IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE **CASE NO: 134/20**

In the matter between:

MBONGISENI VILAKATI & 39 OTHERS Applicants

and

DU TOIT HOLDINGS (PTY) LIMITED

t/a THE SPECIALISTS Respondent

Neutral citation : *Mbongiseni Vilakati & 39 Others vs Du Toit Holdings (Pty) Limited t/a The Specialists (34/2020) [2020] SZIC 92 [28 July 2020]*

Coram : **Muzikayise Motsa - Acting Judge**
(*Sitting with N. Dlamini and D. Mmango Nominated Members of the Court)*

Date of Hearing : 03. 07. 2020

Date of Ruling : 28. 07. 2020

Summary – Labour Law - The Applicants are employees of the Respondent. They are ordinarily based at the KM III International Airport save for one of them who also works at one of the branches of Standard Bank (Swaziland) Limited.

They have filed an urgent application before the Court contending that they were paid drastically reduced salaries for the month of May 2020 without any prior consultation as required under ***The Guidelines on Employment Contingency Measures in Response to the Coronavirus (COVID-19) Pandemic Notice****.*

They have applied to the Court for an Order setting aside the employer's decision as aforesaid and declaring it as unlawful. They have applied further, that the balance of their salaries equivalent to the amounts deducted by the Respondent be paid to them immediately.

The Respondent contends that the Applicants were properly consulted through their representatives prior to the implementation of the temporary employment contingency measure as required under the Guidelines.

Held: The Respondent's decision as afore-stated, was procedurally unfair and thereby constituted an unfair labour practice for lack of genuine and effective consultation hence it is hereby set aside.

RULING

THE COURT

INTRODUCTION

[1] The virus that has become commonly known as Covid-19, first detected in Wuhan, China in late 2019, has in the past seven months, become arguably the most formidable challenge that humanity has had to face in the last 100 years; since the end of the Spanish flu which ended in April 1920.

[2] At the time of writing this ruling, globally in excess of 16, 114 449 million people had been infected and more than 646, 641 lives had been lost directly on account of the virus.[1] There were at least 2,316 confirmed cases of COVID-19 and 34 deaths in the Kingdom of Eswatini.[2]

[3] The impact of the virus has reached even far beyond these figures. It has impacted on the lives and livelihoods of probably billions across the world. Economists and global leaders already warn of the massive loss in employment and the inevitable contraction of economies with all the attendant consequences that go with it.

[1] www.covid19.int WHO Coronavirus Disease (COVID-19) Dashboard (accessed on Monday, July 28, 2020). These are figures represent the globally data as reported to WHO as of 1924hrs CEST, 27 July 2020

[2] Ministry of Health COVID-19 Update Press Statement (27 July 2020)

[4] Thus, while the initial concern and response to the virus was largely and understandably a public health one, with time the impact of the virus on issues such as the economic survival of nations and their citizens, and the simple ability to live a meaningful and decent life, has come sharply into focus. This has been exacerbated by the inevitable recognition over time that the virus will be with us for some time and that a cure in the form of a vaccine is still somewhere in the future.

[5] There has been no universal response to how to deal with the virus, save for agreement on measures such as social distancing, the wearing of face masks and the washing of hands. Beyond that, some countries have opted for what has become known as a hard lockdown while others have opted for a soft lockdown.

[6] In some instances, economic and social restrictions have acquired the force of law and attract criminal sanctions while in other instances guidelines are issued and it is left to the wisdom and goodwill of citizens as to how to comply with them. What this simply demonstrates is that in dealing with a virus, whose scope and dimensions are not fully known, intervention measures are not universal.

[7] At the same time and despite the considerable level of uncertainty and anxiety that has accompanied the arrival and spread of the virus, there has also been many unintended and beneficial consequences.[3]

[8] The universal response on to how to deal with the virus, manifested itself through measures such as social distancing, the wearing of face masks and the washing of hands which in this country have been implemented using instruments such as ***The Coronavirus (COVID-19) Regulations, 2020***[4] (as amended). These regulations were put in place primarily to prevent the spread of COVID-19 by the Government of Eswatini.

[9] The immediate impact of these regulations on the social lives and livelihoods of all of us, inter alia, have been the restriction and prohibition of gatherings, closure of schools and tertiary institutions, suspension of visits and the closure of international borders and prohibition of international travel.

[10] Other measures have included the control of the numbers of people who may simultaneously enter shopping centres and supermarkets as well as the number of people who may board public transport at a time and several other measures. These measures have over time been relaxed and accordingly adjusted

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[3] *One South Africa Movement & Another v President of the Republic of South Africa and Others (24259/2020) [2020] ZAGPPHC249 (1 July 2020)*

[4] *Legal Notice No. 72 of 2020, issued under section 43 of The Disaster Management Act 1 of 2006*

as the authorities deemed fit pursuant to having made necessary assessments on the ground.

[11] As alluded to hereinabove in trying to prevent the spread of COVID-19 some countries opted to adopt and implement what has become to be known as a hard lockdown while others have opted for a soft lockdown. The latter being what in this country was referred to as a partial lockdown and / or strengthen partial lockdown as the case may be.

[12] The effects of the lockdown notwithstanding which type was adopted by any country has had massive and immeasurable economic consequences for the country, employers and employees alike. Sometime towards the end of March 2020 and during the month of April 2020, economic activity in this country was almost grounded to a halt.

[13] Employers were compelled to operate only their essential services departments whilst non-essential employees had to either work from home or render their services on staggered basis. In other cases employees virtually offered no services to their employers during this period.

[14] To ameliorate further economic hardships on both employers and employees, in April 2020 the Government of the Kingdom of Eswatini issued ***The Guidelines on Employment Contingency***

Measures in Response to the Coronavirus (COVID-19) Pandemic Notice [5] to provide for temporary employment contingency measures aimed, inter alia, to mitigate against the effects of loss of earnings and jobs by employees.

THE RELIEF

[15] It is against this backdrop that the Applicants in this matter seek to challenge certain aspects of the Respondent's response to the Covid-19 crisis. The Respondent's response under focus in these proceedings was implemented presumably to mitigate against the effects of loss of earnings by the Applicants and thus to serve as a temporary employment contingency measure.

[16] The challenge is one of many that this Court has had to deal with in recent past. This is not surprising, given that the COVID-19 crisis which has given rise to the implementation of the partial lockdown has required employers at short notice (or no notice at all) to adopt measures with complex procedures they had never envisaged prior to this era. In an effort to prevent further economic losses, some employers have therefore been inevitably stretched to the limits.

[17] In this matter, what the Applicants seek is the reversal and setting aside as unlawful the Respondent's decision to slash and /or implement a sharp reduction in their monthly salaries during the

[5] *General Legal Notice No. 00 of 2020, issued by the Minister for Labour & Social Security under Regulation 32 (10) of the Coronavirus (COVID-19) Regulations of 2020*

partial lockdown in the month of May 2020 on the ground that they were not consulted prior to the making and implementation of the decision. In addition, they want the Respondent to pay them the balances slashed from their respective salaries and / or with which their monthly salaries were reduced from May 2020 and going forward as the case may be.

[18] This application was instituted by the Applicants against the Respondent under a certificate of urgency and the relief sought is framed as follows in the Notice of Motion: -

"1). That this Honourable Court dispenses with the normal requirements relating to time limits, manner of services form of proceedings and deal with the matter as one of urgency in terms of Rule 15 of the rules of the Industrial Court rules.

2) That the Honourable Court condones the Applicants for non-compliance with the rules of this Honourable Court.

3) That a rule nisi do hereby issue calling upon the Respondent to show cause, on a date to be determined by the above Honourable Court, why an order in the following terms should not be made final.

3.1 The withholding of Applicants salary by the respondent for the period where Applicants were scheduled by the Respondent to be at home not executing the actual performance of work because of Covid-19 safety majors (measures) from 30 March 2020 to 28 May 2020 is hereby set aside and declared Unlawful. ***(The word 'measures' is my own addition to provide proper context).***

3.2 *The Respondent is ordered to pay the Clerks a balance of E1580.00, cleaners a balance of E1290.00, Isabel Shabangu a balance of E740.00, Height and Scaffolding E1100.00, Drivers given a balance of E850.00 forthwith.*

4) *That the Respondent is ordered to pay cost at attorney and own client scale.*

5) *Granting the Applicant further and / or alternative relief.* **[sic]**

[19] With due respect, it must be stated at this point that the application was clearly not elegantly drafted. It was practically littered with a dismal exposition of the sequence of events and annexures to which no reference had been made in the Founding Affidavit. The Court often had to scrape through and predominantly rely on context and both parties' representatives' oral submissions to appreciate the sequence and relevance of the unnamed annexures.

THE PARTIES

[20] The Applicants are Mbongeni Vilakati and 39 others who are employed by the Respondent either as cleaners, height and scaffolding users, drivers or supervisors.

[21] Save for one Applicant, to wit; Isabel Shabangu who also doubles up as a cleaner at an unnamed Standard Bank branch, all the Applicants are based at King Mswati III International Airport where they render their services under a contract of service entered into

between Eswatini Civil Aviation Authority (ESWACAA) and the Respondent.

[22] A careful perusal of the documentation annexed to the application indicates that apart from the main Applicant (Mbongeni Vilakati) and three (3) others who are employed as height and scaffolding users, Philile Mavimbela and Bonsile Lukhele who are supervisors, Muzi Dlamini and Colane Msibi who are drivers; the rest of the Applicants are employed by the Respondent as cleaners.

[23] The Respondent is **Du Toit Holdings (Pty) Limited t/a The Specialists** initially and incorrectly cited by the Applicants in their papers as **Specialist in Pests Control and Cleaning (Pty) Limited**. The Respondent is a company duly registered and incorporated in terms of the company laws of the Kingdom of Eswatini having its principal place of business in Mbabane in the Hhohho region.

[24] It is common cause that the Respondent employs all the Applicants in the various positions as indicated in the one but preceding paragraph as cleaners, height and scaffolding users, drivers and supervisors to render services predominantly at King Mswati III International Airport in the Lubombo region.

PRELIMINARY POINTS *IN LIMINE*

[25] The Applicants' application was opposed by the Respondent which duly filed its answering affidavit and simultaneously raising some preliminary points *in limine.* The Applicants thereafter filed their replying affidavit. Both parties had also filed their heads of argument prior to the date of hearing arguments.

[26] The three (3) clear points of law which could be deduced by the Court from the Respondent's answering affidavit related to the following, namely:-

26.1 Misjoinder of the Respondent as Applicants had cited the Respondent as **Specialist in Pests Control and Cleaning (Pty) Limited** when the actual and correct name of the Respondent is ***Du Toit Holdings (Pty) Limited t/a The Specialists;***

26.2 That the Applicants' application lacks candour in that **Resolution No.2 of 2020** annexed to the application as **annexure "BK1"** purporting to have been signed by all forty (40) employees was a fraud and sham because one Bonisile Lukhele disputes having signed the same despite a signature to that effect appearing next to her name and that she had not given her authority to anyone to sign on her behalf; and

26.3 Urgency - that the application had been moved on a certificate of urgency yet the Applicants had failed to detail any prejudice they would suffer or were suffering by not approaching the Conciliation Mediation and Arbitration Commission as is a norm for employer-employee disputes.

[27] However, when the matter appeared in Court for arguments, Respondent's Counsel informed the Court that he was no longer going to pursue the point of law on misjoinder as it was not in contention that the Respondent employed the Applicants notwithstanding that the actual name of the Respondent had been incorrectly captured by the Applicants in their papers.

[28] At a later sitting in chambers which was convened at the instance of the Court and in the presence of both parties' representatives specifically on this point, Respondent's Counsel consented to the amendment of the Respondent's name to correctly appear in the ruling as **Du Toit Holdings (Pty) Limited**; hence the change compared to what appears in the pleadings.

[29] This Court is indebted to Respondent's Counsel for exhibiting his legal maturity and experience on this point and electing not to insist on immaterial technicalities but to allow that the matter to be determine on the merits.

[30] Even though Counsel for the Respondent did not expressly indicate in Court that he had abandoned and / or was no longer pursuing the preliminary point on urgency, he nevertheless did not pursue that point. The Court is of the view that common sense and good logic prevailed to both the Applicants' representative and Respondent's Counsel in this regard.

[31] The matter was registered with the Court on June 2, 2020 and served on the Respondent on the same day and it had initially been scheduled to be heard by this Court on an urgent basis on Friday, June 5, 2020. However, the matter had not been heard until Friday, July 3, 2020 when it eventually appeared before this Court for arguments. With this background it makes sense therefore why both parties did not pursue this point since urgency had now become moot.

[32] Respondent's Counsel addressed the Court on the second point *in limine* as part of his main submissions on the merits of the matter and not as an independent point of law.

APPLICANTS' CASE

[33] In support of the application, the following submissions and arguments were made on behalf of the Applicants:-

33.1 That on March 27, 2020 in an effort to control the spread of the Coronavirus (COVID-19) pandemic, the Government of

Eswatini imposed a national partial lockdown which impacted on the normal flow relating to how the Applicants reported for duty and/or executed their duties on a daily basis.

33.2 Pursuant to the announcement by the government, the Respondent through its Human Resources Manager, scheduled the Applicants to work in groups of seven (7) per week in order to comply with the safety measures and guidelines which had been put in place to curb the spread of the virus in the workplace.

33.3 According to the Applicants, this arrangement meant that each group of 7 would work for one (1) week per month. The Applicants also submitted that the Respondent informed them that notwithstanding the obtaining new shift arrangement, they were still going to receive their full salaries.

33.4 It was submitted further on behalf of the Applicants that this was made possible by the fact that ESWACAA had undertaken to continue paying the Respondent for the full contract despite that the former was now receiving reduced services from the Respondent.

33.5 The Applicants contend that everything was well until April 28, 2020 when they all received an equivalent of half of their normal salaries without any notice and/or communication from the Respondent.

33.6 Nevertheless the Applicants argue that on May 5, 2020 they were fully refunded the balance of their half salaries which had been withheld from their April 2020 salaries. This was pursuant to the intervention of ESWACAA officials who facilitated a meeting between the Applicants and the Respondent which was held on May 4, 2020.

33.7 At the May 4, 2020 meeting between the Applicants and the Respondent, it was submitted that the former were represented by the employees' representative committee known as and also referred to herein as **the Committee of 8.**

33.8 At that meeting the Applicants contend that two (2) critical outcomes manifested themselves, to wit:-

33.8.1 That on the following day (May 5, 2020) the Applicants would be refunded the portion of their salaries which had been withheld in the month April 2020; and

33.8.2 That the Respondent further informed them that with effect from end of May 2020 it would begin slashing and/or effecting a sharp reduction to the Applicants salaries.

33.9 According to the Applicants, the Respondent lived up to its word and indeed paid them the portion of their withheld and/or slashed salaries for the month of April 2020 as promised on May 5, 2020.

33.10 It was submitted for the Applicants that **the Committee of 8** was never consulted by the Respondent concerning the reduction of the Applicants salaries with effect from end of May 2020 rather this position was simply imposed on **the Committee of 8** by the Respondent hence they were not happy with it.

33.11 To express their dissatisfaction or discontent with what they regarded as an imposed decision of the Respondent, on May 13, 2020 the Applicants wrote a letter to the Respondent which was copied to the Commissioner of Labour titled: **CONTINGENCY MEASURES IN RESPONSE TO CORONAVIRUS (COVID-19) IMPOSED BY YOURSELVES WHEN WE DEMANDED OUR APRIL MONTHLY SALARIES AS OPPOSED TO SHORT PAYMENTS.**

33.12 It was submitted for the Applicants that in that letter it was highlighted that the Applicants and/or **the Committee of 8** had not been consulted by the Respondent prior to the decision to implement the measure to reduce their salaries from the end of May 2020 and going forward was taken.

33.13 In the same letter the Applicants informed the Respondent that they had escalated the issue to their trade union. They further appealed to the Respondent to review the decision and thereafter advise them on the outcome of the review.

33.14 The Respondent responded through a letter dated May 19, 2020 wherein it stated that the Applicants had been fully consulted through **the Committee of 8.** This letter was also copied to the Commissioner of Labour and CMAC.

33.15 The Respondent further advised the Applicants that before the decision was taken the Department of Labour was also consulted and **the Committee of 8** had also made counter proposals on behalf of the Applicants when the consultations took place.

33.16 The Applicants submitted that on or about May 28, 2020 they were shocked to receive their salaries having been massively reduced and/or slashed by the Respondent without any consultation.

33.17 The Applicants admit having been part of a meeting with the Respondent before a certain Mr. Mkhonta at the Department of Labour where they were represented by some members of **the Committee of 8.**

33.18 They contend that this meeting was at their instance. They argue further that the intervention of the said Mr. Mkhonta came after receiving their letter to the Respondent which they had also copied the Commissioner of Labour.

33.19 It was argued for the Applicants that at both meetings of May 4, 2020 (in which **the Committee of 8** was first advised of the Respondent's decision to reduce their salaries at the end of May 2020) and the meeting with the Respondent before a certain Mr. Mkhonta at the Department of Labour they were not consulted on the Respondent's decision to reduce their salaries. Instead the Respondent's decision in this regard was imposed on them.

33.20 Applicants contend that in the meeting of May 4, 2020, they were only consulted and engaged by the Respondent with regards to the refund in respect of the portions of their salaries which had been withheld in April 2020 and not about the reduction of their salaries commencing from end of May and going forward.

33.21 On behalf of the Applicants it was strongly contended that the meeting held at the Department of Labour in the presence of one Mr. Mkhonta was also not a consultation as alleged by the Respondent.

33.22 In the end it was submitted on behalf of the Applicants that in terms of the ***Guidelines on Employment Contingency Measures in Response to the Coronavirus (COVID-19) Pandemic Notice*** the Respondent was obliged to consult them prior to taking and implementing the decision to reduce their salaries as a temporary employment contingency measure during the period of the partial lockdown.

33.23 The Court was then asked for an order declaring the Respondent's decision as unlawful and to have the same set aside.

33.24 The Applicants also prayed that the Respondent be ordered forthwith to pay the Applicants the balance of their salaries equivalent to the amounts deducted by the Respondent with effect from May 28, 2020 and the subsequent period.

RESPONDENT'S CASE

[34] On behalf of the Respondent it was argued to the contrary as follows:-

34.1 Firstly it was submitted that the Applicants application is an abuse of the court process as the Applicants had dismally failed to establish a case against the Respondent in their papers.

34.2 It was submitted that to demonstrate the fore-going, the Applicants have truncated the Respondent's employees (the Applicants before Court) and told this Court in their application that all the Applicants are based at ESWACAA when in fact that is not true since some of them are stationed elsewhere or at other stations. However, save for this submission, no further specific details were provided in this regard.

34.3 Respondent's Counsel did not dispute the Applicant's version that notwithstanding the fact that during that period the Respondent was now rendering limited services to

ESWACAA but the latter continued to pay the former for the full contract.

34.4 It was nevertheless submitted for the Respondent in this regard that even if that was the case, the Respondent paid the salaries of all its employees (the Applicants and all other employees based at various stations) from a common pool and not strictly from the funds received from the clients where the employees are providing a service.

34.5 The submission went on to state that when the Government implemented a partial lockdown as one of the measures to prevent the spread of coronavirus (COVID-19 pandemic), the Respondent was not spared from the economic losses which affected most businesses countrywide.

34.6 In this regard it was submitted that as a result of the national lockdown a number of the Respondent's clients' closed shop while others scaled down operational hours since they were not considered essential services.

34.7 Consequently the revenue base of the Respondent was affected and there was a massive contraction in the revenue made by the Respondent during that period. This incapacitated the Respondent's ability to cater for its expenses including the payment of salaries for all its employees (these being the Applicants and other employees stationed at other stations).

34.8 With the prevailing circumstances, Respondent's Counsel submitted that sometime in March/April 2020 the Respondent through its General Manager, one Mr. Michael Viljoen, approached the Department of Labour for guidance on how the Respondent can best cater for its employees' salaries in the face of such limited financial resources.

34.9 The Court was told that that the Department of Labour informed Mr. Viljoen that the Respondent was at liberty to do whatever it needed to do with the limited income and that its employees cannot dictate to the Respondent how it must utilize its revenue.

34.10 Pursuant to this advice, it was submitted that the Respondent then elected to spread the little revenue derived from a few operational clients equitably across all its employees for the month of April 2020.

34.11 In implementing this decision the Respondent paid its employees reduced and/or slashed salaries for the month of April 2020. In fact Respondent paid half salaries for the month of April to all its employees who had either not rendered any service during that month or had worked for very limited hours.

34.12 It was conceded on behalf of the Respondent that pursuant to the implementation of this measure, there was great discontentment amongst the Applicants, and the situation was resolved after the intervention of the client,

ESWACAA at a meeting held on May 4, 2020 between the Respondent and **the Committee of 8** representing the Applicants.

34.13 According to the Respondent's version, at the May 4, 2020 meeting, the parties agreed on the following issues, to wit:-

34.13.1 That the Respondent would utilize the two (2) months contribution initially meant for its contribution towards the Eswatini National Provident Fund (ENPF) to pay the Applicants their full salaries for the month of April (in line with a reprieve given to employers as per existing regulations); and

34.13.2 That since such a reprieve could not be sustained going forward into May 2020, it was further agreed that for May and subsequent months, the Respondent would then pay the Applicants 'for days worked only'.

34.14 Respondent's Counsel submitted that as per the agreement reached at the May 4, 2020 meeting, the Respondent on May 5, 2020 paid the Applicants their full salaries for April and went on further to pay the Applicants only for days worked in the month of May 2020 hence they all received what they refer to as 'slashed' and /or reduced salaries.

34.15 It was submitted further that over and above the meeting of May 4, 2020, the Respondent through its General Manager (Mr. Viljoen), took it upon himself to arrange a meeting between himself and the Applicants through their representatives; (where three (3) of out **the Committee of 8** attended) with a certain Mr. Mkhonta at the Department of Labour.

34.16 According to the contents of Mr. Viljoen's affidavit, the Department of Labour official explained the following to the Applicants' representatives who were in attendance, to wit:-

34.16.1 The circumstances warranting the salary deductions to the extent that he spoke to them in the vernacular language for ease of understanding;

34.16.2 That the Respondent was at liberty to apply and/or use its limited financial resources in whatever way as it deemed fit; and

34.16.3 It was stated that he even went as far as telling the Applicants representatives that they were not entitled to full pay under the prevailing circumstances of the national lockdown as the pandemic was a *vis major* and beyond the control of the Respondent.

34.17 Respondent's Counsel placed great emphasis on the fact that this version of the Respondent relating to its efforts in engaging the Applicants before the effecting the salary deductions in May was not denied by the Applicants in their replying affidavit which therefore translates to an admission.

34.18 In this context therefore it was contended that since the Respondent's evidence has not been controverted then this Court must accept it as proof that the Applicants were consulted by the Respondent prior to effecting the deductions on their May 2020 salaries.

34.19 In concluding Respondent's Counsel submitted that the Applicants were engaged and/or consulted at every stage of the process prior to effecting the deductions in their May salaries and that the deductions were in line with fair labour practice as obtained under the national lockdown.

34.20 In essence, the submission here was that both the meeting of May 4, 2020 and the subsequent meeting held in the presence of the said Mr. Mkhonta at the Department of Labour constituted consultations for this purpose.

34.21 It was submitted on behalf of the Respondent that the outcomes of the meetings and/or consultations between the parties were communicated to the Applicants through **the Committee of 8** as their representatives.

34.32 Respondent's Counsel then prayed for a dismissal of the application and indicated that the Respondent does not insist on an order for costs against the Applicants.

FACTUAL ANALYSIS

[35] It is common cause that following the declaration of the national partial lockdown with effect from Match 27, 2020, the Respondent was called upon to introduce a new working arrangement designed to comply with the safety measures, protocols and guidelines which had been put in place to curb the spread of the virus in the workplace.

[36] Through its Human Resources Manager on March 30, 2020, the Respondent scheduled the Applicants to work in shift groups of seven (7) per week. This new arrangement entailed that the Applicants, in each group of 7 would work for one (1) week or seven days per month.

[37] It would appear that Applicants were nonetheless given assurances that notwithstanding the obtaining new shift arrangement and less services being rendered by the Applicants, they were still going to receive their full salaries. It seems they were assured that Respondent's client, ESWACAA remained committed to honour the full terms of its contract with the Respondent despite receiving reduced services.

[38] The Court will however not delve into the veracity or otherwise of this assertion or alleged assurances as the question to be decided by the Court does not hinge on this aspect as it will appear more fully hereunder.

[39] It also common cause that the Applicants worked under the 'new normal' arrangement until their pay date (April 28. 2020) whereupon without receiving any prior communication and/or consultation from the Respondent they received what they refer to as slashed salaries for the month of April. Their salaries were slashed or reduced by half.

[40] One of the unnamed annexures to the Applicants Founding Affidavit is a letter by Respondent's Managing Director addressed to the Applicants dated May 19, 2020. The letter is a response to the Applicants letter dated May 13, 2020. From a reading of that letter, it appears that there was a meeting of the directors of the Respondent which was held on April 27, 2020 whereat the decision to reduce the Applicants salaries from end of April and subsequent thereto was taken.

[41] In the Court's view it follows that the reduction of the Applicants salaries to half on April 28, 2020 was the implementation of the Respondent's directors' decision which had been taken at the directors meeting on the previous day. It is not in dispute that the Respondent had not consulted the Applicants prior to implementing the directors' decision in relation to slashing of their April salaries.

[42] It is common cause that after the Applicants expressed their dissatisfaction at the Respondent's decision to halve their April salaries, and with the intervention of the Respondent's client ESWACAA, they were ultimately invited to a meeting with the Respondent on May 4, 2020 to discuss this issue. At this meeting the Applicants were represented by **the Committee of 8**.

[43] The parties agree on one of the agenda items and one of the resolutions arrived at in this meeting. However, they differ with regards to another item which the Respondent contends was also on the agenda and upon which an agreement was also allegedly reached.

[44] Both parties agree that at this meeting held on May 4, 2020 it was agreed that the Applicants would be paid their full salaries for the month of April and that the Applicants did receive the balance of their April salaries on May 5, 2020.

[45] However the parties preset different versions regarding what was to become of their salaries from the end of May and going forward. The Applicants version is that after consensus had been reached in relation to their April salaries, the Respondent then without consulting them simply informed **the Committee of 8** that the Applicants' salaries for May and subsequent months will be slashed due to the impact the national lockdown was causing to the revenue base of the Respondent.

[46] Furthermore, the Applicants do acknowledge that they were represented and therefore present at the meeting with the Respondent's General Manager in the presence of one Mr. Mkhonta at the Department of Labour sometime in May 2020.

[47] However, they dispute that the said meeting was the initiative of the Respondent rather they contend that it was at their instance following a letter they had written to the Respondent on the subject-matter and had copied to the Commissioner of Labour. They further dispute that such a meeting constituted a consultation process.

[48] On the contrary the Respondent's version is that during the deliberations on the April salaries with the Applicants representatives, before an agreement was reached that same will be paid in full, the employer explained to **the Committee of 8** that because of the lockdown their revenue base had been affected.

[49] The Respondent contends further that in the same meeting it was explained to **the Committee of 8** that to pay the Applicants full salaries in the month of April, Respondent would use the ENPF reprieve which could not be sustained to May and subsequent months.

[50] The Respondent contends strongly therefore that it was at that juncture that an agreement was reached that the Applicants be paid their full pay for April and from May and going forward the Applicants would be paid for days worked only. The Respondent

stated that as per the aforesaid agreement, it paid the Applicants their full pay for April.

[51] Subsequent to this agreement the Respondent contends that it also initiated a further consultation process with **the Committee of 8** at the Department of Labour on the same subject matter where this interim measure was also explained to the Applicants through their representatives.

[52] It was therefore argued on behalf of the Respondent that it was on the strength of the agreement reached with the Applicants' representatives at the May 4, 2020 meeting and the further consultations held with them at the Department of Labour in the course of May that it proceeded to pay the Applicants for the days worked at the end of May 2020.

[53] On behalf of the Respondent it was argued that the Applicants were therefore consulted prior to the implementation of the 'pay for days worked' contingency measure at the end of May.

[54] The contention went further to state that not only were the Applicants consulted through **the Committee of 8** but pursuant to the consultation, the Respondent also communicated the implementation of this pay per days worked contingency measure to the Applicants through the same **Committee of 8.**

[55] As alluded to in various paragraphs of this ruling in the preceding paragraphs, the Respondent's version is disputed by the Applicants. The Applicants argue that the slashing of their pay (as

they prefer to refer to it) effective at the end of May 2020 or the 'pay for days worked' contingency measure (as the Respondent's call it), was imposed on them by the Respondent at the May 4, 2020 meeting without any consultation. They contend further that no consultation took place at the meeting held at the Department of Labour.

[56] The crisp question to be determination by this Court to dispose of this matter is whether the Applicants were consulted by the Respondent prior to the implementation of the 'pay for days worked' contingency measure in May 2020.

LEGAL ANALYSIS

[57] It is common cause that amid the national lockdown and to mitigate against further economic hardships on both employers and employees, on April 14, 2020 the Government of the Kingdom of Eswatini issued ***The Guidelines on Employment Contingency Measures in Response to the Coronavirus (COVID-19) Pandemic Notice***[6] (hereinafter referred to as the Guidelines) to provide for temporary employment contingency measures aimed, inter alia, to mitigate against the effects of loss of earnings and jobs by employees.

[6] *General Legal Notice No. 00 of 2020, issued by the Minister for Labour & Social Security under Regulation 32 (10) of the Coronavirus (COVID-19) Regulations of 2020*

[58] The purpose and objective of these Guidelines to name just a few which have a direct bearing in this matter is to:-

(a) provide for temporary employment contingency measures which are meant to mitigate against the effects of loss of earnings by employees;

(b) legitimize various temporary employment contingency measures which are meant to mitigate against job losses;

(c) suspend Eswatini National Provident Fund contributions and divert funds towards payments of wages and salaries for the months of April and May, 2020;

(d) provide for standard measures on Workplace Governance during the period of national emergency;

(e) promote workplace related social dialogue (consultations) between employers and employees in respect of all employment contingency measures that are deemed appropriate during the period of the partial lockdown or national emergency, as the case may be;

(f) to safeguard the rights of employers in managing their businesses;

(g) to safeguard the rights of employees from unfair labour practices disguised as employment contingency measures in

response to the emergency situation;[7] *...* **(Underlining is my own emphasis)**.

[59] Measures that are meant to mitigate against the effects of loss of earnings are provided for under section 4 of the Guidelines and pertinent to this application are subsections (d) and (e) respectively.

[60] Section 4 and the pertinent subsections thereof provide as follows, to wit:-

4. Employers are encouraged to continue to pay their employees, where this is not economically possible, employers, in consultation with a recognized employees' organization or employees' representative structure within the enterprise and the Commissioner of Labour, are to consider the following options to mitigate against the effects of loss of earnings by their employees during the partial lockdown or the entire period of the national emergency,

(a) ... ...

(b)... ...

(c) ... ...

(d) suspension of Eswatini National Provident Fund contributions for April and May 2020, and divert these to cushion wages and salaries payments; or

[7] Section 3 of the Guidelines

(e) *other options such as work from home, shift work and short time as might be considered appropriate by employers, acting in consultation with the employees or their representative structure, are hereby legitimized, provided that any of the preferred or feasible option is not incompatible with any of the conditions of the lock-down period or any of the conditions of the declared national emergency.* **(Underlining is my own emphasis).**

[61] A reading of both sections 3 and 4 of the Guidelines emphasize on the significance of social dialogue and/or consultation between employers and employees, employers and employees' representative structure within the enterprise and the Commissioner of Labour in considering the preferred option(s) to mitigate against the effects of loss of earnings by employees during the partial lockdown.

[62] In the context of this case, it is common cause that the Applicants representative structure was none other than **the Committee of 8** and this was acknowledged and accepted by the Applicants' representative during the presentation of oral arguments.

[63] It is also clear from the facts of this case read in conjuction with the provisions of section 4 (e) that the preferred option chosen by the Respondent to mitigate against the effects of loss of earnings by the Applicants during the partial lockdown was shift work through which the Applicants were to be paid for days worked only.

[64] It is also apparent from the facts of this case that there were two (2) meetings held between the Respondent and **the Committee of 8** where the issue of the employer's preferred option was raised. These meetings were the May 4, 2020 meeting and the subsequent meeting held at the Department of Labour.

[65] What now remains to be determined by this Court is whether the Applicants were consulted by the Respondent on the employer's preferred option at those two meetings. Alternatively, whether those two meetings constituted consultations between the Respondent and the Applicants (through their representative structure) and the Commissioner of Labour on the employer's preferred option to mitigate against the effects of loss of earnings by the Applicants during the period in question.

[66] The meaning and/or definition of the term 'consultation' is often found in the context of dismissals for operational requirements, generally known as retrenchments. Both legal scholars and the courts have dealt with and pronounced on the meaning of consultation in that context. While the purpose for which consultations are done in the context of retrenchments and the issues upon which consultations must done may differ from those on the case before this Court, however, the essence of the consultations is similar in both cases.

[67] This Court finds that consultation in the context of retrenchments is akin to the consultation required of any employer in considering the preferred option(s) to mitigate against the effects of loss of earnings by employees during the partial lockdown under the

prevailing Guidelines. Henceforth the opinions of legal scholars and legal authorities relied upon in cases of retrenchments in as far as they relate to the meaning of consultation will be equally relevant to the matter at hand.

[68] Renowned labour law scholar and author, John Grogan in his twelfth edition[8] masterpiece states that the test for whether there has been genuine consultation prior to a retrenchment is whether the employees concerned or their representatives were given a fair opportunity to suggest ways in which job losses might be avoided or the effects of retrenchments ... might be ameliorated. **(Underlining is my own emphasis)**.

[69] In the present case and under the prevailing Guidelines, the test is whether the Applicants through **the Committee of 8** were given a fair opportunity to suggest ways in which the effects of loss of their earnings could be mitigated during the partial lockdown prior to the Respondent's preferred option was implemented.

[70] In ***Metal & Allied Workers Union v Hart Limited***[9] the court held that 'to consult means to take counsel or seek information or advice from someone and does not imply any agreement ...'

[71] The Applicants contended that while they were represented at the May 4, 2020 meeting, however, the employer's preferred option to slash their pay or to pay them for days worked only from the month of May was imposed on them without any consultation.

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[8] J Grogan *Workplace law* (2017) 300 - 301

[9] ***Metal & Allied Workers Union v Hart Limited*** (1985) 6 ILJ 478 (IC)

[72] On the contrary the Respondent argued that the Applicants were consulted on this measure and they were further told that even to pay them their full pay for April, the Respondent was rescued by the suspension of the ENPF contribution for two months which was then diverted to cushion the Applicants wages for April.

[73] Respondent contended further that the Applicants were also advised that this cushion was not sustainable going into May and the subsequent months hence the Applicants were to be paid for days worked only from the end of May.

[74] While the version of the Respondent in this regard is not disputed in so many words by the Applicants in their replying affidavit as rightfully pointed out by Respondent's Counsel, however, the Court does not have any other evidence presented by the Respondent to prove this version.

[75] There is no evidence at the Court's disposal which proves, firstly, that the 'pay for days worked only' measure was deliberated upon at the May 4, 2020. Secondly, even if the subject-matter was raised at that meeting we have nothing presented before the Court to prove that the Applicants representatives were given a fair opportunity to suggest ways in which the effects of loss of their earnings could be mitigated during the partial lockdown prior to the Respondent's preferred option was implemented.

[76] The Court accepts that the ultimate decision on whether to implement the chosen contingency measure rests with the employer. Moreover the employer is not bound to accept the

employees' representations or suggestions since consultation does not imply an agreement. The employer or Respondent must nevertheless seriously consider those representations.

[77] In this case, there is no evidence that the Respondent took counsel from **the Committee of 8** at the May 4, 2020 meeting or that it afforded them an opportunity to make any representations on the matter at hand. There are neither any minutes from that meeting nor any internal memorandum containing a summary of the deliberations and/or resolutions taken at that meeting, if any. There are also no individual letters by the Respondent addressed to each of the Applicants communicating the contingency measure taken and giving them notice relating to when it will come into effect.

[78] Now going further to the meeting held between the Respondent and the Applicant's representatives at the Department of Labour in the presence of a certain Mr. Mkhonta sometime in May 2020. The Court concludes that this meeting was held sometime after the May 4, 2020 meeting. In actual fact it was held even after the Respondent's letter to the Applicants dated May 19, 2020.

[79] At this meeting (reading from the Respondent's Answering Affidavit), we find absolutely nothing regarding any input or representations that were made by **the Committee of 8** at that meeting. Instead it appears that this was Mr. Mkhonta's show.

79.1 It is stated that he went at length explaining to the Applicants' representatives the circumstances warranting the salary deductions to the extent of using the vernacular language for their ease of understanding;

79.2 He even told them that the Respondent was at liberty to utilize its limited resources in whatever way it deemed fit;

79.3 It is stated that he further told the Applicants' representatives that the Applicants were not entitled to full salaries under the prevailing circumstances.

[80] Save for the first statement appearing under paragraph 79.1, with the greatest of respect to the public officer whose first name could not be ascertained, the rest fell outside his official mandate, in the event that this session was intended to be a genuine consultation by the Respondent. It is on that basis that in the Court's view, this became his show. Instead of providing guidance to the parties he then descended into the arena and pushed the Respondent's narrative.

[81] Once again, just as it happened after the May 4, 2020 meeting before this Court there is no proof that Applicants' representatives were afforded an opportunity to make any representations on the subject matter during that session.

[82] There are also no minutes from that meeting nor any internal memorandum containing a summary of the deliberations and/or outcomes of that meeting, if any. Further there is no individual and

formal communication by the Respondent to each of the Applicants informing them of its decision in relation to the contingency measure taken and giving them notice about the implementation date.

[83] The Court must emphasize here that in principle officials of the Department of Labour under the Guidelines are tasked with the responsibility to provide advice and guidance to stakeholders and should not allow themselves to be used by employers to persuade their employees to accept employers' decisions.

[84] In absence of minutes from that meeting, the Court has no way of knowing what information the said Mr. Mkhonta had in his possession before taking the stance which he did. Whether or not such information had been shared and/or deliberated at the meeting in the presence of **the Committee of 8** remains a mystery.

[85] Assuming that both the meeting of May 4, 2020 and the session at the Department of Labour were intended by the Respondent to be genuine consultations with the Applicants within the spirit of the Guidelines regarding the employer's preferred contingency option on how the effects of loss of earnings of the Applicants could be mitigated during the partial lockdown; it could not just end there with the meeting.

[86] In the event that the Respondent had allowed representations from the Applicants representatives in these meetings, thereafter Respondent would have been required to consider those

representations, take the final decision and then formally communicate same to the Applicants and giving them sufficient notice. All these do not appear to have happened in this case.

[87] Understandably so, the task of the Respondent to ensure genuine consultation with the Applicants was made difficult by the fact that the decision to reduce their salaries or to pay them 'for days worked only' appears to have been made much earlier at the directors meeting of April 27, 2020. So it appears to the Court that everything that followed thereafter was an effort to validate the directors' decision.

[88] Grogan also states that '[C]onsultation must be exhaustive and thorough, not merely sporadic, superficial or a sham.'[10] Concerning an employer who approaches a consultation predisposed to a particular solution, the trend has not been to necessarily hold that it was a mere pretence unless the employer fails the test set out in ***SATAWU & others v Roadway Logistics (Pty) Ltd.***[11] The test is whether management retained a mind sufficiently open to be persuaded by practical and rational alternatives.

[89] In ***BEMAWU obo Mohapi v Clear Channel Independent (Pty) Ltd***[12] the Respondent having failed to consult in advance and having resolved to unilaterally amend the employees' terms and conditions of employment, management set about attempting to persuade the employees to accept the new terms. When the workers refused, they were dismissed. The Court found that most

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[10] Grogan (n 8 above) 300. Also see ***Hadebe & others v Romatex Industries Ltd*** (1986) 7 ILJ 726 (IC)
[11] ***SATAWU & others v Roadway Logistics (Pty) Ltd*** (2007) 28 ILJ 937 (LC)
[12] ***BEMAWU obo Mohapi v Clear Channel Independent (Pty) Ltd*** (2010) 31 ILJ 2863 (LC)

of the consultation meetings held prior to the employees' dismissals were merely aimed at persuading them to accept the change.

[90] This Court is of the view that the Respondent in the present case fails the test as set out in the ***SATAWU*** case. At the time of the purported consultations, Respondent's management no longer retained a mind sufficiently open to be persuaded by practical and rational alternatives, if any; even if the Applicants had been afforded an opportunity to make representations.

[91] In the same breathe, the Court finds that the purported consultation or meeting of the parties at the Department of Labour was merely aimed at persuading the Applicants to accept the directors decision taken on April 27, 2020 at the Respondent's directors meeting thus making it both superficial and a sham.

[92] It is the finding of this Court therefore that consultation must commence when the employer contemplates implementing the policy or measure in question. What this means is that the decision must not have already have been finally taken when the employer begins the consultations.

[93] Employees must not be presented with a *fait accompli.*[13] The Respondent in the present case had taken the final decision to pay the Applicants for days worked only before presenting them with a done deal or an accomplished fact at the subsequent meetings.

[94] Grogan in his previous masterpiece and tenth edition[14] stated that consultation entails the *bona fide* consideration of suggestions from the other party. He distinguished consultation from negotiation which requires the parties to compromise in an effort to reach an agreement.

[95] Grogan's understanding was confirmed in the ***MAWU v Hart Limited*** case[15] where the court held that '[T]here is a distinction and substantial difference between consultation and bargaining. To consult means to take counsel or seek information or advice from someone and does not imply any agreement, whereas to bargain means to haggle or wrangle so as to arrive at some agreement on terms of give and take. The term bargain is akin to bargaining and means to confer with a view to compromise and agreement.' The Respondent in this case was not called upon to do the latter but the former.

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[13] ***Mabaso & others v Universal Product Network (Pty) Ltd*** (2003) 24 ILJ 1532 (LC), in which the employer identified and selected employees for retrenchment before consultation commenced **and** ***Enterprise Foods (Pty) Ltd v Allen & others*** (2004) 25 ILJ 1251 (LAC), in which the employer had taken the decision to close its plant before commencing consultation.

[14] J Grogan *Workplace law* (2009) 274

[15] ***MAWU v Hart Ltd*** (n 9 above) at 478

[96] ***Kotze v Rebel Discount Liquor Group (Pty) Limited***[16] provided a full account of the nature and purpose of consultation as follows:-

> *Consultation provides employees or their union with a fair opportunity to make meaningful and effective proposals in relation to the need for retrenchment (or the need for implementing any other measure) or if such need is accepted, the extent and implementation of such process.*
>
> *In principle it gives effect to the desire of employees who may be affected, to be heard and helps to avoid or at least reduce industrial conflict.*
>
> *Implicit in the requirement of a fair opportunity to meaningful proposals is the duty to give employees reasonable notice of the proposed retrenchment (or other measure to be taken). Such notice must allow them time and space to absorb the shock brought about by the daunting prospect of losing their jobs (or having their salaries sharply reduced).*
>
> *...no employee can reasonably be expected to constructively and effectively engage the employer on such a serious matter from the very minute the bad news is broken to him or her. He or she must be afforded the opportunity to come to terms with the situation, to reflect on the matter, to seek advice and*

[16] ***Kotze v Rebel Discount Liquor Group (Pty) Limited*** (2000) 21 ILJ 129 (LAC) at 132-3

prepare for the consultation and only then can a fair and genuine consultation begin. What constitutes reasonable time would depend on the circumstances of each case. **(Underlining is my own additions and emphasis to reflect the measure applicable in this case).**

[97] This Court has already made a determination in this case that the decision to 'pay for days worked only' adopted and implemented by the Respondent in this case was initially taken at Respondent's directors meeting held on April 27, 2020 and was instantly implemented on the following day (April 28. 2020).

[98] This decision was implemented not only without consultation and notice to the Applicants' but also implemented without giving them time and space to absorb the shock that was to be brought about by losing a fair portion of their salaries. While the Applicants' April salaries were eventually paid in full, however, the key and critical decision was taken at April 27, 2020 directors' meeting prior to any consultation.

[99] The Court has also made a finding that the purported efforts by the Respondent to consult the Applicants in the course of May 2020 were all in vain; not only because of the reasons already stated in the preceding paragraphs but also owing to the fact that the decision was already an accomplished fact at that time.

[100] In the ***Kotze*** case above the court also made the following profound statement which needs no further elucidation for its relevance to the present case, to wit;-

> *[T]he final decision to retrench (or to 'pay for days worked only') must be informed by what transpired during consultation. That is why consultation must precede the final decision.* (**Underlining is my own addition to reflect relevance to the case at hand**).

[101] As a Court our function in scrutinizing the consultation process is not to second-guess the commercial or business efficacy of the employer's ultimate decision but to pass judgement on whether such a decision was genuine and not merely a sham. A case in point in this context is that of ***SA Clothing & Textile Workers Union & Others v Discreto - A Division of Trump & Springbok Holdings.*** [17]

[102] Apart from promoting more informed decision-making, consultation also serves the principles of natural justice and helps discourage industrial unrest.[18]

[103] Another legal scholar and author Matthew Rossett[19] reiterates the obligation of the employer to consult with employees or their representatives before embarking on a retrenchment or similar

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[17] ***SA Clothing & Textile Workers Union & Others v Discreto - A Division of Trump & Springbok Holdings*** (1998) 19 ILJ 1451 (LAC) at 1454-H

[18] ***Administrator, Natal v Sibiya*** 1992 4 SA 532, ***Chemical Workers Industrial Union of SA v Lemon Ltd*** (1994) 15 ILJ 1037 (LAC), ***NUMSA v Atlantis Diesel Engines (Pty) Ltd*** (1993) 14 ILJ 642 (LAC) (confirmed on appeal (1994) 15 ILJ 1247 (A).

[19] M Grossett 'Managing labour relations in the workplace' in R Venter (ed) *Labour relations in South Africa* (2006) 277

exercise. He also emphasizes that the employer must entertain and properly consider suggestions from employees or their representatives. He concludes by saying that employers are forbidden to implement any proposals before consultation has been finalized.

[104] In their book, authors van Jaarsveld and van Eck[20] buttress the point that the employer must afford the other party the opportunity to make representations on any issue which concerns the matters to be consulted. They stress that after consultations with the employees and after having considered their proposals, the employer must make a decision and communicate such decision to the employees prior to its implementation.

[105] In this case the Court fully appreciates that at some stage during the national partial lockdown Respondent's management may have perceived or recognized that its business enterprise was taking an economic strain from the effects of the partial lockdown. Having noted the causes and considered the possible remedies, Respondent's management may have appreciated the need to take remedial steps.

[106] Taking advantage of the Guidelines, Respondent's management identified shift work and 'pay for days worked only' as a possible remedial measure to cushion the economic effects brought about by the partial lockdown and as a contingency measure meant to mitigate against the effects of loss of earnings by the Applicants.

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[20] F van Jaarsveld & S van Eck *Principles of labour law* (2002) 234 - 235

[107] The Respondent having foreseen the need to implement this remedial or contingency measure and while contemplating it, the duty to consult the Applicant or their representatives then arose. At that moment consultation became an integral part of the process which would have led to the final decision whether or not the 'pay for days worked only' contingency measure was inescapable.

[108] In the ***Kotze*** case referred to hereinabove, the court held that the need to consult before a final decision is taken is a pragmatic or practical one. We agree fully with the holding of that court.

COSTS

[109] This Court takes note that the coronavirus and its inherent implications for both employers and employees was very sudden and without a warning. Similarly the regulations and Guidelines issued to provide relief in the workplace, were spontaneous and did not provide either party, (especially employers) much time to understand them fully before applying them.

[110] It is therefore not surprising that most employers would have found themselves stretched to the limit in the quest to save their ailing businesses yet at the same time being expected to consider the welfare of their employees. In the process of grappling with what they were expected to do in line with the Guidelines, most employers just as the Respondent did; were bound to make procedural mistakes. As such it is the view of this Court that burdening an unsuccessful party in these proceedings with an order for costs would be grossly unfair under the circumstances.

ORDER OF THE COURT

[111] Taking into account all the foregoing findings and the circumstances of this case, the Court will make the following Order:-

(a) The Respondent's decision to pay the Applicants for days worked only with effect from May, 2020 and any subsequent period as a temporary employment contingency measure under the Guidelines was procedurally unfair and thereby constituted an unfair labour practice and is hereby set aside for lack of genuine and effective consultation.

(b) The Respondent is therefore directed to pay the Applicants the portion of their salaries being the equivalent with which they were reduced from May 2020 and subsequent months, as the case may be.

(c) There is no order as to costs.

The members agree.

Muzikayise Motsa
Acting Judge of the Industrial Court of Eswatini

For Applicant: Mr. Basil Tfwala (Eswatini Transport & Allied Labour Union)

For Respondent: Mr. S. V. Mdladla (S. V. Mdladla & Associates)