IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE N0.557/08 B**

In the matter between:

SWAZILAND POST AND TELECOMMUNICATIONS CORPORATION **Applicant**

and

MUSA MABUZA **Respondent**

In re:

MUSA MABUZA **Applicant**

and

SWAZILAND POST AND TELECOMMUNICATIONS CORPORATION **Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
MATHOKOZA MTHETHWA	**:**	**MEMBER**
FOR APPLICANT	**:**	**B. MAGAGULA**
FOR RESPONDENT	**:**	**S. DLAMINI**

J U D G E M E N T – 25/02/2009

1. On the 17th September 2008 the parties entered into a written

Memorandum of Agreement at the Manzini offices of the Conciliation, Mediation & Arbitration Commission.

2. The memorandum records the settlement of a dispute reported by the Applicant and referred to conciliation in terms of the provisions of Part V111 of the Industrial Relations Act 2000 (as amended).

3. The terms of the settlement are to the effect that the present Applicant shall pay the sum of E96,558-04 subject to any statutory deductions to the present Respondent on or before 30th October 2008 in full and final settlement of all the issues in dispute.

4. The memorandum contains a further clause in terms of which both parties consent to the agreement being lodged with the Industrial Court by the Commission in terms of section 84 (1) (b) of the Industrial Relations Act and made an order of the court.

5. The agreement is signed by the Respondent and by one Mandla Hlophe on behalf of the Applicant. Hlophe was at all material times the Industrial Relations Manager of the Respondent. The agreement is witnessed by the CMAC Commissioner who was appointed to supervise the conciliation of the dispute.

6. As agreed in terms of the Memorandum, the Commission duly lodged the agreement with the Industrial Court and on the 2nd December 2008 the agreement was duly registered and made an order of the court.
7. The Applicant has now applied to the Industrial Court for an order in the following terms:

7.1 *That the order granted by the above Honourable Court on the 4th December 2008 be rescinded and set aside.*

7.2 *That the execution of the judgement granted on the 4th December 2008, be stayed pending the final determination of this matter.*

7.3 *That the memorandum of agreement entered into by the parties on the 17th September 2008, be cancelled and set aside.*

7.4 *That pending a civil action to be instituted by the Applicant against the Respondent, the amount of E96 558.04 Ninety-Six Thousand Five Hundred and Fifty-eight Emalangeni and Four Cents) be held in an interest bearing account to be controlled jointly by the respective legal representatives of the parties.*

8. In support of these prayers, the Applicant has filed a founding affidavit made by its Legal Advisor Mandisa Matsebula together with certain confirmatory affidavits. Ms. Matsebula states that the facts contained in her affidavit are within her knowledge in so far as they have been drawn from the files and records of the Applicant kept under her control and to which she has access. The court shall caution itself in relying on Ms. Matsebula's affidavit that she has no personal knowledge of the issues dealt with in the affidavit save in

so far as recorded in the Applicant's files.

9. Ms. Matsebula alleges that the Respondent is indebted to the Applicant in an amount of E86,361-98 in respect of funds allegedly misappropriated by the Respondent whilst he was an employee of the Applicant. Considering that the Respondent resigned from the employ of the Applicant in February 2007, it is reasonable to expect some explanation from the Applicant as to why legal proceedings have not yet been instituted despite the elapse of two years. No such explanation is forthcoming.

10. The Respondent denies liability to the Applicant in the amount alleged or at all. It is not necessary for the court to enter into the merits of the disputed claim. Suffice it to say that the Applicant has made allegations against the Respondent which, if proved at a trial, would establish an indebtedness in the sum of E86,361-98.

11. More central to the present application are the allegations of Ms. Matsebula pertaining to the memorandum of agreement which has been made an order of court. Ms. Matsebula alleges, and we quote her verbatim:

"The person who signed the agreement on behalf of the Applicant Mr. Mandla Hlophe did so erroneously and without the full authorization of the Applicant. What he had been mandated to do was only to acknowledge that the computation of the Respondent's gratuity is in the amount of E96,558-04, not to agree to the payment thereof."

12. The court notes that it is not alleged that Mandla Hlophe had no authority to attend at the conciliation meeting at the offices of the

Commission. Instead, it is alleged that he had an express, specific and limited mandate which he exceeded. On close examination, however this allegation is seen to be entirely unsubstantiated. There is no affidavit from Mandla Hlophe filed before court attesting to the nature of his mandate, nor is there any affidavit filed by the Applicant's managing director or board of directors or any other person or body in authority over Hlophe regarding an express mandate given to him. The legal advisor on her own admission has no personal knowledge of the mandate given, and she has not produced any document contained in the Applicant's files which provides evidence of an express mandate.

13. The Respondent in his answering affidavit states that Mandla Hlophe attended the initial conciliation meeting on 3 September 2008 accompanied by Sithembiso Shongwe, the Human Resources Officer. At this meeting the amount of the gratuity due to the Respondent was calculated in the sum of E96.558-04. A second meeting was held on 17th September 2008 on which date the memorandum of agreement was signed. These allegations are not denied by the Applicant.

14. Not only is there no evidence before us that Mandla Hlophe's mandate was expressly limited to merely acknowledging the computation of the Respondent's gratuity, we find it most improbable that an Industrial Relations Manager would simply disregard an express mandate given to him and go to the extent of signing a settlement in disregard of his employer's instructions.

15. We reject the Applicant's allegation that Hlophe was given a specific and limited mandate which he exceeded. In our view he

attended the conciliation meetings and entered into the settlement agreement in the exercise of the general authority and mandate he derived from his position as Industrial Relations Manager. Clearly Hlophe considered that he had the necessary authority to negotiate and conclude a settlement agreement since he signed the agreement. We also infer from the singular absence of any affidavit by Hlophe that he does not agree with the Applicant's belated repudiation of his authority.

16. In our view an Industrial Relations Manager is usually vested, by virtue of his office and functions with authority to settle industrial relations disputes pertaining to an employee's terminal benefits. The Applicant has not furnished us with any proof of a policy or directive which expressly limits the powers which normally attach to the position of Industrial Relations Manager.

17. The Applicant submits that it has consistently manifested an intention to recover the money allegedly embezzled by the Respondent, and that the settlement agreement was signed in error. The Industrial Relations Manager must have been aware of the Applicant's claims, yet he deliberately and calculatedly signed the agreement undertaking to pay the Respondent's gratuity within 30 days. He did so after having the opportunity to consult and take full instructions from his superiors after the first conciliation meeting. Furthermore, the Applicant took no steps to challenge or set aside the memorandum of agreement until a writ of execution was delivered in December 2008.

18. It is the finding of the court that Mandla Hlophe possessed the necessary authority to bind the Applicant when he signed the

memorandum of agreement. The belated perception of the Applicant that it erred in undertaking to pay the Respondent's gratuity is not a ground entitling it to escape from the agreement. We find that the agreement is valid and binding on the Applicant.

19. The agreement was reached in full and final settlement of all the issues in dispute. The court is not aware of all the issues in dispute before the Commission, so we are not in a position to venture any opinion as to whether the Applicant is precluded from pursuing its claim against the Respondent.

20. The other issue raised and argued by the Applicant is that the court ought not to have made the agreement an order of court on the 17th September 2008 because the application for such an order was not served upon the Applicant.

21. In point of fact, the application was not served upon either party. It was brought to court by the Commission in terms of section 84 (1) of the Industrial Relations Act 2000 (as amended), which provides:

"(1) If a dispute has been determined or resolved, either before or after conciliation, the parties shall, with the assistance of the Commissioner-

(a) *prepare a memorandum of agreement setting out the terms upon which the agreement (was) reached; and*

(b) *lodge the memorandum with :*

(i) *the Commission and the Commission shall lodge it with the court."*

22. In terms of the memorandum itself, the parties agreed to the Commission lodging the agreement with the Industrial Court and having it made an order of court. In terms of the Act, the Commission is required to lodge the memorandum with the court and the parties are deemed to know the law. No useful purpose would be served by requiring notification of the lodging to the parties, and this would only serve to create unnecessary expense and delay. The Commission is an independent body whose duty is to protect the interests of both parties. In our view the legislature intended, when it enacted section 84 (1) (b), that the Commission would represent both parties to an agreement when it lodged the memorandum with the court, and in those circumstances notice to the parties is in the normal course unnecessary. We do add by way of a caveat that there may be circumstances where the Commission should give notice - for instance, where it has been brought to its attention that one of the parties is repudiating the agreement.

23. There is no evidence before us that the Applicant notified the Commission that it repudiates the agreement, or that there were any other unusual circumstances which should have prompted the Commission to give notice to the Applicant. We find that the memorandum of agreement was properly lodged and made an order of the court, and no irregularity was occasioned by the failure to give notice to the Applicant.

24. Finally, the Applicant has not made out any case why the Respondent should be kept out of his judgement merely because the Applicant intends to institute proceedings against him. A bald

allegation that he has no assets does not justify holding his gratuity pending such proceedings in a bank account to which he has no access, particularly where the Applicant has delayed instituting proceedings for two years without any explanation.

25. For all the above reasons, the application is dismissed with costs.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT