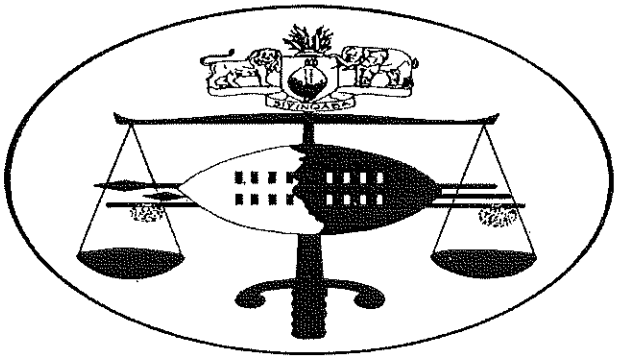

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 70/2019**

In the matter between:-

SANTOS ALDOFO **APPLICANT**

AND

IFA ENGINEERING (PTY) LTD **RESPONDENT**

Neutral citation : *Santos Adolfo v IFA Engineering (PTY) Ltd (70/2019) [2023] SZIC 102 (22 September 2023)*

CORAM : **DLAMINI J.**
(Sitting with A. Ntiwane and S.P. Mamba Nominated Members of the Court)

Heard : **08 JUNE 2023**

Delivered : **22 SEPTEMBER 2023**

Summary: ***Labour law – Unfair Dismissal:*** *Applicant offered a new contract after having worked for 14 years without one. Applicant demanding that he be paid his terminal benefits for the 14 years that he had previously worked for the Respondent. Respondent refusing to pay, instead informing the Applicant that he had all along been employed as an independent contractor. Thereafter Applicant told that the relationship between the parties had terminated because of his refusal to sign the contract.* ***Held:*** *Dismissal of the Applicant was both procedurally and substantively unfair.*

1. The Applicant in this matter is Mr. Santos Aldofo. He is a former employee of the Respondent, IFA Engineering Pty (Ltd) an engineering company based in the Lubombo Region. Aldofo has approached this Court with a certificate of non-resolution from the Conciliation Mediation and Arbitration Commission (CMAC) contending that he was unfairly dismissed by his former employer. IFA Engineering on the other hand vehemently disputes the Applicant's contention that he was unfairly dismissed, contending instead that there was never an employer/employee relationship between the parties. Instead, according to the Respondent, the Applicant was a sub-contractor/independent contractor. As such, according the Respondent, the Applicant was never dismissed because he was never an employee in the first place. Secondly, the Respondent's contention is that the Applicant was never dismissed but left on his own volition.

2. This Court is now called upon to, firstly determine whether indeed the Applicant was an employee of the Respondent or an independent contractor, and if the finding of the Court is that he was an employee, then secondly whether he was unfairly dismissed by IFA Engineering?

3. The evidence of the Applicant was that he was initially employed by the Respondent in January of the year 2004, and that such engagement was verbal. He informed the Court further that his engagement was for the position of Boilermaker and that he was paid monthly, based on the total number of hours he had worked. According to him, on his initial engagement in 2004, he was earning a salary calculated on an hourly rate of E20 (Twenty emalangeni) and when his services were terminated in 2018 his remuneration was at E60.10 (Sixty emalangeni and ten cents).

4. To prove that indeed he was an employee, the Applicant referred the Court to a number of documents, amongst which were the following; Document exhibit 'AS 1' at page 8 thereof – this document is a letter which is addressed to the Applicant and was headed '***WAGE REVIEW***'. It was advising him that the Respondent '*...had the pleasure of upgrading his wages to E29.00 (Twenty nine emalangeni per hour) with effect from December 2007*'. Document exhibit 'AS 2', pages 1 – 3. This document is a bank statement from the Applicant's bank. Herein the Applicant specifically referred the Court to entries which he says showed that he was receiving a monthly salary from the Respondent. These entries are depicted with the caption 'SALARY', and were mostly between the days of the 23rd and the 28th of each month, which are month end days. At page 6 of document exhibit 'AS2' there is an entry captured as 'SALARY ADVANCE' with the date 06 January 2017. This, the Court was informed, was further proof that the Applicant was an employee of the Respondent.

5. Further testimony by the Applicant was to the effect that when he was initially employed by the Respondent in the year 2004, he did not sign any contract but in 2011, the Respondent attempted to have him sign a contract of employment, which he says he declined to do. He says he declined to sign the contract of employment because from the year 2004 he had worked without a contract and wondered why the Respondent would now want to introduce a contract to regulate their employment relationship. He also informed the Court that another reason for refusing to sign the contract was because the Respondent had disregarded his period of service from the year 2004 to 2011.

6. Following his refusal to sign this contract, the Applicant informed the Court that the Respondent's Managing Director, Ricardo Paiva, questioned him

about such refusal and he says he informed him that he wanted to be paid for the period of service between the years 2004 and 2011. The Managing Director however demanded that he should reduce his request into writing.

7. It would seem nothing became of this issue of the contract from the year 2011 until 2018, when the Applicant says he was again directed that he should sign a contract of employment. He says he yet again politely requested that he be paid all his dues for the previous years of service, to which the Respondent, through the Managing Director, again demanded that he should reduce his request into writing. Indeed he says he did write the letter about his request that he be paid for his previous years of service. This he did through his then Attorneys, MongiNsibande & Partners.

8. In response to the Applicant's request to be paid his dues for the previous years of service, the Respondent, through its present Attorneys, wrote back to the Applicant's previous Attorneys basically contending that the Applicant was not an employee of the Respondent, and insisting that the nature of the relationship of the parties was that the Applicant was engaged as a sub-contractor since the year 2004. The Respondent's Attorneys further stated that as a matter of fact, the Applicant had been signing these sub-contractor contracts since the 2004 and only refused to sign these contracts in the year 2014.

9. Interestingly, the letter from the Respondent's Attorneys further informed the Applicant's Attorneys that the employer was well within his rights to refuse and deny the Applicant access to the Respondent's premises because of his refusal to sign the contract of service. The letter concluded by informing the Applicant's Attorneys that Mr. Santos was therefore not entitled to any terminal benefits because same was reserved for employees

and not people in the Applicant's position ***i.e.*** sub-contractors/independent contractors. They were further informed that the Respondent was willing to consider paying the Applicant an ***ex gratia*** amount, which they said was *'...strictly dependant on considerations of fairness in view of the long relationship that has existed between our respective Clients.'*

10. Then on 02 July 2018, the Applicant says he was summoned by his Supervisor, who informed him that if he still refused to sign the contract offered to him, that would be end of his relationship with the Respondent company. Seeing that things were quickly escalating to something he had not anticipated, the Applicant says he approached the department of Labour where he was informed to reduce same into writing, which he did. When he was not assisted by the department of Labour, the Applicant says he then reported a dispute with the Conciliation Mediation and Arbitration Commission (CMAC) where after an unsuccessful attempt to conciliation the Commission issued a certificate of non-resolution.

11. To prove that indeed he was an employee, the Applicant referred the Court to a number of documents, amongst which were the following; 'AS1' page 7 which is his provident fund statement as at 30 June 2017. In this statement the Respondent is registered as the Applicant's employer. At page 9 of the same 'AS1' is a letter from the Respondent addressed to the Applicant inviting him to a disciplinary hearing scheduled for the 06th of July 2016. There is also the statement from the Applicant's bank in which the monthly deposit of the Applicant's remuneration was always captured and depicted as 'SALARY'.

12. Under cross questioning by the Respondent's Counsel, Attorney Ms Charamba, the Applicant maintained that he was employed in 2004 and that

he was employed as a Boilermaker. He insisted as well that he worked between the hours 7am and 5pm and that his remuneration was based on the total number of hours worked in each month, which he said sometimes included overtime pay in months where he had worked hours in excess of the daily regulated hours of work. This, he explained, was the reason why in some months his salary would be higher than in other months and that in December they were paid a bonus, hence his salary would almost double. Santos further informed the Court under cross examination that the Respondent had in place a card clocking system through which it monitored the hours worked by each employee for purposes of remuneration and ensuring that they worked the required daily hours per shift.

13. Still under cross questioning, the Applicant vehemently denied that he was a sub-contractor insisting instead that he was an employee who was required to work at least 45 hours per week, made up of 9 hours per day over 5 days (between Monday and Friday) and that on some weekends they would also be required to put extra hours and that these would be compensated as overtime work. This, he explained was the reason why in some months his salary would fluctuate. He reiterated that his remuneration could never be the same amount because of the overtime worked in each month could never be the same hours and that such overtime depended on the amount of work that needed to be carried out in each month.

14. Then in relation to the Applicant's contracts of employment, the contention by the Respondent's Counsel was that the Applicant together with one Nomsa Hlatshwako allegedly conspired to remove all the contracts he had signed over the years, from his file, so that he could file this claim before Court. The allegation here was that the Applicant and the said Nomsa Hlatshwako had an intimate relationship, and that Nomsa Hlatshwako

'stole' the Applicant's contracts from his file so that there would be no evidence that he had been signing what the Respondent calls 'sub-contractor' contracts all these years which were regulating their relationship. This the Applicant again vehemently denied, maintaining that he had never signed any such contract but had always been permanently employed. That was the Applicant's case.

15. First to testify in support of the Respondent's case was Ricardo Paiva, who introduced himself as the Respondent's Managing Director. Paiva informed the Court under oath that the Applicant was engaged by the Respondent back in the year 2007, as a sub-contractor. He explained that IFA Engineering was incepted at the end of the year 2001 and that it was sub-contracted to a company known as ILLOVO, specifically to do engineering work that had been outsourced by the said ILLOVO.

16. Further testimony by Paiva was to the effect that the Applicant was engaged by the Respondent as an Artisan, from the year 2007, on fixed term contracts which mostly ran between the months January and December of each and every year. Apparently, as a sub-contracted Artisan, the Applicant was allocated a certain number of Labourers to assist him in carrying out his duties. He had a clock card which he used to clock in and out of work and would be paid according to the total number of hours he had worked in each month.

17. Then in relation to the circumstances under which the Applicant's services were terminated, Paiva explained that in January 2018, he questioned Nomsa Hlatshwako as to whether all the contracts had been signed and her (Nomsa's) response was that all the other Artisans had signed their contracts except for the Applicant. Apparently, the Applicant was refusing

to sign his contract. Paiva informed the Court that between January and May 2018, he could not address the issue of the Applicant's refusal to sign his contract as this was a busy period at the work place. In June 2018, Paiva says he summoned the Applicant and questioned him about his refusal to sign his contract. He says he explained to the Applicant the importance of signing the contract, especially because he could no longer work for the Respondent if he did not sign the contract.

18. Then in July 2018, Paiva testified that the Respondent was served with a letter of demand from the Applicant's Attorneys in which they were demanding that the Applicant be allowed to work. When he (Paiva) searched for the Applicant's file, he was informed by Nomsa Hlatshwako that the Applicant had stolen the file. A diligent search was conducted for the file and when it was found, the Applicant's previous contracts were no longer in the file, they were missing. Paiva informed the Court that he suspects that the contracts were 'stolen' by the Applicant and Nomsa because they were said to be in a relationship.

19. When Paiva was questioned about the allegation by the Applicant to the effect he was unfairly dismissed by the Respondent, he vehemently denied this, informing the Court instead that in his company (Respondent), before an employee is dismissed, there ought to be a formal disciplinary process preceding such dismissal, where the employee would be allowed an opportunity to state his case before a decision whether to dismiss or not is taken. Paiva also denied that the Applicant was dismissed, informing the Court instead that he (Applicant) terminated the relationship on his own accord.

20. Paiva was adamant that the Applicant had always signed a contract every year, insisting that as the Managing Director of the Respondent, he would not have employed the Applicant and made him work without a contract for all these years. In fact, according Paiva, the last contract signed by the Applicant was from January to December 2017.

21. Under cross questioning by the Applicant's Counsel, Paiva was first asked to clarify the exact year of the Applicant's engagement because according to the Respondent's Reply in the pleadings, it is indicated that he was first engaged in the year 2004 and not the 2007 he informed the Court about. To this Paiva was dumbfounded, informing the Court that he did not instruct his Lawyers about the year 2007. When asked to, at the very least produce some form of documentation to prove that indeed the Applicant was engaged in the year 2007, as opposed to 2004, he informed the Court that he had none such document. When the Court interjected and asked Paiva whether it could be possible that indeed the Applicant was first engaged in the year 2004, he stated that it could be, it's just that the Respondent only had documentation from the year 2007. One however wonders where the Respondent's Attorneys could have gotten the year 2004, if not from the Respondent's officials.

22. When asked to produce at least one contract signed between the Applicant and the Respondent, to prove that indeed he was always engaged as a subcontractor, Paiva informed the Court that he did not have any such contracts because all the Applicant's contracts had mysteriously disappeared from his file.

23. Then interestingly, witness Paiva was referred to what he had all along been referring to as the subcontract between the Respondent and those he

says were independent subcontractors, he was questioned on the sub-heading titled **'EMPLOYMENT RECORD/CONTRACT'.** When it was put to him that in terms of the contract agreement prepared by the Respondent, this was essentially an employment contract that the parties were signing, he confirmed that indeed it was an employment contract and not the subcontract agreement that he wanted the Court to believe the parties were always signing.

24. When referred to exhibit document 'AS2', which depicts the Applicant's bank statement, he confirmed that payments for hours worked by the Applicant were always captured by the bank as 'salary' or 'salary advance' but he informed the Court that it is what the bank decided to describe it as such, and that this was beyond the control of the Respondent. When Attorney Mr. Sithole, for the Applicant brought it to witness Paiva's attention that all documentation before Court indicates that the relationship of the parties was that of employer/employee, he informed the Court that as the concerned parties, they understood their relationship to be a subcontractor one, not that of an employer and employee.

25. Again witness Paiva was referred to exhibit document 'AS1' page 7, which is the Applicant's statement from Lidlelantfongeni eSwatini National Provident Fund, in which the Applicant is described as an employee, and the Respondent as employer, with employer number 11191181. When Attorney Sithole questioned Paiva on the description of the parties in the provident fund statement, he could only mumble that the Applicant was engaged as a subcontractor, insisting that he was not an employee because he was not entitled to leave and was not paid for overtime worked. He further stated that the description of the parties in the provident fund statement was only after the Respondent had been directed to collect and

transmit taxes for the Applicant and others who were in the same position as the Applicant.

26. And then with reference to exhibit document 'AS1' page 8, a letter addressed to the Applicant, informing him of the Respondent's decision to increase his wages, Paiva could only inform the Court the obvious, which is that this letter was advising the Applicant of an increase in his hourly rate.

27. Attorney Sithole also referred witness Paiva to a document at page 9 of exhibit document 'AS1' which is letter inviting the Applicant to a disciplinary hearing. Sithole questioned Paiva on whether he appreciated that if the Applicant was indeed an independent contractor, as he wanted the Court to believe, he could not be hauled to a disciplinary hearing. To this, Paiva was insistent that the Applicant could be hauled to a disciplinary hearing despite that he was not an employee.

28. Finally, witness Paiva was referred to exhibit document 'AS1' at page 14 paragraph 2.4 where in response to the allegation by the Applicant's then Attorneys that he (Applicant) had been refused entry into the Respondent's premises, the Respondent's Attorneys stated that *'...our Client was well within its rights to refuse yours entry into its premises...'* To this assertion, Paiva turned around and vehemently denied that the Applicant was refused entry into the workplace.

29. Themba Magagula was the Respondent's second witness. He informed the Court that he is employed by the Respondent as a Supervisor. Further testimony by Magagula was to the effect that he found the Applicant already working for the Respondent. Themba Magagula also informed the Court that he was employed on a fixed term contract, and so was the

Applicant. He admitted though that he was not aware of the terms of the Applicant's contract, but what he was sure of was that its duration was between January and December in each year.

30. Explaining the circumstances under which the Applicant left his job, Magagula informed the Court that the Applicant refused to sign his contract informing him and Nomsa Hlatshwako that he wanted to be promoted to the position of Supervisor as he had been working for the Respondent for a long time. Apparently, he was taken to the Managing Director, Mr. Paiva, with his request and Paiva informed him that he could not be made a Supervisor because he could not communicate eloquently in the English language. One wonders if an independent contractor could be promoted to the permanent position of Supervisor, unless of course that person is an employee. Magagula denied that the Applicant was dismissed, informing the Court that he left on his own accord.

31, Charles Khoza was the next witness called to testify in support of the Respondent's case. He informed the Court that he was employed in 2008 and found the Applicant already working for the Respondent. Even though he was engaged in the same position as the Applicant, he informed the Court though that he was not aware of the Applicant terms of engagement.

32. The fourth and final witness to be called in support of the Respondent's case was Nomsa Hlatshwako. She informed the Court under oath that she was initially employed as a Secretary in the month of September of the year 2003, and worked up through the ranks until she was appointed Administrator, a position she held until April 2021.

33. Witness Nomsa Hlatshwako further informed the Court that as Administrator, she was involved in the employment of all employees of the Respondent and the payment of their salaries. She also testified that the Applicant was employed in January of the year 2004 and left the Respondent in the year 2018. According to Hlatshwako, the Applicant was employed at a time when the Respondent had not yet introduced written contracts in the workplace. Apparently, contracts were only introduced in the year 2007, but the Applicant never signed one because he said he was permanently employed. As such, according to Hlatshwako, the Applicant never signed a contract with the Respondent for the entire 14 years that he was with the Respondent. Even when this witness was the Administrator at the Respondent's undertaking, the Applicant still did not sign any contract. It was Hlatshwako's further testimony that when the Applicant left the employ of the Respondent he held the position of Site Supervisor, when he was initially employed as a Boilermaker.

34. As witness Hlatshwako was still on the stand testifying, the Respondent's Counsel, Attorney Ms. Charamba, unexpectedly shot up and applied that witness Hlatshwako be declared a hostile witness. When the Court questioned her on the basis for her application, she seemed dumbfounded and could only mutter that her evidence was contrary to her statement.

35. In this regard, I should point out that a Court does not just declare a witness 'hostile' for the sake of it. It is important to note that a witness that is merely unfavourable or provides unsatisfactory evidence does not render that witness as being hostile. An important factor that must be considered when determining whether a witness is hostile is the attitude of the said witness. The declaration of a witness as hostile is a recognised exception to the rule that a party may not discredit or cross examine their own witness.

36. Another thing, a hostile witness should not be confused with a poorly prepared witness. Witness preparation should be thorough and methodical to avoid unfavourable testimony. What was obvious in this matter is that there was no thorough and methodical preparation of this witness before she was called in to testify for the Respondent. This I say because initially, before this witness took the stand, there was difficulty in securing her attendance as she had left the employ of the Respondent and was said to be unwilling to come to Court to testify on behalf of the Respondent. It was only after the Court had directed that the Registrar should issue a subpoena to secure the attendance of Hlatshwako that she then showed up in Court to testify.

37. Obviously therefore, from the manner witness Nomsa Hlatshwako's attendance was secured in Court, it is obvious that there was no prior thorough consultation and preparation of this witness to get a sense of what she would inform the Court in testimony. What was obvious is that the Respondent's Counsel met this witness for the first time here in Court. Attorney Charamba was not aware of what witness Hlatshwako was going to tell the Court about this matter. Charamba could not therefore apply that the witness be declared a hostile witness because witness Nomsa Hlatshwako could not be said to have acted against the Respondent in the manner she testified when she (Charamba) was not even aware of what she was going to say in her testimony.

38. A hostile witness is described as a witness who acts against the party for whom they are testifying, in a manner which is inconsistent with previous statements. This cannot be said of witness Nomsa Hlatshwako because no one knew what her testimony would be. It cannot be said therefore that her testimony was inconsistent with her previous statements when we are not

even aware what her testimony was going to be. Perhaps Attorney Charamba should have done more to establish what Hlatshwako was going to say here in Court before even calling her to the stand. It is for that reason therefore that this Court could not therefore accede to Attorney Charamba's application to have Hlatshwako declared a hostile witness.

39. Attorney Sithole, on behalf of the Applicant, informed the Court that he had no questions for witness Nomsa Hlatshwako. The Court though, ***mero mutu,*** asked her if, in her knowledge, the Applicant had ever signed a contract whilst with the Respondent? And her response was that the Applicant had never signed a contract between the years 2004 – 2018, and further that he worked without a break in service in all these 14 years.

40. As stated at the beginning of this judgement, the first question to be determined by this Court is whether indeed the Applicant was an employee of the Respondent as he alleges or an independent contractor (subcontractor) as contended by the Respondent?

41. At common law, Courts have consistently developed a number of tests for distinguishing between employees and independent contractors. The most prominent of these tests is the supervision-and-control test. There is also the organisation or integration test and the economic dependency test. In determining the existence or otherwise of an employment relationship, a Court should consider all aspects of the relationship which will enable it to come to a conclusive decision on the nature of the relationship of the parties.

42. Amongst the list to be considered by a Court in determining the existence or otherwise of an employment relationship are the following:

i) Whether the manner in which the person works is subject to the control or direction of another person;

ii) whether the person's hours of work are subject to the control or direction of another person;

iii) in the case of a person who works for an organisation, whether the person forms part of that organization;

iv) whether the person has worked for the other for a determinable number of hours per month, in the last 3 months. These should at least be, on average, 40 hours per month over the last 3 months;

v) the person is economically dependent on the other person for whom he/she works;

vi) the person is provided with the tools of trade or work equipment by the other person; or

vii) the person only works for or renders service to that one person.

43. In proceedings in which a person alleges that he/she was an employee, that person is presumed to be an employee if they render services to the other person, but over and above such presumption, there should be present at least one or more of the seven factors listed in the preceding paragraph. The focus here is on the facts relating to the performance of the work, rather than the character and content of the contractual arrangement between the parties. ***(See: Universal Church of the Kingdom of God v Myeni & Others [2015] ZALAC 31).***

44. I hasten to point out as well that according to the authority of the ***Universal Church of God v Myeni*** case, per ***Ndlovu JA,*** the fact that the Applicant satisfies the requirements of the presumption by establishing that one of the listed factors is present in the relationship does not conclusively establish that the Applicant is an employee. However, what is does is that it saddles

the alleged Employer with the onus of leading evidence to prove that that the Applicant is not an employee and that the relationship of the parties is in fact one of independent contracting. If the 'alleged' Employer fails to lead satisfactory evidence in this regard, that is to say he is unable to discharge the onus he is saddled with, the Applicant must be held to be an employee.

45. The first issue to be considered is the question of whether the Applicant was subject to the control or direction of the Respondent? To prove that he was under the control and/or direction of the Respondent, the Applicant referred the Court of exhibit document 'AS1' at page 9, which is a letter from the Respondent addressed to the him, inviting him to a disciplinary hearing. The right and duty to maintain discipline in the workplace, in terms of the law, is the exclusive preserve of the Employer. Further to this, the power to prescribe standards of conduct for the workplace and to initiate disciplinary action against transgressors in the workplace is one of the most jealously guarded territories of Employers everywhere, and it forms an integral part of the broader right to manage. This is what is famously known as the 'managerial prerogative'. In respect of the present matter, the Respondent's power to command and impose discipline against the Applicant is sufficient proof that indeed IFA Engineering (PTY) LTD was the Mr. Santos Aldofo's employer.

46. Next in line for consideration in solving this puzzle, is the question of whether the Applicant's hours of work were subject to the control or direction of the Respondent. In this regard, the uncontroverted evidence before Court is that the Applicant was required to work at least 9 hours a day between Monday and Friday. Sometimes he would be called upon to work overtime after the regulated weekly hours and on weekends, for

which he was paid. To effectively control the hours worked by its employees, the Respondent had in place the clock card system, through which it was able to ensure and regulate the hours put in by each employee and further pay them their remuneration based on the actual hours put in by each one of them. Surely this again is sufficient proof that the Applicant's hours of work were subject to the control and direction of the Respondent, and such, that he was an employee of the Respondent.

47. The next issue to be considered by the Court is the question of whether the Applicant could be said to have formed part of the Respondent organisation? The answer to this question lies in the fact that the Respondent religiously remitted the Applicant's provident fund contributions to the Lidlelantfongeni Swaziland (now eSwatini) National Provident Fund. In terms of exhibit document 'AS1' page 7, for instance, which is the Applicant's provident fund contributions statement for the year ended 30 June 2017, the Applicant is registered under the provident fund as an employee (member number 10286436) whilst the Respondent is registered as an employer (employer number 11191181). Even though the Respondent's Managing Director, Mr. Ricardo Paiva, tried to deny that the Respondent was the Applicant's employer, informing the Court that the contributions captured at page 7 of exhibit document 'AS1', were tax remittances to the Swaziland Revenue Authority, it is clear though that he was merely clutching at straws because this statement at page 7 speaks for itself and needs no interpretation. The Court accordingly comes to the conclusion that there is no doubt that the Applicant formed part of the Respondent's employees.

48. Other inherent factors which make the Court come to the conclusion that the Applicant was indeed an employee of the Respondent are the following;

a) the fact that he worked at least 45 hours a week (divided into 9 hours daily shift)

b) the fact that he was paid a monthly salary, based on the amount of hours he had worked in each month. Document exhibit 'AS2', which is the Applicant's bank statement, depicts that the monthly deposits by the Respondent into the Applicant's bank account were always captured as 'salary'. There is also a deposit, on 06 January 2017, which was captured as 'salary advance'.

c) The fact as well that the Applicant could not work for anyone else except the Respondent. This reiterates the Applicant's assertion that he was subject to the control and direction of the Respondent.

49. The fact that the Applicant was dependent on the Respondent economically, also goes to prove that indeed Mr. Adolfo Santos was without doubt an employee of IFA Engineering (PTY) Ltd.

50. Perhaps in summing up on this first leg of the enquiry, one should point out that even the contract the Respondent relies on to say that the Applicant was an independent contractor/subcontractor has all the hallmarks of an employer/employee contract, not what he says it is. This document is headed ***'EMPLOYMENT RECORD/CONTRACT'***, which is an indication that it is meant to be an employment contract, and not an independent contractor's contract. It then has sub-headings of ***'Employee Details'*** and ***'Conditions of Employment'***, and at the end of it has space for the ***'Employee'*** to sign. Surely all this is an indication that it in engaging its work force, the Respondent engages them as employees. Whosoever prepared the contracts the Respondent relies on must have ill-advised the Managing Director in making him believe that when he engaged his Artisan

employees he was engaging them as independent contractors when in fact he engages them as his employees.

51. Then coming now to the second leg of the enquiry, which entails the question whether the Applicant was unfairly terminated by the Respondent. The Applicant's evidence is that his services were terminated because of his refusal to sign a contract presented to him. He says he declined to sign the contract because he wanted to be paid for his previous years of service with the Respondent. When the Applicant insisted that he wanted to be paid for his previous years' service he says he was then told that he was first told to reduce his demand into writing, which he did through his then Attorneys.

52. In response to the Applicant's demand, the Respondent, through its Attorneys as well, informed the Applicant Attorneys that the Applicant had always been engaged as a subcontractor/independent contractor, and had been signing contracts to that effect. However, and quite interestingly, there was not even a single contract produced here in Court to prove that indeed he had previously signed same. Instead, the Respondent's Managing Director, Ricardo Paiva, informed the Court that he speculated or suspected that the Applicant and Nomsa Hlatshwako must have stolen his (Applicant's) contracts from his file to bolster his case here in Court. Such speculation, was without a shred of evidence. Besides, in law speculation is not considered as reliable evidence. Our Courts do not allow speculation as evidence.

53. The Applicant's further evidence, to prove that he was dismissed, was that he when he was called to the meeting of 02 July 2018, by his Supervisor, he was informed that if he did not sign the contract, that would be end of his relationship with IFA Engineering. He was further told that if he insisted on

refusing to sign the contract he would not be allowed into the Respondent's premises. Indeed, even the Respondent's present Attorneys confirmed in the letter addressed to the Applicant's then Attorneys that the Respondent was well within his rights to refuse the Applicant entry into its premises.

54. The refusal by the Respondent to allow the Applicant into the premises supports his assertion that he was dismissed for his refusal to sign the contract. It accordingly a finding of this Court that the totality of the evidence entailing in this matter supports the Applicant's assertion that he was indeed unfairly dismissed by the Respondent.

55. All cases of alleged unfair dismissal are assessed on the basis of two criteria – namely; substantive and procedural fairness. No dismissal will ever be deemed fair if it cannot be proved by the Employer, that it was initiated following fair procedures [procedural fairness] and for a fair reason [substantive fairness].

56. The substantive fairness of any dismissal is to be determined on the basis of the reasons on which the Employer relies for instituting the disciplinary hearing against the Employee and ultimately terminating his services. The law requires that the Employer must prove that the Employee committed an act of misconduct so severe as to warrant dismissal. So that if an Employer cannot prove that the probabilities of the employee being guilty are greater than the probability that the Employee is not guilty, the dismissal will be deemed to have been substantively unfair. And before this Court, the case of Mr. Santos is that his dismissal was procedurally and substantively unfair.

57. The Court points out that the overwhelming evidence before Court supports the Applicant's assertion that his services were terminated without any hearing whatsoever. He was dismissed simply for his refusal to sign a contract without being paid for his previous years' service. It is accordingly a finding of this Court that the dismissal of the Applicant was procedurally unfair.

58. Then on the substantive aspect of the Applicant's dismissal, the Court has determined that the reason for the dismissal of the Applicant was none other than his refusal to sign a contract without being paid for his 14 years of service to the Respondent. Surely the Applicant's demand for payment of his 14 years of service should have been considered before being made to sign a contract that was now saying he was an independent contractor. The Applicant even informed the Court that he would have signed the contract offered to him if he was paid for his 14 years of service.

59. It is accordingly also a finding of this Court that the Respondent herein, IFA Engineering (PTY) Ltd, has dismally failed to prove that the Applicant, Adolfo Santos, committed an act of misconduct so severe as to warrant dismissal. As such, the Court finds that dismissal of Mr. Adolfo Santos was substantively unfair. The dismissal of the Applicant was very callous indeed.

60. The Applicant's claims before Court are as follows; Notice Pay - E11,538.00, Additional Notice Pay - E29,998.80, Severance Allowance - E74,997.00 and 12 months compensation for unfair dismissal - E138,456.00. His total claim is the amount of E254,989.80.

61. Having carefully considered the Applicant's personal circumstances and the unfair manner in which his services were terminated the Court comes to the conclusion that his claims should succeed in its entirety. Accordingly, the Respondent is hereby ordered and directed to forthwith pay the Applicant as follows;

a)	***Notice Pay***	***E 11,538.00***
b)	***Additional Notice Pay***	***E 29,998.80***
c)	***Severance Allowance***	***E 74,997.00***
d)	***12 Months compensation for unfair dismissal***	***E 138,456.00***
	Total	**E254,989.00**

62. The Respondent also ordered and directed to pay the Applicant's costs. The members agree.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT AT MBABANE ON THIS 22ND DAY OF SEPTEMBER 2023.

For the Applicant: Attorney Mr. M. Sithole (Sithole Magagula Attorneys)
For the Respondent: Attorney Ms. B Charamba (Waring Attorneys)