IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 210/05

In the matter between:

ANDREW MKHONTA & 6 OTHERS **1st APPLICANT**

SEBENELE SIBANDZE & 4 OTHERS **2ND APPLICANT**

and

SWAZILAND POSTS & TELECOMMUNICATIONS **RESPONDENT**

CORAM

N. NKONYANE: ACTING JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANTS: MR. Z. DLAMINI

RESPONDENT: MR. Z. JELE

RULING ON POINTS OF LAW 27.07.05

The applicants brought a notice of application to court on 20.07.2005 for an order in the following terms:-

"***1. The respondent to fully comply with the order of the court granted on the 28th of June 2005.***

2. The respondent be ordered to pay the applicants the sum of Thirty Six Thousand Four Hundred and Twenty
Six Emalangeni Thirty One cents (E36,426.31), which has been deducted by the respondent alleging same to be in respect of Income tax due to the Commissioner of Taxes.

3. The monies aforesaid in prayer two (2) above be made payable to the offices of TZD & Associates, Central
House Nkoseluhlaza Street P. O. Box 6990 Manzini.

4. ***The respondent be ordered to pay costs of this application.***

5. ***Any further and/or alternative relief that the Honourable court may deem fit.***"

The respondent filed a notice of intention to oppose. It also filed a notice to raise points of law dated 19.07.2005.

The points of law raised are as follows:-

"*1. That the settlement agreement concluded by the parties at the Conciliation Mediation & Arbitration Commission on the 23rd June 2005, was a settlement and not an award of compensation.*

2. It was never the respondent's intention to assist the applicant evade the tax obligations by agreeing to have the agreement made an order of court."

The respondent did not file an answering affidavit simultaneously with its notice to raise the points of law. The court will therefore consider the points of law raised in the background of the Founding affidavit before it deposed to by one Andrew M. Mkhonta.

The court will make an observation that the deponent does not say in any paragraph that he is deposing to the facts therein on behalf of the other applicants. There is also not annexed thereon any confirmatory affidavit by any of the other applicants.

The court will however excuse the inelegance in the drafting of the papers on the basis that there is evidence from the memorandum of agreement that it was the same parties that appeared before the Conciliation Mediation and Arbitration commission, hereinafter referred to as CMAC.

The background facts are that on 23 June 2005 the parties entered into an agreement before a CMAC Commissioner in terms of which the respondent would pay the applicants a sum of One Hundred and Fifty Eight Thousand and Ten Emalangeni, Thirty-Eight cents (El58,010.38) in full and final settlement. The payment is referred to as being made ex-gratia. In terms of clause 3 thereof, it is stated:

"*The parties now agree that this shall be made the order of the Industrial court once it is registered by either party.*"

The court is bringing to the fore the contents of clause 3 of the memorandum of agreement for a particular reason. It was one of the arguments by Mr. Jele on behalf of the respondent, that the court should not place any particular importance to the fact that the agreement was registered in court on 28.06.2005. He argued that the registration was merely for security reasons, that is, if the respondent failed to pay the money, the applicant would be in a position to sue out a writ of execution.
It is clear however from clause 3 that it has always been the clear intention of the parties that the agreement entered into should be made an.order of the court.

After the agreement was registered in court therefore on 28.06.2005, it became an order of the court. It is no less important than any other order of the court.

It was also argued on behalf of the respondent that it is only compensation for unfair dismissal that is exempt from taxation. It was argued that the payment in this case was ex-gratia and therefore not exempt.

When one removes the chaff of the nomenclature and has regards to the substance the issues giving rise to the payment of the money was the unfair dismissal of the applicants by the respondent. Paragraph 4 of the Founding affidavit states as follows:

"*On or about the 20th April 2005, we reported a dispute with the Labour Commissioner for unfair dismissal against the respondent, wherein the matter was referred to the Conciliation, Mediation and Arbitration Commission (CMAC) for determination.*"

Whatever name is given to the amount of money in question, it is clear that it was arrived at following the dismissal of the applicants by the respondent.

There is no provision under Section 12(1) (g) of the Income Tax order no.21 of 1975 that the dismissal must have been determined or decided by the court.
The other question that must be determined by the court is whether the respondent was obliged to seek the tax directive in this matter.

This question was addressed by this court in the case of **LEWIS STORES (PTY) LTD VS GUGULETHU NSIBANDE, DEPUTY SHERIFF AND THE ATTORNEY GENERAL, (I.C.) CASE NO. 39/04** and was answered in the negative. In that case reference was also made to the High Court case of **MAHLALELA LUCKY G. V. SWAZILAND ROYAL INSURANCE CORPORATION AND FOUR OTHERS CIVL CASE NO.281/2001,** which addressed the action of the respondent in seeking a tax directive.

The High Court found that the 1st respondent was not obliged or entitled to deduct any amounts from the payment made to the applicant.

In the Lewis Stores case this court also pointed out that as Lewis Stores was no longer the employer of the applicant, it acted ultra vires the Income Tax Order by seeking the tax directive.

A similar finding will be made in the present case, that is, as the respondent was no longer the employer of the applicants, it had no obligation to seek a tax directive.

It follows therefore that the points raised will be dismissed by the court, and that is the order that the court makes.

No order for costs is made.

N. NKONYANE

ACTING JUDGE-INDUSTRIAL COURT