IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

JUDGMENT

Appeal Case No: 02/14

In the matter between

VIKINDUKU DLAMINI **APPELLANT**

And

SWANNEPHA **RESPONDENT**

Neutral citation: *Vikinduku Dlamini v SWANNEPHA (02/14*) [2014] SZICA 05 (30 September 2014)

Coram: **M.M. RAMODIBEDI JP, J. P. ANNANDALE AJA, M.S. SIMELANE AJA.**

Heard: **15 September 2014**

Delivered: **30 September 2014**

Summary: **Civil Appeal – Appellant claiming under a contract of Employment – non-disclosure of material facts – Deed of Settlement – Appeal Dismissed with costs.**

THE COURT

[1] This is an Appeal against the decision of the Industrial Court rendered on 14 February 2014 under Industrial Court case number 23/2013 per Mazibuko J (Andreas Nkambule and Mathokoza Mthethwa concurring.)

[2] **Background.**

What appears to be the facts of this case is that the Appellant was employed as a Finance Manager in terms of a written contract dated 1 March 2012, by the Respondent, which is the SWANNEPHA, a non-governmental organization with legal capacity to sue and be sued. The contract was for a two year period terminating on 28 February 2014.

[3] It is not seriously disputed that in terms of the contract the Appellant was entitled to the following as enumerated in paragraph 6 of the founding affidavit, to wit:-

"6.1	**Housing allowance**	**E2 599.20**
6.2	**Cellphone allowance**	**E1 500.00**
6.3	**Pension**	**E2 592.00**
6.4	**Medical aid contribution**	**E 795.00**

6.5 Swaziland National Fund Contribution E 75.00"

[4] As it often happens in employment agreements, relations between the Appellant and Respondent went sour during the period of the contract. This resulted in a spate of litigation both in the Industrial Court and High Court of Swaziland respectively.

[5] The history of the litigation is aptly captured by the Court *a quo* in the impugned judgment as reflected at paragraph 8 thereof which we reproduce in *extenso*.

> **"8. It may be apposite to sketch a brief history of the legal battles which the parties have fought before this Court and the High Court of Swaziland. The parties have repeatedly referred to these other matters in their argument.**
>
> **8.1 About the 24th September 2012, the Respondent suspended the Applicant from work. Thereafter the Respondent instituted a disciplinary hearing against the Applicant. At the hearing the Applicant was faced with two (2) charges of misconduct. The disciplinary hearing commenced on the 28th November 2012 and was chaired by an attorney named Mary Da Silva.**
>
> **8.2 The Applicant was found guilty on one of the two charges. The ruling was delivered on the 9th January 2013. The chairperson then invited the parties to prepare to make submissions on mitigation or aggravation of sentence.**

8.3 Thereafter the Applicant moved an application for the chairperson to recuse herself from the disciplinary hearing. The Chairperson heard the application for her recusal and delivered her ruling on the 22nd January 2013. The Chairperson dismissed the application for her recusal and directed that the matter should proceed to finality.

8.4 Thereafter the Applicant applied for a postponement of the disciplinary hearing and gave the following reasons.

8.4.1 to allow himself (Applicant) time to institute review proceedings before the Industrial Court of Swaziland, and

8.4.2 that the defence Counsel (Applicant's Counsel) was not feeling well, he needed sometime off work in order to recuperate.

8.5 The application for a postponement was dismissed on the 28th January 2013. The Chairperson ordered the disciplinary hearing to proceed.

8.6 On the 31st January 2013 the Applicant filed an urgent application before this Court under case no 23/2013 in which the employer (Swannepha) and the chairperson of the disciplinary hearing, Mary Da Silva, were cited as 1st and 2nd Respondents, respectively. The Court shall refer to this particular application as the 1st urgent application. The contents of paragraphs 8.1 to 8.5 above are extracted from the

Applicant's affidavit which was filed in support of the 1st urgent application.

8.7 The Applicant's prayer in the 1st urgent application can be summarized as follows:

8.7.1 That attorney Mary Da Silva be removed as chairperson of the disciplinary hearing.

8.7.2 That the Respondent be ordered to appoint a new chairperson.

8.7.3 That the disciplinary hearing should commence de novo before a new chairperson.

8.7.4 That the ruling of attorney Mary Da Silva of the 9th January 2013, in which she found the Applicant guilty of misconduct, be reviewed and set aside.

8.7.5 In the event that attorney Mary Da Silva is not removed as chairperson, she be directed to consider afresh the evidence which was led at the disciplinary hearing.

8.7.6 The Applicant prayed for costs of suit at a punitive scale of attorney and client.

8.8 The 1st urgent application was opposed. The Respondent asked for time to file opposing papers. The Applicant then asked for an interim order for a stay of the ongoing disciplinary hearing pending finalization of the application before Court. The Court granted the Applicant's request which had in any event

been consented to by the Respondent. Both parties were given time to file the necessary papers in preparation for argument. Thereafter, the Court referred the matter to the Registrar to allocate a date for argument. The Registrar allocated the 20th June 2013 for argument.

8.9 Before the Court could hear argument on the 1st urgent application, the Applicant filed a 2nd urgent application about the 15th March 2013, against Swannepha. In the 2nd urgent application the Applicant claimed payment of certain contractual benefits including a 13th cheque. The Applicant was substantially successful in this application. Most of his prayers were granted.

8.10 On the 19th June 2013, the Applicant instituted a 3rd urgent application against Swannepha, and a certain Thembi Nkambule and a certain Mr. Vusi Nxumalo, as the 1st, 2nd and 3rd Respondents respectively. The 2nd and 3rd Respondents are officers who work for the 1st Respondent. The Applicant's complaint before Court was that on the 7th June 2013 he was dismissed from work by the Respondents. The Applicant prayed for an order that: pending finalization of the 3rd urgent application;-

8.10.1 the Court should set aside the employer's decision to dismiss him, and

8.10.2 the Court should restrain and interdict the employer (Swannepha) from recruiting a finance manager to replace him (Applicant), and

8.10.3 the employer (Swannepha) should be held in contempt of Court and further that the employer should not be given a hearing by the Court until it has purged its contempt,

8.10.4 the employer should be ordered to pay costs at attorney and client scale.

8.11 The Court enrolled the matter as an urgent application on the 20th June 2013. The Court dismissed the application. The Court issued an ex tempore judgment the same day the application was heard. Since the matter had come as an urgent application, the Court could not prepare a written judgment there and then.

8.12 Sometime in July 2013, the Court was notified that the Applicant intends to apply for review of the order which this Court delivered on 20 June 2013. The Court, through the Clerk of Court, notified the parties that written reasons for the Court Order will be ready by 31 July 2013. The Court delivered its written reasons on the 31st July 2013. The attorneys for the respective parties namely Mr. S. Dlamini for the Applicant and Mr. C. Bhembe for the Respondents appeared before Court to note judgment"

[6] It appears that the Appellant's application for review of the Industrial Court judgment of 20 June 2013 before the High Court was successful as evidenced by the Court order dated 29 July 2013 issued under the hand of the High Court Registrar and Exhibited in this record as Annexure VD3.

[7] It appears from the record that on 4 October 2013 the Appellant filed a fourth urgent application which gave birth to the present appeal.

[8] In that application the Appellant as Applicant had claimed the following relief:-

> **"1. Dispensing with the Rules of this Honourable Court as relate to form or procedure, service and time limits, condoning the Applicant's non-compliance with the Rules of this Honourable Court and enrolling this matter as one of urgency.**
>
> **2. Directing the Respondent to pay the Applicant's June, July, August and September 2013 salaries forthwith such sum to include the following benefits:**

Basic Salary;	**E33 560.00**
Housing Allowance;	**E 2 599.20**
Cell phone allowance;	**E 1 500.00**
Pension;	**E 2 592.00**
Medical aid;	**E 795.00**
Swaziland National Provident Fund contribution.	**E 75.00**

> **3. Directing the Respondent to henceforth deposit the Applicant's salaries inclusive of the benefits referred to in prayers 2.2 through to 2.6 above for the forthcoming months (during the subsistence of the contract of employment between the parties) in the Applicant's First National Bank Mbabane Branch Code 280164, Account Number. 62271738258, not later that the 25th day of the said months.**

4. **Directing the Respondent to pay the Applicant E13 500.00 (Thirteen Thousand Five Hundred Emalangeni) in reimbursement of both his and the Respondent's medical aid contributions for the months January to September 2013.**

5. **Directing the Respondent to pay the Applicant's costs in these proceedings at attorney-and client scale.**

6. **Granting the Applicant any further or alternative relief."**

[9] The Court *a quo* dismissed the application with punitive costs on attorney and client scale. This appeal lies against that decision.

[10] **THE APPEAL.**

The grounds on which this appeal is predicated are in the following terms:-

"1. The Learned Judge in the Court a quo erred in law and/or misdirected itself in not ordering the Respondent to pay the Appellant's June 2013 and part July 2013 salaries. The learned Judge in the Court a quo more particularly erred in finding that the Appellant's June 2013 and part July 2013 salaries:

1.1 Was not in Appellant's notice of motion in the Court a quo;

1.2 Was not argued before it;

1.3 Was not supported by evidence;

1.4 Could not be determined by the Court a quo.

2. The Court a quo erred in law and / or misdirected itself in finding that the instrument of alleged termination of the contract of employment between the parties (annexure A) had any bearing on the Appellant's claim for his June 2013 and part July 2013 salaries.

3. The Court a quo erred in law and / or misdirected itself in not applying Section 11 of the Industrial Relations Act 1/2000 as amended in the determination of the Appellant's claim for his June and part July 2013 salaries.

4. The Court a quo erred in law and / or misdirected itself in upholding annexure "A" inasmuch as the said "mutual termination of the employment contract" between the parties manifested in annexure "A" arose to settle an unfair dismissal dispute which was non-existent on 11 July 2013 regard being had to the fact that the Appellant had been reinstated as per the then subsisting order of the High Court of Swaziland under case number 962/2013 annexed hereto.

5. The Court a quo erred in law and / or misdirected itself in regarding annexure "A" as admissible evidence in the proceedings in that whereas the parties were specific about negotiating an out of Court settlement in respect of proceedings then pending in Court, annexure "A" arose outside of the formal legal proceedings and without the participation of both the parties' attorneys of record violating cardinal principles relating to the conduct of litigation. The Court a quo more particularly erred in that it permitted the

introduction of vagueness and uncertainty in the form of annexure "A" which was otherwise unenforceable.

6. **The Court a quo erred in law in finding that the Appellant signed annexure "A" voluntarily and that his claim that he was coerced into signing the agreement was false. The Court a quo more particularly erred in rejecting the Appellant's version of coercion as incredible in the face of a dispute which could not be resolved otherwise than by referral of the question to oral evidence. The validity of annexure "A" is a question that should have remained open for this Honourable Court to determine at a hearing in due course with the aid of oral evidence.**

7. **The Court a quo erred in law in ordering the Appellant to pay the Respondent's costs at attorney-and client scale.**

8. **The Court a quo misdirected itself in ordering the Appellant to pay the Respondent's costs at attorney-and-client scale in the absence of an application by the Respondent in this regard and further not affording the Appellant an opportunity to address the Court a quo on its inclination to order payment of costs against him at attorney-and-client scale in the exercise of its discretion.**

9. **The Court a quo misdirected itself in finding as a fact that the Appellant's non-disclosure of annexure "A" was willful and mala fide and/or dishonest in the face of undisputed allegations about the Appellant's motive for the non-disclosure.**

10. The Court a quo misdirected itself in not considering the financial imbalance between the Appellant as employee on the one hand and the Respondent as employer on the other."

[11] The question for determination here is did the Court *a quo* err in any of the ways alluded to by the Appellant or did it commit any material misdirection resulting in a miscarriage of justice which will entitle interference with its decision?

[12] The issues for determination are as follows:-

(1) Whether or not the Court *a quo* was correct to have held that the Appellant was not entitled to the June/July 2013 salaries.

(2) Whether or not the Court *a quo* was correct in considering the settlement agreement annexure A in the impugned judgment.

(3) Whether or not the Court *a quo* was correct to have found that the Appellant's non-disclosure of annexure A was wilful and *mala fide* and or dishonest and warranted a dismissal of the entire application.

(4) Whether or not the Court a quo misdirected itself in ordering the Appellant to pay costs at attorney and client scale in the case.

[13] These issues will be determined wholistically in this appeal.

[14] The Appellant's main complaint is that the Court *a quo* erred in finding that the Appellant's June/July 2013 salaries were not in Appellant's notice of application in the Court *a quo,* were not argued before it, were not supported by evidence and could not be determined by the Court *a quo*.

[15] The Appellant further contended that the Court *a quo* misdirected itself in finding that Annexure A had any bearing on his claim for the June/July 2013 salaries and that the Court ought to have considered and applied Section 11 of the Industrial Relations Act 1/2000 as amended in the determination of his claim.

[16] It is our considered view that having gone through the record of appeal and the impugned decision, the complaints raised herein are unmeritorious and must fail. We say this because, in the first place, the Appellant failed to disclose to the Court in his founding affidavit the fact that the parties had entered into a compromise agreement terminating the Appellant's contract of employment, effective 11 July 2013.

[17] As correctly found by the Court *a quo* the Appellant launched the application before that Court solely on the premise that there was an existing contract with the Respondent. The Court *a quo* correctly captured excepts of the Appellant's averments in his founding affidavit. In this regard paragraph 26 of the impugned judgment as reflected on page 90-91 of the record, is as follows:-

"26.1 The said obligations arise out of the <u>subsisting employment contract</u> between the parties – the written terms and conditions of which are set out in annexure "VD1" hereto, being a fixed term employment contract entered into by the parties on 1 March 2012.

(Underlining added)
(Record Page 10).

26.2 In paragraph 8 of the founding affidavit the Applicant testified as follows:

'The Respondent is bound to fulfill the obligations referred to in paragraph 6 and 7 (and the sub-paragraphs thereunder) by virtue of the <u>valid employment contract</u> between the parties.'

(Underlining added)
(Record Page 11)

26.3 In paragraph 12 of the founding affidavit the Applicant added the following.

'I submit that the Respondent's actions are unlawful and this Honourable Court should intervene and order the Respondent to fulfill its <u>contractual obligations</u> to me.'

(Underlining added)
(Record Page 13)

26.4 In paragraph 7 of the founding affidavit the Applicant declared the following:

'I am entitled to a 13th cheque equivalent to my salary payable in December of every year that the <u>contract subsists</u> (article 5.2)' "

[18] The issue of the compromise agreement only came to light in the Respondent's answering affidavit. For the avoidance of doubt, the agreement states as follows:-

"MEMORANDUM OF AGREEMENT BETWEEN SWANNEPA AND VIKINDUKU DLAMINI – (UNFAIR DISMISSAL DISPUTE)

The parties negotiated an out of COURT settlement for VIKINDUKU DLAMINI. The parties agreed that VIKINDUKU DLAMINI shall be paid three months' salary in full and final settlement of this dispute. Swannepha agreed to pay VIKINDUKU in three instalments. They further agreed that no any other matter (sic) will be raised pertaining to the above.

The parties mutually agreed to terminate the employment relationship.

[SIGNATURE] **[SIGNATURE]**
EMPLOYER **EMPLOYEE**

[SIGNATURE]
INDEPENDENT FACILITATOR

Signed at Matsapha on the 11 day of July 2013."

[19] As correctly held by the Court *a quo* in paragraph 27 of the impugned decision a reading of the compromise agreement reveals the following facts.

> **"27.1 The agreement is signed by the Applicant, Respondent, and an independent facilitator. The Applicant and the Respondent are the only parties to the agreement. The role of the facilitator was to witness the signing of the agreement.**
>
> **27.2 The agreement was a result of a negotiation between the parties with the intention to settle a claim of unfair dismissal which the Applicant had raised against the Respondent.**
>
> **27.3 The parties mutually agreed to settle their dispute by terminating their employment contract with effect from the 11th July 2013.**
>
> **27.4 The Respondent further agreed to pay the Applicant a three (3) months salary as a termination package.**
>
> **27.5 The agreement (annexure A) was in full and final settlement of the Applicant's claim against the Respondent. It was agreed that no further claims would be raised pertaining the matter."**

[20] It is clear from the above that the employment agreement between the parties had terminated effectively on 11 July 2013. The Appellant failed to reveal this to the Court *a quo*, rather he surreptitiously moved

the application *a quo* claiming salary arrears and other entitlements for the months of June, July, August and September 2013.

[21] In these circumstances, it appears to us that the Appellant deliberately withheld this information to gain some advantage over the Respondent. His belated lame excuse advanced in his replying affidavit is unsustainable and is hereby rejected. We cannot agree more with the Court *a quo* when it held as follows in paragraph 38 - 42 of the impugned judgment (see pages 98 -99 of the record.):-

> **"38. If the Respondent had not filed an answering affidavit, the Court would not have known about the existence of the agreement (annexure A) and more especially the fact that the employment contract between the parties terminated on the 11th July 2013, by mutual agreement. This fact is material to the application before Court.**
>
> **39. At the time the Applicant launched this application, he was aware-**
>
> **39.1 that since he had terminated his employment contract with the Respondent in terms of annexure A, he was therefore no longer an employee of the Respondent, and**
>
> **39.2 that this fact was material and central in the determination of his application before Court.**
>
> **40. It follows therefore that the Applicant deliberately withheld information from the Court in order to conceal the existence of the agreement (annexure A). Had the Applicant succeeded in**

his plan to conceal the existence of the agreement from the Court, he would have been able to evade its consequences. The Applicant's conduct was clearly dishonest and intended to deceive the Court.

41. The reason which the Applicant gave for withholding material evidence from the Court was that such evidence was embarrassing to him. The Applicant therefore had a choice and a purpose in the manner he drafted his application. He had an option to tell the Court the whole truth, but he chose not to. Instead, he knowingly presented deceptive evidence in his affidavit since he considered the truth unfavourable to his case. His purpose was to get an order notwithstanding the obvious irregularity in his founding affidavit.

42. In the circumstances, the Applicant's affidavit is defective for willful and mala fide non-disclosure of material facts. It is the duty of every litigant to make certain that his affidavit is factually correct and completely honest. An application that is supported by an affidavit which is tainted by such defect, cannot be entertained by the Court. It is accordingly rejected. The administration of justice can be seriously undermined and can be brought into disrepute if the Courts were to fail to denounce and penalize dishonest conduct among litigants and / or witnesses. For this reason as well the application is dismissed."

[22] It cannot be gainsaid that wilful and *mala fide* non-disclosure of material facts as the Appellant contrived to embark on in these proceedings is a veritable ground for the dismissal of the whole

application. This is an entrenched position of our law as was succinctly stated by the Court in the case of **Khanyisile Masuku vs J. D. Group Swaziland (PTY) Ltd Civil Appeal No. 38/11 at paragraph 15** as follows:-

> **"It is trite law that "utmost good faith" must be observed by litigants making *ex parte* applications, and, that all material facts must be placed before the court. If any order has been made upon an *ex parte* application, and it appears that material facts have been kept back which might have influenced the decision of the court whether or not to make the Order, the court has a discretion to set aside the Order on the ground of non-disclosure; it is not necessary that the suppression of the material facts be willfully, negligently or *mala fide*. "Materiality" in this regard means that the facts not disclosed must not only be relevant but should have a bearing on the merits of the *ex parte* application. In the exercise of its discretion, the court should have regard to the extent to which the rule has been breached, the reasons for non-disclosure, the extent to which the court might have been influenced by full disclosure as well as the consequences of denying relief to the applicant on the *ex parte* order. The court has a discretion even where the non-disclosure was material to dismiss the application or to set aside the proceedings."**

[23] We cannot therefore fault the learned Court *a quo* in its findings in this regard.

[24] More to the above and as correctly found by the Court *a quo* is that there is no evidence before Court in proof of the contractual benefits which the Appellant alleges accrued to him for the months of

June/July 2013 or part thereof. The principle of our law is that he who alleges must prove. In our view the Court *a quo* correctly held as follows in paragraph 34 of the impugned judgment.

> **"34 There is no evidence before Court as to how the agreement (annexure A) impacts on the Applicant's claim for contractual benefits which allegedly accrued to him in June and July 2013 (or part thereof). The Applicant approached the Court on the principle that he is an employee of the Respondent and is therefore entitled to payment of salary and contractual benefits until the end of the contract, which terminates 28th February 2014. As aforementioned, that principle has been misapplied by the Applicant, since the employment contract had already been terminated by the parties at the time the Applicant filed his application in Court. On that basis the application fails."**

[25] The fact remains that the compromise agreement terminating the Appellant's contract of employment is valid, subsisting and binding between the parties. It has not been set aside by any court of law or by subsequent agreement by the parties. The parties are thus bound by it. The belated cries of foul by Appellant in his replying affidavit to the effect that he was coerced into entering into the agreement and that the agreement was entered in the absence of counsel has no legs to stand upon. It is clearly an afterthought designed to pull wool over the eyes of the Court.

[26] In this regard we agree entirely with the Court *a quo* when it held as follows:-

"28 If the Applicant had been coerced into signing annexure A, as he alleges, he has not explained the reason he has failed to take the necessary steps to have that agreement set aside. As aforementioned, the Applicant has to date instituted about four applications before this Court against the Respondent and has further challenged the Respondent to a review at the High Court. That means the Applicant is conscious of his rights and interest and is prepared to defend them, should there be an infringement.

29. If the Applicant genuinely believed that he had been coerced into signing the agreement (annexure A), he was at liberty to take the necessary action to cancel that agreement. From the time the Applicant signed the agreement (11th July 2013), to the time he filed his 4th application in Court (4th October 2013), the Applicant had sufficient time to challenge the agreement. Instead, the Applicant adopted a complacent attitude upon signing the agreement. During that period, the Applicant did not think or feel that he had been coerced into signing the agreement.

30. The Applicant complained for the 1st time in his replying affidavit that he had been coerced into signing the agreement. The replying affidavit was deposed to on the 6th October 2013. The Applicant's silence and complacency regarding the manner he signed the agreement is inconsistent with his recent claim that he was coerced into signing. In the Court's view the claim of coercion is an afterthought which is intended to evade the consequences of the agreement. The Applicant's claim that

he was coerced into signing the agreement (annexure A), is accordingly rejected.

31. Before the Applicant signed the agreement, he negotiated a payment of a three (3) month's salary. That demand was successful and it became a term in the agreement. The Applicant therefore contributed towards the creation of the agreement (Annexure A), and he stands to benefit financially from it. The Court can conclude therefore that the Applicant signed the agreement voluntarily and with full knowledge of its contents. The Applicant's claim that he was coerced into signing the agreement is accordingly false.

32. When the parties signed the agreement (annexure A), they clearly terminated the employment contract that existed between them, by mutual agreement and with immediate effect. As from the 11th July 2013 the Applicant ceased to be an employee of the Respondent. After the 11th July 2013, there was no salary or any employment benefit that accrued to the Applicant.

33. The Applicant is entitled to approach the Court to claim contractual benefits (if any), that may have accrued to him on or before the 11th July 2013. That claim would have to be properly pleaded in the Applicant's papers, and where necessary, oral evidence would have to be led. With the papers that are before Court, the Court is unable to determine whether or not the Applicant's salary for June and July 2013, was provided for in the termination package. That claim is not in the Notice of Motion, it was not argued before Court and it

is also not supported by the evidence. The Court cannot therefore make a determination on that issue.

34. There is no evidence before Court as to how the agreement (annexure A) impacts on the Applicant's claim for contractual benefits which allegedly accrued to him in June and July 2013 (or part thereof). The Applicant approached the Court on the principle that he is an employee of the Respondent and is therefore entitled to payment of salary and contractual benefits until the end of the contract, which terminates 28th February 2014. As aforementioned, that principle has been misapplied by the Applicant, since the employment contract had already been terminated by the parties at the time the Applicant filed his application in Court. On that basis the application fails.

35. The Applicant has raised an alternative argument in his replying affidavit, in which he seeks to challenge the validity of the agreement. According to the Applicant, the agreement (annexure A) is invalid and therefore unenforceable because the Respondent has not complied with its obligation as contained therein. In particular, the Respondent has failed to pay the Applicant the three (3) months salary as promised. Since the Respondent has failed to comply with this obligation, it cannot rely on the agreement in its defence.

36. The Court has difficulty with the Applicant's argument for several reasons.

36.1 This argument was raised for the 1st time in the replying affidavit. The argument raises an allegation of fact which the Respondent was not given a chance to

address. The replying affidavit was filed on the 6th October 2013. The matter was argued on the 7th October 2013. There was no time available to the Respondent to apply for leave to file a supplementary affidavit. The Applicant cannot be allowed to raise a new course of action alternatively new allegation in its replying affidavit. The Court cannot, determine this allegation on the papers before it. The Applicant's alternative argument is therefore rejected by Court.

36.2 The validity of the agreement (annexure A), is not dependant on whether or not the Respondent has performed its obligations as contained therein.

36.3 The Applicant has misunderstood the Respondent's argument. The Respondent has not applied to the Court for an order to compel the Applicant to perform its obligations in terms of the agreement. The Respondent has merely informed the Court about an agreement which terminated the employment contract with effect from the 11th July 2013. That agreement (annexure A) is valid whether or not the Respondent has performed its obligations as contained therein.

36.4 The Applicant is at liberty to institute legal action to compel the Respondent to perform in terms of the agreement, if the Applicant is so persuaded. The Applicant's argument accordingly fails for this reason as well"

[27] We cannot agree more with the foregoing exposition and analogy. We adopt it entirely.

[28] The parties are in consonance that the order of the Court *a quo* of punitive costs against the Appellant should be set aside because the parties were not invited to motivate the question of costs and the scale before the Court.

[29] We agree entirely that though an award of costs is a matter at the discretion of the trial Court, this Court is entitled to interfere where it becomes obvious that the Court in the exercise of its discretion in awarding costs committed an irregularity resulting in a miscarriage of justice. It is our view that failure to invite submissions on costs and the appropriate scale from the parties constitute an irregularity entitling this Court to interfere with that decision.

[30] Since the parties have agreed that in the circumstances this Court should order costs in the proceedings *a quo* to be in the ordinary scale, this settles the matter. We say no more on this issue.

[31] **Court Order**

(1) The Appellant's appeal against the decision of the Court *a quo* rendered on14 February 2014 be and is hereby dismissed save for the issue of costs.

(2) The order of the Court *a quo* in paragraph 43 of the impugned decision for costs to be paid by Appellant at attorney and own client scale be and is hereby set aside. In its place we substitute the following order:

"Applicant to pay costs on the ordinary scale."

(3) Appellant to pay costs of this Appeal in the ordinary scale.

DELIVERED IN OPEN COURT IN MBABANE ON THIS

---------- DAY OF ----------

M. M. RAMODIBEDI
JUDGE PRESIDENT

J. ANNANDALE
ACTING JUDGE APPEAL

M. S. SIMELANE

ACTING JUDGE APPEAL

For Appellant: Mr S. K. Dlamini

For Respondent: Mr M. Z. Mkhwanazi