IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 03/2010

In the matter between:

SWAZILAND NATIONAL LEARNING INSTITUTE AND ALLIED UNION (SNALIAW)
APPLICANT

And

SEBENTA NATIONAL INSTITUTE **RESPONDENT**

CORAM:

D. MAZIBUKO : **JUDGE**

A. M. NKAMBULE : **MEMBER**

M. MTETWA: **MEMBER**

MR. C. BHEMBE: **FOR APPLICANT**

MR. D MANDA: **FOR RESPONDENT**

JUDGEMENT - 20th AUGUST 2010

Enforcement of a written agreement, party seeking to vary terms of a written agreement by extrinsic evidence, parole - evidence rule and caveat subscriptor rule applied, party challenging mandate given to its agent - validity of agreement not affected thereby, dispute before CMAC settled by written agreement, role of Commissioner under section 84 (l)(a) Industrial Relations Act No. 1 2000 as amended.

1. The Applicant before court is Swaziland National Learning Institution and Allied Workers Union, a trade union duly registered in terms of the Industrial Relations Act 1/2000 (as amended). The Applicant represents its members in this suit who are also employees of the Respondent. The Applicant and the Respondent have admitted that they both have power to sue and be sued.

2. The Respondent is Sebenta National Institute a learning institution operating as such in Mbabane. The answering affidavit of the Respondent is signed by a certain Ms. Fikile Buthelezi who introduced herself as a senior accountant of the Respondent. The confirmatory affidavit is signed by Mr. George Thabede who introduced himself as Acting Chief Executive Officer of the Respondent (hereinafter referred as the CEO).

3. About October or November 2009 the Applicant reported a dispute at CMAC against the Respondent. The dispute concerned a claim by the Applicant against the Respondent for salary increments. By CMAC is meant the Conciliation, Mediation and Arbitration Commission established in terms of section 62(1) of the Industrial Relations Act No. 1/2000 (as amended) hereinafter referred as the Act.

4. About the 3rd November 2010 the parties signed an a

agreement which settled the dispute. The agreement was signed by a certain Mr. Kofi Mhlongo for the Applicant who was its Secretary General. Mr. Mhlongo's signature was witnessed by a certain Mr. Eric Dlamini. Mr. Richard Magongo signed on behalf of the Respondent. His signature was witnessed by Mr. George Thabede. Mr. George Thabede was the CEO of the Respondent at the time of signing the settlement agreement.

5. A large portion of the argument submitted before court is centred on the agreement dated 3rd November 2009. It is therefore necessary that, that agreement be reproduced verbatim, as we hereby do;

MEMORANDUM OF AGREEMENT

BETWEEN

SWAZILAND NATIONAL LEARNING INSTITUTIONS AND ALLIED WORKERS UNION (SNALIAWU)

(Hereinafter referred as the Union)

AND

SEBENTA NATIONAL INSTITUTE

(Herein after referred as "Sebenta")

2009/2010 salary negotiations settlement

PREAMBLE

WHEREAS *the parties reached a deadlock during the salary negotiations and subsequently a certificate of unresolved dispute was issued by the Conciliation Mediation and Arbitration Commission (CMAC)* ***REF: No. SWMB 380/09.***

AND WHEREAS *the Union has evoked Section 86 of the Industrial Relations Act of 2000 (As amended) and expressed its intention to embark on a strike*

action.

AND WHEREAS *the parties have engaged in further negotiation to avert the strike action.*

IT IS HEREBY AGREED AS FOLOWS:

Having engaged in salary negations for the year 2009/2010, an agreement was reached on the 3rd of November 2009 by both parties as follows:-

1. That Sebenta National Institute shall grant its employees a salary increase of 11.8 %.

1.1 Sebenta pays all its employees within the Union's Bargaining Unit, in terms of the Memorandum of Understanding, and its employees as at 1st April 2009 to the 31st March 2010, an across - the-board salary increase of11.8% per annum, with effect from 1st April 2009.

1.2. That the said increases be payable on or before the 25th November, 2009.

1.3. That the said increases once implemented form a permanent part of one's salary.

2. The Union shall revoke and/or cancel the notice of intended strike action arising out of the dispute under CMAC Reference No. SWMB 380/09.

3. That the content of this memorandum of understanding is made agreement under the ouspices [auspices] of CMAC.

4. That this is a full and final settlement of the dispute.

THUS DONE AND SIGNED IN MBABANE ON THE 3rd DAY OF NOVEMBER 2009.

FOR THE UNION ***FOR SEBENTA***

WITNESS ***WITNESS***

3rd November 2009 ***3rd November 2009***

DATE ***DATE***

For the sake of convenience this agreement shall be referred to as Annexure **A1.**

6. The Applicant has prayed for an order as follows:-

(1) Directing the Respondent to pay Applicant's members employed in Respondent's undertaking salary arrears with effect from the 1st of April 2009 to date of the grant of this order and on every subsequent months, being the difference between 11.8 % percent in terms of a Memorandum of Agreement entered into between the parties on the 3rd November 2009 and 9.9 % actually paid to Applicant s members aforesaid.

(2) Costs of application.

(3) Further or alternative relief

The application is opposed by the Respondent. The Respondent had raised a point *in limine* and also pleaded over the merits. At the hearing of the matter the Respondent's counsel abandoned the point and stated that the point is inter-linked with the merits. The Court will not spend anymore time on that point as it was argued together with the merits as proposed by the Respondent's Counsel

7. It is common cause that the Applicant reported a dispute at CMAC in which the Applicant demanded from the Respondent qua employer a salary increment of 11.8% (Eleven point eight percent) for the financial year 2009/2010.

The Respondent made an offer of increment of 9.8 % (Nine point eight percent). The negotiation continued between the parties as a result of which the Respondent increased her offer and an agreement was reached dated 3rd November 2009 annexure **Al** aforementioned.

8. In terms of annexure **Al** the Respondent agreed to grant
its employees (as represented by the Applicant) a salary increment of 11.8% (eleven point eight percent) beginning 1st April 2009 to the 31st march 2010. It was further agreed that payment of the increment shall take place on or before the 25th November 2009.

9. It is common cause that on due date for payment the Respondent failed to pay the Applicant's members (Respondent's employees) the agreed 11.8% salary increment. Instead the Respondent paid her employees 9.8% increment. The employees (duly represented by the Applicant) were offended by the Respondent's conduct which led to the present application.

10. The Respondent admits that the agreement annexure **Al** was signed by its representatives namely Mr. Richard Magongo and his witness Mr. George Thabede. The counsel for the Respondent admitted in his argument that these two (2) representatives had power to bind the Respondent in an agreement in particular annexure **Al.** According to the Respondent's Counsel the source of complaint is that the Respondent's representatives exceeded the limits of their mandate when negotiating and contracting with the Applicant. The Respondent is also challenging the agreement itself and has advanced several reasons for refusing to honour the agreement (annexure **Al).**

10.1. According to the Respondent her representatives were mandated to agree with the Applicant on a salary increment of 9.9% (Nine point nine percent) only. This strict mandate was caused by the limited financial resources of the Respondent. The Respondent could not agree to an increment beyond that limit as that would result in an economic disaster for the Respondent. An increment beyond 9.9% would create an economic liability which the Respondent could not satisfy. The strict mandate was also made known to the Respondent's employees.

Since the Respondent's representatives have exceeded their mandate the Respondent has decided not to comply with the agreement and has treated it as non existent. The Respondent has instead given its employees a 9.9% (nine point nine percent) increment which the Respondent finds affordable. The above is the Respondent's submission.

10.2. The Respondent argued further that her representatives (the signatory to annexure **Al** and his witness) failed to bring the proposed agreement to the Respondent's board of directors for approval before signing and dispatching same. By failing to get the board's prior approval on the agreement the Respondent's representatives exceeded their authority when they signed annexure **Al.** For that reason the Respondent has resolved to treat the agreement as void and unforceable because it lacks the authority of the board.

10.3. A third argument from the Respondent is that the agreement (annexure **Al)** was not signed before a CMAC official. Instead it was signed at Mbabane town by both parties at the Respondent's boardroom, on the 3rd November

2009. It was taken before CMAC on the 4th November 2009 by the Applicant in the absence of the Respondent. According to the Respondent that procedure was irregular and amounts to a breach of statute (the Act) and renders the agreement null and void and unenforceable. The agreement (annexure **AI)** was supposed to be prepared in the presence and with the assistance of the CMAC Commissioner. Since the parties prepared and signed the agreement in the absence and without the assistance of the CMAC Commissioner a statutory requirement had been breached. That breach of statute has compromised the authority and legal validity of the agreement and renders it null and void, and unenforceable.

11. The court will now arguments and determine legally sound and analyse the Respondent's whether or not they are factually correct.

12. The Respondent introduced into Court a Memorandum dated 2nd November 2009. The Memorandum is signed by Mr George M. Thabede who was then the CEO of the Respondent albeit in an acting capacity. The Memorandum is attached to the Respondent's affidavit marked **GT1.** In his affidavit Mr. Thabede alleges that as CEO he notified all the Respondent's employees that the Respondent's board had approved a salary increment of 9.9% (nine point nine percent) only. The Respondent's employees were directed in the same memorandum to form a local committee that will represent them in salary negotiations. Further that, that local committee should prepare a memorandum of agreement which will be signed by the union and the Respondent and

thereafter be taken to the board for ratification.

12.1. Annexure **GT1** is a memorandum allegedly addressed to the Respondent's employees by the CEO. Since the employees of the Respondent were represented by the Applicant in salary negotiation it is not clear as to why did the CEO fail to communicate his memorandum to the Applicant.

The CEO and the Respondent's counsel have failed to explain the reason the CEO avoided the Applicant who is the employee representative had a mandate to negotiate with the Respondent and enter into an agreement. The Applicant represented the employees at CMAC. The mandate of the Applicant to represent the employees is a fact that was well known to the CEO at the time of writing the memorandum (annexure **GT1).** It is not clear what purpose would be served by the suggestion from the CEO to the Respondent's employees that they should form a local committee to represent them when infact the employees already had a union (Applicant) which represented them. What is further confusing with the memorandum (annexure **GT1)** is that it directs the Respondent's employees to form a local committee which should prepare a memorandum of agreement for the employees which agreement will however be signed by the union on behalf of the same employees. Why should the CEO make a directive as to who should negotiate an agreement for the employees and who should sign that agreement once it is drafted. Once employees have formed a union as the case is with the Respondent's employees (Applicant's members) the employees are entitled to manage their own affairs without interference from the CEO.

12.2. There is no indication in the Respondent's affidavits as to how did the CEO convey the contents of the annexure **GT1** to the Respondent's employees. The CEO states as follows in paragraph 3.3 of his confirmatory affidavit;

> "*The Management Team did not have the authority and/or mandate to sign the agreement granting the Union more that 9.9% as approved by the board. This fact was communicated by myself to all staff members by Memorandum dated 2nd November 2009 a copy of which is hereto annexed marked* ***"GT1****". Further, the increase in 9.9. % was communicated to the employees by Memorandum dated 12th November 2009 a copy of which is hereto annexed and marked* ***GT2".***
>
> The CEO has failed to demonstrate with evidence that he communicated the contents of annexure **GT1** to the Applicant or any employee of the Respondent. It is a finding of this court that the CEO failed to communicate the contents of annexure **GT1** to any person other than himself.
>
> Whatever the Respondent's board had decided it had no effect in any event on the contract (annexure **Al).**

12.3. Annexure **GT1** is dated 2nd November 2009. The agreement subject of dispute (annexure **Al)** was entered into on the 3rd November 2009. That means that on the 3rd November 2009 when the CEO signed the settlement agreement (annexure **Al)** as witness he already knew of the contents of his memorandum (annexure **GT1).** That means further that at the time the CEO and Mr. Richard Magongo signed the

settlement agreement with the Applicant, the CEO knew that he and Mr. Richard Magongo were acting contrary to the mandate of the Respondent's board. The signing of the settlement agreement by the Respondent's representative was therefore not a mistake but a deliberate breach of the alleged mandate from the board.

12.4. In the quotation that appears in paragraph 12.2 of this judgement, the CEO makes the point that; the management team did not have authority and/or mandate to sign the agreement granting the Union 11.8% increment.

By management team the CEO meant himself and Mr. Richard Magongo, the signatories to annexure **Al.** If indeed the management team did not have the requisite authority to sign annexure **Al,** there is no explanation from the management team or Respondent as to why the two (2) went ahead with signing of that agreement. The management team knew as at 2nd November 2009 that their mandate is limited by the board to agree to 9.9% increment. It is not likely that by the following day 3rd November 2009 they had already forgotten the limit on their mandate. There is no explanation from the negotiating team members regarding their controversial conduct. The Court is left with no option but to conclude that they signed annexure **Al** intending to conclude a contract and they actually concluded a written contract with the Applicant. The conduct of the Respondent and the CEO creates an impression that the memorandum dated 2nd November 2009 (annexure **GT1)** is an afterthought created to

mislead the Court. The Court is not convinced that the Respondent's representatives signed the agreement (annexure **Al)** without proper authority as alleged. The facts do not support the Respondent's version.

However, even if the Respondent were to convince the Court on the facts (which is not the case) that the Respondent's representative exceeded the limit of authority when signing annexure **Al,** that does not entitle the Respondent to treat the agreement as null and void and unenforceable. The limit on the authority of the Respondent's representative is a matter between the Respondent's board and her representative. That matter is governed by the rules of contract and the rules of agency.

12.5. It is noted that the Respondent does not allege that at the time of signing the agreement (annexure **Al)** their representative (signatory) did not understand the contents of the document he was signing. The Court therefore concludes that the terms and conditions of the agreement were clearly understood by both parties to the agreement in particular the signatories.

12.6. It is noted further that the Respondent does not allege any improper conduct on the part of the Applicant in negotiating or signing the agreement such as fraud, duress or misrepresentation.

The Court is of the view that the matter before Court is one that is governed by the *caveat subscripto* principle. The principle states as follows:

"*It is a matter of common knowledge that a*

person who signs a contractual document thereby signifies his assent to the contents of the document, and if these subsequently turn out not to be his liking he has no one to blame but himself

RH CHRISTIE: The law of contract 4th edition (Butterworths) 2001 at page 199.

The caveat subscripto principle has been applied by the Courts authoritatively in various judgements including the leading case of **BURGER v CENTRAL SAR 1903 TS 571.**

12.7 The same legal principle is stated as follows; by the authors;

'*It is sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature*'

'*The rule is applied not only when the person studies the document but also when he appends his signature carelessly or recklessly and when he fails to avail himself of an opportunity to study provisions incorporated by reference. In such circumstances the person signing can be considered as taking the risk*'.

AJ KERR: The principles of the LAW OF CONTRACT, 6th edition, Butterworks (2002) at page 102 -103.

The Court agrees with the principles stated above by the learned authors. The Court observes the following factors regarding the conduct of the Respondent;

1. The agreement was signed by the authorised

representatives (negotiating team) of the Respondent namely the CEO and Mr. Richard Magongo.

2. The contents of the agreement were clearly understood by both the parties at the time of signing. There is no allegation to the contrary in the Respondent's affidavits.

3. The agreement is a result of extensive negotiation between the parties both at CMAC and workplace level.

4. There is no provision in the agreement that requires approval or ratification by the Respondent's board of directors before signining or implementation of the agreement (annexure **Al).**

5. The Respondent became aware of the existence of the agreement on the 3rd November 2009 but did not take action to rectify its contents or set it aside as a whole.

6. The agreement is in full and final settlement of the negotiations between the parties.

7. With the aforegoing the court finds that the agreement (annexure **Al)** is binding on the parties and is enforceable.

12.8 The Respondent does not allege that it was misled into signing the agreement (annexure **Al).** The Respondent's principal signatory (Mr. Richard Magongo) knew that he was signing a contract whose terms and conditions he had read or had been read to

him as well as the other signatories to the agreement, and each signatory confirmed that he fully understood the contents of the agreement and each showed his assent by appending their signatures to the agreement. The Respondent's complaint, if any, should be directed against its board of directors and its representatives aforementioned. The Respondent is therefore bound by the agreement (annexure **A1).**

The relationship between the Respondent's representatives (the CEO and Mr. Richard Magongo) and the Respondent itself is one of agency. The learned author describes the agent and principal relationship as follows;

"*An agent is a person who , by performing acts for and on behalf of another person, known as his principal, places the latter in legal relations with the third persons*". "*The essence of the modern view of the agency is that there must be a third party in the existence or contemplation, and that the agent is simply and solely the representative of the first party, his principal, to make transactions for him with the third party; the transactions when made are* ***ipso jure*** *the transaction of the principal....*"

JTR GIBSON: WILLE'S PRINCIPLE OF SOUTH AFRICAN LAW 6th edition, Juta and Co. (1970) at pages 449 - 450

13.1. When applying the principle of agency as stated above, the court accepts that the CEO and Mr. Magongo were the agents of the Respondent when negotiating and subsequently signing the agreement (annexure **A1)** while the Applicant was an agent of the Respondent's employees.

13.2. The agreement that the Applicant's and the Respondent's agents entered into (annexure **A1)** is *ipso*

jure the agreement of both principals (Applicant and Respondent) and is therefore binding on them.

14. The Respondent's remedy if any, lies in the relationship she has with her agents. The learned author states as follows regarding the limit of the agent's authority;

> *"An agent must act in accordance with, and within the limits of, his powers, whether such be express or implied. If an agent either negligently or fraudulently fails to perform his obligations or performs them improperly, and thereby causes loss to his principal, he is liable to him in damages;*
>
> ***he is also liable if he causes loss to his principal while acting within his ostensible powers, but in excess of instructions, privately given to him by his principal".***
>
> *(emphasis added)*
>
> **J.T.R. GIBSON: Supra page 455.**

15. The aforementioned legal authority indicates that even if the Respondent can prove that his agent has exceeded authority when signing the agreement annexure **AI,** the agreement remains valid. The Respondent may have recourse against her agent if so advised.

16. In their third line of argument the Respondent avers that the agreement (Annexure **AI)** is defective in that it was not signed before a CMAC Commissioner. In support of this argument the Respondent referred the court to section 84 (1) of the Act. That section reads thus;

> "*If a dispute has been determined or resolved, either before or after conciliation, the parties shall, with the assistant [assistance] of the Commissioner-*
> *(a) Prepare a memorandum of agreement setting 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.

16.1. The Respondent argues that the agreement (annexure **AI)** was drafted and signed by the parties themselves at the Respondent's workplace and in the absence of the Commissioner. The agreement was signed on the 3rd November 2009. It was then taken by one party, the Applicant, to the Commissioner on the 4th November 2009. The Commissioner merely endorsed an already prepared agreement and did not assist the parties in preparing the agreement. The agreement is therefore defective in as much as it was not prepared with the assistance of the Commissioner. In terms of section 84 (1) (a) of the Act it is mandatory for an agreement to be prepared with the assistance of the Commissioner. The above is the Respondent's argument.

16.2. There is a document attached to the Applicant's affidavit marked annexure **A.** That document is entitled 'Memorandum of Agreement' and it is written partly in manuscript by the Commissioner named Aaron Dlamini and it is also signed by him. Annexure **A** has provision for three (3) signatures adjacent to each other namely that of the Applicant, Commissioner and Respondent. In the space provided for the Commissioner there is a signature presumably that of Commissioner Aaron Dlamini who conciliated the dispute between the parties. There is no signature in the space provided for the Applicant as well as the space provided for the Respondent. However next to the Commissioner's signature there is an endorsement written

'*see agreement attached*'. Indeed attached to annexure **A** is an agreement annexure **Al** hereto whose contents are quoted fully in paragraph 5 above.

6.3. The endorsement in annexure **A** which reads '*see agreement attached*' is understood by the Court and by the counsel for each of the parties to mean that there is an agreement in writing attached to annexure **A.**

6.4. As aforestated that agreement which is attached to annexure **A** is annexure **Al.** That endorsement means that annexure **A** should be read with annexure **Al** in order for the reader to have a complete transaction before him.

16.3. The contents of the annexure **A** reveal the circumstances under which annexure **Al** was concluded. For a full understanding of the events it is therefore necessary that the contents of annexure **A** be quoted in full as we hereby do;

MEMORANDUM OF UNDERSTANDING

APPLICANTS NAME:	**SNALIAWU**
ADDRESS:	**P.O. BOX 1395** **MBABANE**
AND	
RESPONDENTS NAME:	**SEBENTA NATIONAL INSTITUTE**
ADDRESS:	**P.O. BOX 64** **MBABANE**

1. **NATURE OF DISPUTE:**

   Failure and or refusal to agree on union demand of wage increase.

2. **The undersigned parties record the settlement of their dispute in the following terms:**

The parties have since agreed to settle their dispute in accordance with the attached Memorandum of Agreement. That the said agreement nullifies the certificate of unresolved dispute No. 580/09 issued on the 2.10.2009.

3. Both parties hereby agree to comply with their obligations in terms of this agreement and further consent to this agreement being lodged with the Industrial Court by the Commission in terms of Section 84 (1) (b) of the Industrial Relations Act, 2000 (as amended) and made an order of the court.
4. The said agreement has been read to both parties and having confirmed that they fully understand its contents now append their signatures/thumb impression in the presence of the **Commissioner Aaron M. Dlamini** as witness.

THUS DONE AND SIGNED AT MBABANE ON THIS 4th DAY OF NOVEMBER 2009

APPLICANT **RESPONDENT**

A. M. DLAMINI
COMMISSIONER

CMAC date stamp: 4th November 2009.

See agreement attached

16.5. It is common cause that the SNALIAWU as appearing on annexure **A** is an acronym for SWAZILAND NATIONAL LEARNING INSTITUTE AND ALLIED WORKERS UNION, the Applicant. It is also noted by the court that both the Applicant's full name and acronym appear on the pleadings before court. The parties before the CMAC commissioner are therefore the same parties before the court and in the same order.

16.6. It is further common cause that annexure **A** was completed by the Commissioner Mr. Aaron Dlamini in the process of conciliating the dispute between the Applicant and the Respondent.

16.7. In paragraph 1 of annexure **A** the nature of the dispute between the parties is disclosed as a failure or refusal by the parties to agree on a union demand of wage increase. The Respondent stated in paragraph 3.1 of the affidavit of the CEO (Mr. George Thabede) that the union (Applicant) demanded a salary increase of 11.8% while the Respondent offered 9.9%. This resulted in a deadlock. The Applicant issued a strike notice. The parties resumed negotiations which resulted in an agreement annexure **Al.** This submission is supported by the preamble to annexure **Al** as read with paragraph 1 and 2 of annexure **A.**

16.8. For the reason stated above the Court accepts that annexures **A** and **Al** are two (2) portion of the same transaction and should therefore be read as one.

16.9. The provisions of paragraphs 1, *2,* 3 and 4 of annexure
A (quoted above) clearly indicate that, that document was prepared by the commissioner Mr. Aaron Dlamini.
When doing so the Commissioner was assisting the parties to settle their dispute. As a result of that assistance the parties have settled their dispute by way of a written agreement, annexure **Al.** Annexure **Al** is therefore an agreement concluded between the parties which was prepared with the assistance of the Commissioner as required by section 84 (1) (a) of the Act.

16.10. It is common cause that annexure **AI** was typed and signed by the parties in the Respondent's office and in the absence of the Commissioner. It was then submitted to the Commissioner who endorsed it as confirmation that, it settles the dispute between the parties which the Commissioner had jurisdiction to conciliate. According to the Respondent that procedure was irregular.

16.11. The Act (section 84 (1) (a)) does not require the physical presence of the Commissioner in typing and signing the settlement agreement. The Commissioner is not required to literally draft an agreement for the parties. The assistance required from the Commissioner is to ensure that once a dispute is settled by agreement, that settlement is in writing and is legally compliant and capable of being enforced. The role of the Commissioner is to ensure finality in a dispute hence it examines the agreement to make certain that it is factually and technically correct. No doubt parties may appear before the Commissioner who are legally challenged and cannot afford the expense of hiring legally trained personnel to draft their settlement agreements. In such a case the Commissioner is enjoined to assist the lay parties by drafting them an agreement that will suit their needs and interests and also interprete the clauses therein before the parties sign the agreement. The assistance that the Commissioner may render the parties may come in the form of advise regarding terms and conditions which the parties may include in their agreement or overall supervision of the finished product (agreement). The word 'assistance' in the Act does not mean that the Commissioner should take-over the negotiations and impose an agreement on the parties.

16.12. The Court finds that the Commissioner acted correctly in making an endorsement on annexure **A** to reflect that it should be read as one (1) with annexure **AI** in compliance with section 84 (1) (a) of the Act. The court finds further that it is not irregular for the parties to type and sign their settlement agreement in the absence of the Commissioner. Further that upon signing annexure **AI** the Applicant acted lawfully in submitting it to the Commissioner in order for the latter to finalise the matter for which he had been appointed to conciliate. There is no need for both the Applicant and the Respondent to physically deliver the agreement to the Commissioner after signing it. What is of importance is the contents of the settlement agreement and not the manner it was drafted or delivered to the Commissioner.

17. The Respondent has introduced into court annexure **GT2.** This is a letter dated 12th November 2009 which is annexed to the Respondent's affidavits. According to the confirmatory Affidavit of the CEO, annexure **GT2** is introduced to prove that the Respondent's employees (Applicant's members) were informed that their salaries had been increased by 9.9% (nine point nine percent).

17.1. Annexure **GT2** is dated 12 November 2009. That means this annexure was written about 9 (Nine) days after the agreement, (annexure **AI)** was signed. Annexure **GT2** has no retrospective effect. Annexure **GT2** cannot affect their validity of an agreement which has already been executed by the parties. In as for as the Applicant is concerned (annexure **GT2)** is irrelevant.

17.2. The letter annexure **GT2** appears to have been written by the CEO and addressed to the senior accountant of the Respondent. This letter does not concern the Applicant at all.

It is the court's finding that annexure **GT2** is irrelevant to the matter before court and is therefore inadmissible. It is an internal communication between one officer and another at the Respondents workplace.

18. The evidence and argument of the Respondent may further be considered from another angle to ascertain whether or not it makes legal sense. The court has in mind the contents of the Respondent's affidavit and the conclusion that can be drawn therefrom. It is noted that there is no affidavit from Mr. Richard Magongo (Respondent's signatory) to indicate that he had been informed regarding the limitation on his capacity to bind the Respondent to an agreement.

18.1. In paragraph 7.4 of her affidavit the Respondent's witness states as follows;

> **"*I am advised and verily believe*** *that the Board had sanctioned only a salary increase of 9.9 % after consideration of the financial position of the Respondent.*
>
> *The Respondent's negotiating team did not have the mandate to bound [bind] the Respondent beyond 9.9% offered by the Institute and sanctioned by the Board. I humbly refer to the Confirmatory Affidavit of the Acting Chief Executive Officer*".
>
> *Emphasis added*

In her affidavit, the Respondent's witness (Ms Fikile Buthelezi) admits that she is relying on advice. She therefore has no personal knowledge of the allegations she

has made in her affidavit. The allegations made by Ms Fikile Buthelezi amount to inadmissible hearsay.

18.2 The CEO (Respondent's second witness before court) does not assist the Respondent at all with his evidence. Paragraph 3.3 of the affidavit of the CEO has been produced verbatim in paragraph 12.2 of this judgement. The CEO does not state that the board communicated to Mr. Richard Magongo that his mandate to bind the company was limited to 9.9%. In paragraph 4 of that affidavit it reads as follows;

> '*I reiterate that the Management Negotiating Team did not have the mandate to bind the institute to a salary increase of more than 9.9% sanctioned by the Board and this fact was communicated to the employees*'.

18.3 It is noted further that nowhere in his affidavit does the CEO state that Mr. Richard Magongo was informed by himself (CEO) or any board member that his (Mr Magongo's) capacity to bind the Respondent in an agreement with the Applicant is limited to 9.9%. It has already been stated by the Court that there is no indication in the affidavit of the CEO that he communicated annexure **GT1** to the employees of the Respondent. The Affidavit of Ms Fikile Buthelezi and that of the CEO have both failed to address the issue of substance. The Court does not accept the allegations of Ms Fikile Buthelezi and the CEO without evidence as aforementioned. The court views the allegation of Ms Buthelezi and the CEO as an afterthought intended to delay or frustrate the Applicant in implementing the agreement (annexure **A1).** The Respondent's allegations in the affidavits are not supported by evidence. As a result the defence filed by the Respondent fails.

[19] Besides the legal principles mentioned above, the Respondent's argument, clearly contradicts another well established principle of law. The intention of the Respondent as it appears in the affidavits is to vary or qualify the terms of the written agreement which it signed with the Applicant (annexure **Al).** The effect of the Respondent's argument is that it contradicts the parole-evidence rule. The principle is stated as follows:

> '*The parole-evidence rule has the effect that when a contract is reduced to writing, that writing is generally regarded as the exclusive record of the transaction and no evidence is admissible to prove the terms of the contract*'
>
> '*The parole-evidence rule prohibits evidence to add to, detract from, vary, contradict or qualify the terms of a contract once that contract has been reduced to writing. In this regard, terms do not refer to express terms only, but includes implied terms*".
>
> ***S.J. CORNELIUS: Principles of the Interpretation of Contracts in South Africa, Butterworths, 2002, at pages 99-100.***

19.1. The agreement between the parties (annexure **Al)** does not have a provision for ratification or the prior approval by the Respondent's board of directors. The Respondent's attempt to introduce extrinsic evidence of prior approval or subsequent ratification of the agreement is intended to vary the terms of the written agreement. On the strength of the parole-evidence rule such extrinsic evidence is rejected by the Court.

19.2. There is no allegation in the agreement that its validity is subject to the limited mandate allegedly given to Mr Richard Magongo to agree to salary increment not exceeding 9.9% of the employee wage bill. The allegation by the Respondent is intended to introduce extrinsic evidence to vary the terms of the written agreement. On the strength of the parole-evidence rule such allegation is inadmissible.

19.3. In conclusion, the court finds that the Respondent has failed on the facts and on the law. The Court finds in favour of the Applicant. An order is hereby entered as follows:-

1. Prayer 1 is hereby granted. The Respondent is ordered to comply with prayer 1 not later that the 30th of September 2010, failing which the Applicant may execute the order.

2. The Respondent shall pay the Applicant's wasted costs in the ordinary scale.

The members agree.

D. MAZIBUKO
JUDGE OF THE INDUSTRIAL COURT