was no written charge levelled against the Respondent alleging that the Applicant refused to come to work on time namely at 8. a.m. or that he refused to work on Saturdays. There was no written charge that the Applicant conducted his private business on the Respondent's premises during his working time. There was no written allegation that the Applicant abused the company telephone by leaving his friends and relatives to use it as they liked. There

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was no written charge that the Applicant disregarded the instructions from his superiors. There was no written charge that the Applicant had failed or refused to supervise that Mbabane branch of the Respondent.

None of the witnesses called by the Respondent has given evidence to support these allegations which have been raised in the Respondent's reply filed into Court under paragraphs 4.1, 4.2 thereof. The Respondent does concede that no enquiry was conducted against the Applicant before his services were terminated. It further concedes that no charges were preferred against him and that he was not given an opportunity to be heard or to defend himself. The meeting which MR. PAIVA had with the Applicant in the presence of MRS PAIVA on the 17th December, 1993 where the Applicant was asked to explain what happened in the disagreement he had with MRS PAIVA on the 17th December, 1993 does not satisfy the test of an inquiry because no charge or accusation was put to the Applicant by the Respondent. The Applicant was not informed of the complaint or accusation that had been made by MRS PAIVA to MR. PAIVA nor was he given the opportunity to state his case.

It has been submitted on behalf of the Respondent that in this case it cannot reasonably be expected that the employer could have held a hearing. It has been argued that the Court should be slow to interfere unless there is evidence of bad faith or improper motive. It has further been submitted that MR. PAIVA could not have held a hearing because this is a small establishment. That MR. PAIVA could not hold a hearing in a case where his wife was the Managing Director that he could not be a judge in his own matter and that since this was at the top of Management there was no one who could hold an inquiry or hearing. We are unable to appreciate this argument. MR. PAIVA was able to call the Applicant into his office. He was able to ask the Applicant what had happened on

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the 16th December, 1993 in the disagreement between the Applicant and MRS PAIVA. Nothing could have prevented MR. PAIVA from charging the Applicant and asking the Applicant to state his own case. Nothing stopped MR. PAIVA from calling soliciting evidence from the witnesses that were present when the disagreement took place. The Respondent has submitted that this was a clear case of summary dismissal. The disagreement took place on the 16th December, 1993. The services of the Applicant were terminated on the 18th December, 1993. This was not a case of summary dismissal or face to face as the Respondent would like to call it.

The Management employee is granted the same protection against unfair dismissal just like the ordinary employee. We have not been persuaded that the Applicant deserved to be treated differently. We have also not been persuaded that in the Applicant's case the formal proceedings prior to dismissal should not have been applied. We say so because no evidence was placed before Court by the Respondent to establish its relationship with the Applicant which could attract him being treated differently from other members of staff. Possibly if MR. PAIVA who terminated the services of the Applicant had testified he could have explained what circumstances he took into account and that having taken those circumstances into account he felt it was reasonable to terminate the services of the Applicant. As we have said in the present case. The Applicant was not charged. He was not accused. He was not heard. He was not given an opportunity to defend himself against certain accusations. His dismissal was invariably in the circumstances unreasonable and unfair.

The Applicant seeks additional notice in the sum of E1000. The Applicant was employed on the 3rd January, 1991 and was dismissed on the 18th December, 1993. He had completed not less than two years of continuous

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services for the Respondent. For the period 3rd January, 1991 to 2nd January, 1992 which is more than 12 months or one year. The Applicant was entitled to one month's notice. The evidence is that the basic salary per month for the Applicant was E2700. The Respondent has already paid the sum of E2700. by way of notice. The period 3rd January, 1992 to 2nd January, 1993 is more than one year of continuous employment for the Respondent. The Applicant says he was earning E157.69 per day. He has divided his remuneration of E4100. by 26 days in the month to arrive at the daily income. The Respondent has not challenged those calculations. The Applicant says for 4 days his pay was E630. In the absence of any challenge we grant the Applicant his claim of 4 days additional notice in the sum of E630. and order the Respondent to pay same. The Applicant is claiming payment for public holidays that is Christmas day, Boxing day, Incwala and New Years day, 1993. That is 4 days. This claim has not been challenged by the Respondent. We grant the Applicant his claim for public

holidays numbering 4 days in the sum of E630. and order the Respondent to pay same.

We come to the claim for compensation. The Applicant has not ammended his papers to accommodate the Industrial Relations Act of 1996. In view of the fact that the Industrial Relations Act of 1980 has since been repealed. We cannot assess damages on its basis. We shall have to apply the 1996 Act. The Applicant lead evidence on the question of damages. He secured employment on the 1st June, 1994 with Swazi Trac. Before securing this job he sold his vehicle and some movable assets. He has 4 dependants including his wife. Three of his children are attending school. Having taken the circumstances surrounding the termination of the Applicant's employment we are of the considered view that an award of 8 months salary

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salary by way of compensation in the sum of E21.600 would be equitable. We order that the Respondent do pay to the Applicant the sum of E21,600 as compensation.

The Members have concurred.

MARTIN SAMSON BANDA PRESIDENT

INDUSTRIAL COURT