IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

HELD AT MBABANE **CASE NO: 09/2023**

In the matter between:

MA DLAMINI CONSULTING ENGINEERS

(PTY) LTD **APPELLANT**

And

BONGINKHOSI ZWELI MATHUNJWA **RESPONDENT**

Neutral citation : *MA Dlamini Consulting Engineers (Pty) Ltd v Bonginkhosi Zweli Mathunjwa (09/2023) [2024] SZICA 14 (05/06/2024)*

CORAM: **Z. MAGAGULA AJA**

B.S.DLAMINI AJA

S. M. MASUKU AJA

DATE HEARD: 15 April 2024

DATE DELIVERED 05 June 2024

Summary: *Appeal and cross-appeal from judgment of the Industrial Court- Whether contract of employment between parties concluded in terms of Employment Act, 1980 or under the common law-whether termination of contract on the basis of redundancy lawful-Court to also decide whether Respondent entitled to three (3) months' notice pay and gratuity in terms of written contract of employment.*

Considered : *The treatment of rights and obligations conferred to an employer and employee under common law (fixed term contracts) vis-a-vis the rights and obligations conferred to an employer and employee by statutory contracts of employment ie, the Employment Act, Industrial Relations Act (as amended) and other applicable laws -illustrated. The remedies available under such legal arrangements.*

Held; *The Appellant's appeal partly succeeds. The cross-appeal by the Respondent also partly succeeds with no order as to costs.*

JUDGEMENT

B.S DLAMINI AJA

INTRODUCTION

[1] This matter emanates from an appeal and a cross-appeal noted by the Appellant and the Respondent respectively. Both parties are discontent with certain portions of the Industrial Court's judgment delivered in open Court on the 8th June 2023.

[2] In terms of the orders issued by the Industrial Court (hereinafter referred to as "the Court *quo*"), the Appellant, as employer, was ordered to pay to the Respondent ("the former employee"), the following sums of money for unfair dismissal;

(a) Notice pay in the sum of E 14,000.00.

(b) Six (6) months compensation for unfair dismissal in the sum of E 84,000.00.

(c) Costs of the application.

[3] The history of the matter is as follows; the parties to this appeal, in their respective capacities as employer and employee, entered into a common law fixed term contract of employment which had a duration of one (1) calendar year. The fixed term contract of employment commenced during the month of August 2013 and was to lapse in August 2014. Even though the contract of employment between the parties commenced in August 2013, it was however only signed or endorsed by the parties in January 2014. There is no stipulation in the written contract as to the actual date of commencement and the date of lapse, except that the parties had a common understanding that same commenced in August 2013 and was expected to lapse in August 2014. The Court notes that according to Appellant, the period from August 2013 to December 2013 was for probation. The Appellant's position is that the contract of employment between the parties commenced in January 2014 and lapsed in January 2015.

[4] In August 2015, being the end period of the written contract, at least according to Respondent, he was allowed to continue working for Appellant without the parties having to sign another written contract. It is not clear whether according to the Respondent, the fixed term contract was automatically renewed on the same terms and conditions, or whether he assumed permanent employee status within Appellant's establishment. As already indicated herein above, the Appellant's position is that in January 2015, the contract of employment came to an end through effluxion of time.

[5] During the month of January 2015, the Appellant's Managing Director informed or notified the Respondent that his position had become redundant and therefore that his contract of employment would have to be terminated. As is normal in such cases, the parties are not a*d idem* (of the same mind) as to whether or not there was proper and lawful consultation and engagement prior to the decision to terminate the contract.

[6] Being dissatisfied with the decision to terminate his contract of employment on the ground of redundancy, the Respondent reported a

dispute to the Conciliation Mediation Arbitration Commission (hereinafter referred to as "CMAC"), whereupon after conciliation, a certificate that the dispute could not be resolved was issued. Armed with the Certificate of Unresolved Dispute, the Respondent approached the Industrial Court and based his claim on the normal ground of 'unfair dismissal.'

[7] The relief sought by Respondent (Applicant in the Court *a quo*) was as follows;

(a) Notice pay in the sum of E28,000.00.

(b) Gratuity (15% annual salary) in the sum of E 25,200.00.

(c) Maximum compensation for unfair dismissal in the sum of E 98,000.00

[8] It is evident from the record of trial that the Industrial Court heard the evidence of only two (2) witnesses, namely the Respondent and that of the Appellant's Managing Director. At page 2 of the judgment of the Court *a quo,* the issues for determination are summarized by the Court *a quo* as follows;

"2.1 **Whether or not Applicant was consulted prior to his retrenchment.**

2.2 The lawfulness and/or otherwise of Respondent's reasons for such a retrenchment.

2.3 Whether Respondent was liable to pay Applicant for notice pay and gratuity as per the parties' written contract of employment."

[9] In dealing with the issues on the merits, the Court *a quo* confined itself to three issues namely;

(a) Whether Respondent (then Applicant) was an employee in terms of Section 35 of the Employment Act, 1980.

(b) Whether the reasons advanced by the Appellant, namely redundancy of Respondent's position, had been reasonably and sufficiently proven by the former.

(c) The compensation or remedy, if any, to be awarded to the Respondent, if found that the termination was unfair.

[10] In determining the issues before it, the Court *a quo* had this to say regarding the Appellant's position in the matter, namely that the job occupied by Respondent had become redundant;

"[29] Indeed, the above conclusion of the Court has the backing of RW1's testimony in-chief, where he testified that Respondent was receiving less tenders of a mechanical nature and more on the electrical engineering side. Having established this as a fact, it was then incumbent upon the Respondent [now Appellant] to adduce tangible–documentary evidence to substantiate RW1's assertions. This is so, firstly, because the legal onus to do this vested upon the Respondent, and secondly, because in his evidence in-chief, Applicant gave evidence which was to the contrary, i.e that in January 2015, there were plenty projects requiring mechanical engineering. These were both on-going as well as prospective. We state for the record that no effort was made, by RW1 in his evidence in-chief, to refute Applicant's afore-going assertions. Nor did

the Respondent bother to file with the Court its own 'schedule' of the projects that it was working on in January 2015. In the absence of this very crucial piece of evidence from the Respondent, this Court is left with no other option but to believe Applicant and hold that no substantive reasons were in existence, in January 2015, to warrant for Applicant's retrenchment."

[11] The Appellant, being dissatisfied with the judgment of the Court *a quo*, noted an appeal to this Court and advanced the following grounds of appeal;

"***TAKE FURTHER NOTICE*** **that the Court *a quo* erred in law in granting judgment in favour of the Respondent, inter alia, on the following grounds;**

1. **The Court *a quo* erred in law to hold that section 40 (2) of the Industrial Relations Act, 2000, 2000 ("the Act") applied to the Respondent as it was only his position that was abolished due to surplus of requirements. That Section 40 (2) of the Act applies only if an employer contemplates terminating five or more employees in its undertaking and not one;**

2. **The Court *a quo* erred in law in not holding that it is only Section 36 (j) of the Employment Act, 1980 that applied to the Respondent;**

3. **The Court *a quo* erred in not holding that it was fair to terminate the services of the Respondent as his post was abolished and he was thus redundant;**

4. **The Court *a quo* erred in law to hold that the Respondent was not consulted when there was sufficient evidence that the Respondent refused to take part in the consultation process;**

5. **The Court *a quo* erred in law to find that the Respondent was not fairly dismissed when it was only his position that was abolished for financial reasons as the mechanical department where he was employed under relied on electrical department and no one was employed thereafter to replace him;**

6. **The Court *a quo* erred in law not to find that the Respondent was employed under a fixed term contract of employment when**

that was common cause between the parties and on the pleadings;

7. **The Court *a quo* erred in law not to determine the start and end date of the Fixed Term Contract of Employment. This is so when that was central in determining if there were outstanding months in the fixed term Contract of Employment;**

8. **The Court *a quo* erred in law to refrain from applying the principles of interpretation of contracts in the matter yet that was the crux of the issue to be decided after the Court a quo had allowed the amendment of the Pleadings;**

9. **The Court *a quo* erred in law to only stick to the issues for determination that was agreed at the start of the trial when it later allowed amendment of the Pleadings. The Court a quo ought to have also determined the new issue raised by the Appellant on the Pleadings;**

10. **The Court *a quo* erred in law to award the Respondent 6 months compensation and Notice Pay when the evidence**

showed that the Respondent had no outstanding months at the time of his termination;

11. The Court *a quo* erred in law in awarding the Respondent full costs in the circumstances of the case when Appellant was also partly successful in defending two of the Respondent's claims. The Court *a quo* did not exercise its discretion judiciously."

[12] Not to be outdone by Appellant's conduct of noting an appeal against the judgment of the Court *a quo,* the Respondent lodged a cross-appeal and advanced the following grounds of appeal;

"1. **The Court *a quo* erred in law and misdirected itself by negating to pronounce on the subsistence of the Respondent's Employment Contract at the date of the letter of termination of Respondent's services notwithstanding that the Respondent's claim for NOTICE PAY AND GRATUITY was based on the employment contract provisions.**

2. **That the Court *a quo* erred in law by not holding that there was in existence a valid employment contract between the**

Respondent and Appellant at the date of the letter of termination of Respondent's services.

3. **That the Court *a quo* erred in law by its failure to give due interpretation in accordance with the legal rules of interpretation to Clause 7.8.3 read together with Clause 7.8.1 of the Respondent's Employment Contract and as a result erroneously held that the Respondent was paid all gratuity due to him in terms of the Respondent's Contract of Employment notwithstanding that his services were terminated on the basis of Redundancy which in terms of Clause 7.8.3 entitled the Respondent to a further gratuity equivalent to the amount calculated in terms of Clause a7.8.1 on the basis of termination through Redundancy.**

4. **That the Court *a quo* erred in law by failure to give due interpretation in accordance with the legal rules of interpretation to Clause 8.2 of the Respondent's Employment Contract and as a result erroneously held that there was no basis for the claim of notice pay notwithstanding**

that Clause 8.2 of the Contract of Employment provided for three (3) months' notice pay if the contract is terminated on the grounds of redundancy."

APPELLANT'S SUBMISSIONS

[13] It was contended on Appellant's behalf that the Court *a quo* erred in law by failing to, first and foremost, determine the nature of the contract of employment entered into between the parties. Linked to this point is that the Court *a quo* also failed to determine the date of commencement of the contract of employment as well as the date on which it ended. Such determination, according to Appellant's counsel, goes to the core of the dispute between the parties.

[14] In support of the argument that Respondent's contract of employment had come to its natural end, Appellant's counsel referred the Court to Section 35 (1) (d) of the Employment Act, 1980 which provides;

"This section shall not apply to;

(a)**.....**

(b)**.....**

(c)**.....**

(d) An employee engaged for a fixed term and whose term of engagement has expired."

[15] The Appellant thus submits as follows in its quest to solidify the point that Respondent's contract of employment had come to an end;

[46] Relevant to the present matter is Section 35 (d) [of the Employment Act, 1980]. The Respondent was employed in terms of a one year fixed term contract which commenced in 22nd January 2014. The Respondent's complaint is that his services were unlawfully terminated after the expiry of the contract. It is common cause that the employment relationship came to an end on the 3rd February 2015.

[47] An employee who approaches the Industrial Court seeking redress on alleged breach of employment contract and/or unlawful termination of contract bears the duty to establish that he is an employee to whom section 35 applies. In the present matter, the applicant would be enjoined to demonstrate that the contract had not lapsed due to passage of time.

[48] An employee who is unable to establish that Section 35 of the Employment Act is applicable to them has no recourse in terms of Section 35 (2) of the Act. The applicant was employed on a fixed term contract which has expired and accordingly, has no right to claim unfair termination. See: *Swaziland Meat Industries v Mduduzi Nhlabatsi and Nine Others [Industrial Court of Appeal Case No: 142/2005]*, where the court upheld the principle that where an employee is engaged on a fixed term contract of employment and that contract has expired, they do not have a right to claim unfair termination. See also: *Nkosinathi Dlamini v Tiger Security (Pty) Ltd [Industrial Court Case No:287/2002]. Further see Mazibuko v Eagle's Nest (Pty) Ltd [(225/2001) [2008] SZIC 140 (16 September 2008).*"

[16] The essence of the argument by Appellant's counsel is that if the Respondent's one year written contract of employment came into force in January 2014, then such contract ran its time and came to an end in January 2015. The Court *a quo*, according to Appellant's counsel,

therefore erred in its judgment, firstly, by omitting to make a determination on this issue i.e whether or not the one year contract commenced in January 2014 and ended in January 2015, and, secondly, by holding that Respondent was an employee to whom Section 35 (2) of the Employment Act, 1980 applied, since the contract had come to its natural end.

[17] It was also Appellant's argument that the Court *a quo* erred in its findings that Appellant, as employer of the Respondent, failed to prove and substantiate its decision of declaring Respondent's position redundant. The argument by Appellant was that Appellant's Director was able to prove, by adducing relevant evidence, that Respondent's position was restructured and thereafter abolished due to diminishing opportunities related to mechanical engineering. In this regard, Appellant submitted that;

"[39] In the present matter, the evidence of the Appellant was that the position of the Respondent was abolished due to a restructuring exercise. The Respondent confirmed that his position was abolished and he was not replaced by anyone. An abolishment of a post does not amount to a termination

warranting the invoking of Section 40 of the Employment Act, 1980, this position was authoritatively stated in the local case of ***Don Bosco Ginindza & 73 Others v The Civil Service Commission & 3 Others [(234/2014) [2015] SZIC 24 (26 May 2015)]*;**

"Having said this, the Court therefore points out that the line of argument by Ms Nkambule, on behalf of the Respondents that the termination of the Applicants was due to redundancy in terms of Section 40 of the Employment Act, 1980 is without merit. It is nothing more than a flimsy attempt by Counsel to clutch at straws. In this regard the Court refers to the letter of the Chairman of the Civil Service Commission at page 24 of the book of pleadings. This letter states in bold black and white that the reason for the termination of the Applicant's services was as a result of the abolishment of their positions, not redundancy as now alleged by Counsel..."

[18] Appellant's line of argument on this point therefore is that the employer's conduct of abolishing the position occupied by Respondent did not amount to an unlawful termination of Respondent's contract of employment. According to Appellant, the Court *a quo* thus erred in holding that Respondent's contract was terminated on the ground of redundancy which the Appellant was unable to prove or substantiate.

[19] On the issue of costs being awarded against Appellant in the Court *a quo*, it was submitted on behalf of Appellant that the Court *a quo* erred in this regard and failed to exercise its discretion judiciously. The argument made on behalf of Appellant was that the Appellant was partially successful in that it was able to oppose some of the relief sought by Respondent in the Court *a quo*. The Court, according to Appellant ought to have ordered that each party must pay his or her own legal costs.

[20] In motivating its case on the issue of costs, the Appellant referred the Court to section 13 (1) of the Industrial Relations Act, 2000 and a number of decided cases dealing with this particular issue. In dealing with this issue, the Appellant submitted that;

"[54] The costs order against the Appellant in the Court *a quo* had no basis in law. The conduct of the Appellant was neither mala fide, frivolous nor deliberate in defending the claim by the Respondent. In fact the Appellant was successful in defending some of the claims by the Respondent.

[55] The Court *a quo* therefore in granting costs against the Appellant committed an error of law which is liable to be set aside as there was no basis in law for granting such a costs order."

RESPONDENT'S SUBMISSIONS

[21] The Respondent on the other hand also advanced a number of grounds in contestation of the main appeal and also in support of his cross-appeal. The first point raised on behalf of the Respondent was that his services were terminated on the ground of redundancy in terms of Section 40 (2) of the Employment Act, 1980.

[22] The point made on behalf of the Respondent was that even though Section 40 (2) of the Employment Act is meant to apply to five or more employees, this however does not preclude a single employee from contesting a termination which does not follow the established procedure applicable to a group of employees as envisaged in the Act. The submission made in this regard was that even in the case of a single employee, a termination based on retrenchment must still be substantively and procedurally fair.

[23] The Court was referred to the case of **Nkambule v Lidwala Insurance Company (375/2022) [2023] SZIC (3 March 2023)** in which it was held that;

[7] Dismissals for operational requirements require that there be a meaningful joint consensus seeking process in which the parties attempt to reach an agreement on a range of issues aimed at best, avoiding retrenchment or if that is not possible, at ameliorating its effects and this procedure is termed consultation.

[8] Consultation entails the *bona fide* consideration of suggestions from the other party. Pre-retrenchment is not merely a procedural requirement, it may be that the consultation is found to be so woefully deficient as to render the ensuing dismissal substantively unfair. The Labour Appeal Court has held in the matter of *Broll Property Group (Pty) Ltd vs Du Pont and Others (2006) 27 ILJ 269 (LAC)* that;

"Poorly handled consultations could lead to a retrenchment lapsing from the procedural unfairness to substantive unfairness as well."

[24] The Respondent argued that the Court *a quo* was correct in its findings that there was no proper consultation prior to the decision to terminate his services was taken. In his written submissions, the Respondent submitted as follows on this issue;

> "[10.1] **In *casu*, it was proven at the court *a quo* that indeed the Appellant did not approach the process of rendering the position of the Respondent to be redundant (sic). There is no evidence to the fact that the Appellant approached the process with a *bona fide* and open mind at [and] such is evident upon the common fact that the Respondent was informed of the Appellant's decision of retrenchment prior to being invited to provide ideas to save his job."**

[25] It was also contended on behalf of the Respondent that the Court *a quo* committed an error by failing to pronounce on the fixed term contract of employment entered into between the parties. According to the Respondent, the claim of unpaid two months' notice and gratuity was

based on the written contract. It was submitted on behalf of the Respondent that;

"...The inability of the Court to consider and adjudicate on the issues put before it therefore amounts to the denial of a fair adjudication. In *Honeywell Flour Mills PLC v Ecobank (2018) LPER-45127 (SC)*, the Supreme Court held that;

'A court of law should always make pronouncements on, or must determine all the issues raised before it by the parties.'

[26] The Respondent submitted that in terms of the written contract of employment, he was entitled to be paid two months' notice in the sum of E 28,000.00 (given that one months' notice had already been paid on termination of the contract), and also entitled to the gratuity payment as claimed in his papers filed in Court. According to Respondent, the Court *a quo* was supposed to embark on an exercise of interpreting the terms of the contract and to determine when and how the said gratuity was payable. This, per Respondent's submissions, was a necessary exercise because the view held by Appellant was that the said gratuity had already been paid twice as provided for in the contract of employment, namely mid-year and at the end of the year (2014). The

argument by Respondent was that the gratuity referred to by Appellant is not the one payable on termination of the contract on the grounds of redundancy.

[27] In his written submissions or heads of argument, the Respondent states that;

> **"[20] Courts should always interpret contractual terms with the goal of identifying the intention of the parties. Determining the intent of the parties should be an objective analysis as opposed to considering subjective intentions of the parties. It is further submitted on behalf of the Respondent that a contractual agreement is taken to be the exclusive memorial of the parties' transaction and both parties to the agreement are rebuttably (sic) presumed to be acquainted with those terms and to have assented to them..."**

[28] The crux of Respondent's cross-appeal is therefore grounded on the alleged failure by the Court below to award the Respondent two months' notice pay as well as gratuity payable on termination of the contract on the basis of redundancy as provided for in Clause 7.8.3 of

the written contract. The Respondent referred the Court to a number of decided cases supporting his position in relation to the duty of the Court to interpret and give proper meaning to the intention of the parties when certain clauses in a contract are in dispute.

ANALYSIS AND FINDINGS

[29] Both parties, namely Appellant and Respondent, noted a ground of appeal against the Industrial Court's failure to determine the nature of the contract in existence between the parties in January 2015. Linked to this issue is the alleged failure by the Court *a quo* to make a pronouncement on whether such contract was still in force on termination of Respondent's services. Both parties are absolutely correct in that regard. It was imperative for the Court *a quo* to fully apply its mind to the question of whether or not the written contract between the parties was a fixed term contract or whether Respondent assumed permanent status upon failure by the parties to renew the written contract of employment, whilst allowing the Respondent to continue working for the Appellant.

[30] Over the years, there has been lack of certainty in our jurisdiction on matters that come before the Conciliation Mediation and Arbitration Commission ("CMAC") and the Industrial Court on how to treat the rights conferred to employees under the common law (fixed term contracts), and the rights conferred by statute i.e Employment Act, 1980, Industrial Relations Act, 2000 (as amended), Workmen's Compensation Act, 1963, and other applicable statutes. An employee who enters into a fixed term contract of employment derives his or her rights and obligations from the contract itself, as opposed to a specific legal framework or what some jurists refer to as 'positive law'. There is a tendency in the employment space to treat such employees as having the same legal status. This ultimately leads to an anomaly or what one may refer to as 'skewed outcomes' in the labour law space.

[31] To illustrate the anomaly, which may, to a certain degree, lead to some inconsistencies, an employee may enter into a five (5) year fixed term contract with an employer for purposes of rendering his or her services. When this type of contract is unlawfully and prematurely terminated by the employer in circumstances where the employee had served for only two (2) years, the question that arises is; should the employee not sue

for the remainder of the contract i.e three years or thirty six (36) months? Is there anything in law stopping such employee from claiming compensation for the remaining thirty six (36) months', and, if so, what are the legal barriers? Are there legal remedies available for such employee, and if so, how they to be pursued outside of the known legislative confines?

[32] A converse scenario would be a situation in which the employee is remaining with, for instance, only three (3) months' or less in terms of the fixed term contract of employment. In the event that the Court or CMAC were to find that the termination was unlawful or unfair (as these terms are often used interchangeably), can the Court or CMAC order compensation of five (5) or more months as spelt out in Section 16 of the Industrial Relations Act, 2000 to the aggrieved employee?. These questions need to be resolved so that there is harmony, consistency and predictability in the country's employment space.

[33] We must however first deal with the facts of the present matter. The parties herein are not in agreement as to whether the Respondent was

still engaged as an employee on a fixed term contract of employment when his services were terminated in January 2015.

[34] According to the Respondent, the fixed term contract of employment was concluded in August 2013. This means, as contended by Respondent, he was verbally engaged by Appellant on a one year fixed term contract commencing in August 2013. The argument by Respondent is that this verbal agreement was only formalized or reduced into writing in January 2014. The position by Respondent is that the fixed term contract of employment was to come to an end in August 2014, depending on the day of commencement of work in August 2013. Since the Respondent continued to work for the Appellant when the fixed term contract came to an end in August 2014, the position taken by him (Respondent) is that the fixed term contract of employment was automatically renewed on the same terms and conditions for another year. This would have meant that the next lapse date of the fixed term contract was to be August 2015. For this reason, the automatically renewed contract was still in force when his services were terminated in February 2015.

[35] The Appellant's position on the other hand, differs from that of the Respondent. The position taken by the Appellant is, firstly that it is correct that the parties had concluded a one year fixed term contract of employment. The Appellant however does not accept that the fixed term contract of employment was automatically renewed after the lapse of one year, namely in August 2014.

[36] It was contended by Appellant is that when the Respondent started work in August 2013 up to December 2013, the Respondent was still on probation during that period, and, this explains why the fixed term contract of employment was signed on the 22nd January 2014. Accordingly, the fixed term contract, as per Appellant, commenced in January 2014 and came to its natural end in January 2015, making up a period of one calendar year. The position thus taken by Appellant is that if the contract came to an end through effluxion of time as agreed between the parties in February 2015, then nothing in terms of compensation is due to the Respondent, contrary to what was found by the Court *a quo*.

[37] Having heard the arguments made on behalf of the Appellant and the Respondent, and, having gone through all the pleadings, written submissions and evidence of the parties from the record, this Court is left with no option but to conclude that the Respondent's version on the status of the contract of employment is the correct version.

[38] When RW1 (Appellant's Director) was being cross-examined by Respondent's counsel in the Court *a quo*, his evidence on the issue of the double payment to the Respondent in December 2013 was at best evasive and doubtful. The following exchange between RW1 and Respondent's counsel is found at page 126 of the record of trial;

"***AC: Now, do you also confirm that in December 2013 he [Respondent or employee] was paid a 13th cheque?***

RW1:It wasn't a 13th cheque as included in his contract, there is no reference of a 13th cheque or a bonus in the employment contract."

[39] The response by the Appellant's director as quoted above is clearly not a correct or truthful answer. It does not accord with Clause 6.2 of the written contract of employment which provides;

"Subject to the approval of the Board of Directors an annual thirteenth cheque, equal to one months' basic salary may be payable at the end of the calendar year. If the employee will not have served for a full year, the amount paid shall be proportionate to the period served."

[40] The witness (RW1) was also referred to the written contract of employment and asked to specifically indicate the capacity in which the Respondent had been employed in August 2013. The answer was clearly that Respondent had been employed in the position of Mechanical Engineer and not as a trainee as suggested by RW1 in evidence.

[41] The Court further notes that from the internal engagement of the parties, not once did the Appellant's director mention to Respondent that his contract of employment had come to its natural end in January 2015. To the contrary, the parties were engaging each on the issue of

termination of the contract on the ground of redundancy. When the matter was eventually reported to CMAC, again not once did the Appellant raise an issue that the contract had come to its natural end. The Certificate of Unresolved Dispute from CMAC records that;

"Respondent denies Applicant's claims and states that Applicant's dismissal from work was fair procedurally and substantively."

[42] In its original plea or replies at the Industrial Court, the Appellant did not initially raise the issue that from August 2013 to December 2013, the Appellant was not yet an employee but was on probation. The Appellant amended its Replies in the year 2022 to introduce the new issue being that the contract of employment came to an end in January 2015. In any event this Court is not aware and was not furnished with any principle or legal authority that says the period of probation is discounted when calculating the period of service of an employee. The approach by Appellant on this issue is misguided and does not have legal support.

[43] One last important aspect to consider on this very same issue of the contract allegedly having come to an end, is the Appellant's firm and

unshakable position that the fixed term contract of employment came to an end in January 2015. If such is accepted to be true and correct as alleged by Appellant, the Court has to ask itself why Appellant saw a need to engage the Respondent on the issue of redundancy from January or February 2015 in those circumstances. The position taken by Appellant on this issue is clearly contradictory and self-defeating because, if the contract between the parties came to an end in January 2015, then there would have been absolutely no need to engage the Respondent at all on the issue of redundancy during that same period. Practically, these two issues cannot even be pleaded in the alternative. It is precisely for these reasons that we have found the Respondent's version to be more probable and reasonable as compared to the Appellant's version on the issue of the renewal or non-renewal of the fixed term contract of employment.

[44] The position taken by the Court regarding the tacit renewal of the fixed term contract of employment between the parties is confirmed by Clause 5.1 of the written agreement which provides that;

"**Irrespective of the date of signature to this agreement, the actual term of service under the agreement shall commence on a date**

agreed by both parties and shall subsist for a period of one (1) year or an earlier period as contained in Clause 8 hereunder."

[45] In the case of **Myengwa Sibandze v National Football Association of Swaziland (587/2006) [2016] SZIC 50 (October 14, 2016),** Nkonyane J, (as he then was), in dealing with a matter having almost similar facts stated;

> **"[25] The parties did not renew the contract or enter into a new contract. The Applicant continued to render his services to the Respondent and the Respondent continued to pay the salary for the services rendered. It was only between March and April 2003 that the Respondent approached the Applicant to have him sign a new contract for another two years from 2002 until 2004.**
>
> **[26] Employment contracts are generally of two types, fixed term or indefinite period. In a fixed term contract the parties specify the period of the engagement. Dealing**

with this subject *John Grogan: "Workplace Law" 8th edition at page 45* stated the following;

"If after the agreed date for the termination of the contract the employee remains in service and the employer continues to pay the agreed remuneration, the contract is deemed to have been tacitly renewed, provided that an intention to renew is consistent with the parties' conduct..."

In the present case the Applicant remained in service and the employer continued to pay the agreed remuneration. This conduct by the parties therefore evinced a clear intention to continue to be bound by the terms of the lapsed contract. The contract was therefore tacitly renewed.

[27] **The learned author continued to state on the same page that;**

"The relocated contract will continue on exactly the same terms and conditions as the previous fixed term contract, except that the duration of the contract need not be as that of the original contract; the life of the relocated contract must be

determined in the light of the particular circumstances of each case..."

[46] We align ourselves with the principles of law enunciated by the Court in the *Myengwa Sibandze* case (cited above). The Respondent in the present matter commenced work on a fixed term contract of employment in August 2013. This contract was only signed by the parties in January 2014 even though the parties had verbally agreed that Respondent would commence work in August 2013 on a one year fixed contract. After August 2014, the Respondent continued to work for the Appellant on the same terms and conditions until his contract was terminated in January 2015 on the ground of redundancy. When the fixed term contract was terminated in January 2015, it had seven (7) months remaining since it was expected to lapse or come to an end in August 2015. The latter part is very important as it will give direction on how the remaining issues ought to be resolved.

COMMON LAW RIGHTS DISTINCT FROM STATUTORY RIGHTS

[47] Having found that the fixed term contract of employment was still in force when it was prematurely terminated by Appellant in January

2015, it is now proper to deal with the important issue of defining the legal nature of a common law fixed term contract of employment and then exploring the remedies available under such a legal arrangement.

[48] A fixed term contract of employment derives its legal authority from the common law. **The African Charter on Human and People's Rights-Chapter 2** defines the 'common law' as follows;

"**<u>When a specific matter is not governed by legislation</u>, common law usually applies. South African common law is mainly the 17th and 18th century Roman-Dutch law that was transplanted to the Cape. This forms the basis of modern South African law and has binding authority... Whilst South African common law is mainly Roman-Dutch law, not all principles of Roman-Dutch law were transplanted to South Africa. Sometimes English law had, by means of precedent, influenced South African common law. Some common law principles are for this reason, no longer pure Roman-Dutch law. The sources of Roman-Dutch law are the old sources which are the following:**

- **Legislation (placaaten)- few of these still apply in South Africa**

- **Judgments of the old Dutch courts.**
- **Writings of learned authors (the so called old authorities) such as Hugo de Groot, Voet, van Leeuwarm and van der Linden." [under-lined for emphasis]**

[49] Accordingly, the source of a fixed term contract of employment is not legislation. We are alive to the fact that there is an ambiguous mention of a fixed term contract of employment in Section 35 (1) (d) of the Employment Act, 1980. The legal basis of an employment contract is an agreement between an employer and an employee. Such agreement can derive its source or legitimacy from legislation or an agreement under the common law. Since the source of the agreement is not the same, the legal outcome or legal consequences cannot therefore be the same.

[50] Section 8 (1) of the Industrial Relations Act, 2000 ("the Act") provides;

"The Court shall, subject to sections 17 and 65, have exclusive jurisdiction to hear, determine, and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this [Act], the Employment Act....or in

respect of any matter which may arise at common law between an employer and employee in the course of employment..." *[underlined for emphasis]*.

[51] The reference to the phrase; '**Any matter that may arise at common law between employer and employee'** as expressly mentioned in Section 8(1) of the Act no doubt covers a common law fixed term contract of employment. It may perhaps be important at this stage to explain why we say a fixed term contract of employment derives its authority not from any statute or legislation, but the common law, and therefore that the legal outcomes of the two are not the same.

[52] The Employment Act 1980 recognizes different types of employment contracts namely, casual employment, seasonal employment, foreign contracts of employment and permanent employment (*See: Section 2 of the Employment Act*). All of these types of employment are strictly regulated under Part IV of the same Act without exception. Section 21 (1) thereof provides;

"This part of the Act shall apply in respect of every contract of employment made within Eswatini and to be performed wholly within Eswatini."

[53] Section 22 and 23 of the Employment Act stipulates certain requirements to be met by all employers who conclude the type of contracts of employment specifically mentioned in the Employment Act. This means any contract of employment which does not conform to Part IV of the Employment Act is unlawful and therefore of no force and effect. Some may argue that failure to comply with Part IV of the Employment Act does not necessarily render the contract of employment void but only renders it voidable in the sense that the requirements stipulated in Part IV can still be complied with during the subsistence of the contract. That for now is not the point being made in relation to the issue at hand.

[54] The point being made is that if we are to treat fixed term contracts of employment as having the same legal status as the other types of contracts specifically mentioned in the Employment Act, this would not only mean that such contracts (fixed term contracts) should strictly comply with Part IV of the Employment Act, but also with all the other

material provisions of this Act as well as other legislative provisions impacting on this type of contract. The result would be that a fixed term contract of employment not containing all the key provisions of the Employment Act as well as other pieces of legislation applicable in this relationship would be null and void. If, on the other hand, the fixed term contract is strictly regulated by the common law, then there is no need to comply with the material provisions of the Employment Act when employers and employees enter into this type of contract. In this way, the principle of freedom to contract is well recognized. In the case of **Wells v South African Alumenite Company 1927 AD 69 at page 73,** the Appellate Division in South Africa stated the law as follows;

"If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice."

[55] Rhetorically, the Court then asked itself this question; what distinguishes a fixed term contract of employment made under the common law from a statutory contract of employment? The answer does not simply lie on

the duration of such contract being predetermined or fixed, but most importantly, it is that the parties can agree on terms and conditions totally outside of those contained in the various pieces of legislation impacting on employers and employees, as long as those terms are not below the standard set by statute. The minimum standards set by the legislature to be followed by employers and employees within the labour space, does not in any way oust the common law right of the parties to freely contract and determine their own cause of action and remedial action within the employment space in Eswatini.

[56] The Industrial Court and CMAC (if we accept that all disputes must first be reported to CMAC before being entertained by the Industrial Court), have therefore been ordained with powers and jurisdiction by Section 8 (1) of the Industrial Relations Act, 2000, to entertain and preside over both common law claims and statutory claims by any of the parties within the labour space.

[57] Thus, whenever a claim or dispute is brought before the Court or CMAC, the paramount duty of the Court or CMAC is to conduct an enquiry with the aim of ascertaining whether the claim is founded on a common

law fixed term contract of employment, or whether such contract is founded on the Employment Act (the case of an employee to whom Section 35 of the Employment Act applies).

[58] Whilst still on this issue, the Court must try to make sense of what was intended by the legislature when it enacted Section 35 (1) (d) of the Employment Act. From a holistic reading of the section, it can be inferred that this provision is directed to '*a statutory fixed term contract of employment which comes to an end*'. The only fixed term contracts of employment defined in the Employment Act, 1980, are 'seasonal contracts' or seasonal employment, because in such contracts, the term of employment is fixed and determined by the period of completion of the specified project i.e construction of either a bridge or road, housing project, cane harvesting and so on.

[59] Section 2 of the Employment Act, 1980, defines a seasonal contract as follows;

""seasonal contract" means a contract of service, the period of which cannot be pre-determined, entered into for a particular

season, or for work to be performed on or in connection with a special project."

[60] This section therefore does not apply to a normal common law fixed term contracts of employment which, as we have explained above, stand on a separate legal principle. In our view, the Appellant's reliance on Section 35 (1) (d) of the Employment Act, namely, that the fixed term contract of employment had come to an end, would have failed in that the type of fixed term contract of employment referred to under this section, as it differs from standard common law fixed term contracts of employment.

[61] The common law allows both natural persons and legal entities, in particular, employers and employees to freely contract and to freely regulate their own relationships. The only exception in the circumstances is that whatever terms and conditions are agreed upon between the parties, ought not to fall below those stipulated by the legislation and other regulatory frameworks. An argument may be raised that we cannot be talk about common law rights and obligations when there is a legislative framework setting out certain thresholds and

minimum standards within the employment space. That argument cannot however hold or be correct because within those limits, parties can still freely contract and set their own terms and conditions, according to their own needs and specifications. It is trite that if the legislature intends to limit certain fundamental rights, especially those grounded upon the common law, then it shall do so in clear and unambiguous language. The fundamental rights of parties to freely and independently agree on suitable terms and conditions within the labour space is what the common law promotes.

[62] The Court is of the firm view that the type of contract of employment in *casu* is regulated by the common law in that *inter alia*;

(a) Its duration or period of lapse is pre-determined by the parties themselves and not by statute i.e twelve (12) months. The Employment Act, 1980 anticipates that all contracts of employment shall come to an end only upon the happening of the events specifically described in the Act itself (*see* Section 36 of the Employment Act;

(b) Some of the material terms and conditions differ significantly from those provided for under the employment Act i.e payment of three 3 months' notice and payment of gratuity upon termination of the contract;

(c) Termination of the contract is based on additional grounds other than those outlined in the Employment Act, 1980;

(d) Dispute resolution methods are specifically agreed upon by the respective parties and;

(e) The payment to the employee of additional or other benefits is not specifically required to be done in terms of the employment Act.

REMEDIAL ACTION UNDER A FIXED TERM COMMON LAW CONTRACT OF EMPLOYMENT.

[63] Presently, the only proper reference to an employee entitled to remedial action is '*an employee to whom Section 35 of the Employment Act, 1980 applies.*' It seems inescapable that we must introduce another type of employee, namely, '*common law employee*', whose cause of action and

remedial action lies not in the relevant labour statutes, but rather lies in the application of common law principles and remedies, some of which we have canvassed above..

[64] The demarcation is absolutely necessary in order to avoid the lack of certainty that played itself from the facts of the present matter. The Respondent claimed an 'unpaid two (2) months' notice as well as gratuity (these being contract entitlements), and at the same time claimed twelve (12) months' compensation for 'unfair dismissal'. This effectively means that the Respondent's claims are premised on both the common law and statute (Employment Act and Industrial Relations Act). In such a case, there is bound to be an uncertainty on the applicable and lawful remedies.

[65] An action undertaken in terms of the common law can only be dealt with or corrected by applying acceptable remedial action under the common law. In Eswatini, the principles of common law which Courts are enjoined to apply are similar to those applicable in the Republic of South Africa. Section 252 (1) of the Constitution of the Kingdom of Eswatini provides;

"Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th September, 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except and to the extent that those principles or rules are inconsistent with this Constitution or a statute."

[66] In the case of **Mogopeni v Acacia Mining (SA) (Pty) Limited and Others (16878/18) [2020] ZAGPHC 300 (30 March 2020)**, the High Court of South Africa crystalized the issue for determination in that matter as follows;

"[6] The main issue which therefore arises is whether a fixed term contract of service or employment can be terminated prior to its date of termination by mere exercise of the notice as provided in the contract without any existent reasons being stipulated in the notice."

[67] When dealing with the issues, and in particular the remedies available to an employee who had concluded a common law fixed term contract of employment, the Court stated the following;

"[48] Accordingly, a notice to bring a fixed term contract to an early end is a repudiation because it does not in itself constitute a contractually permissible act of termination. Being a repudiation, the innocent party has an election to hold the guilty party to the contract or to accept the repudiation and cancel the contract. As long ago as in the case of *Fedlife Assurance Ltd v Wolfaardt 2002 (1) SA 49 (SCA) at para 18* the court confirmed that a premature termination of a fixed term contract of employment results in a claim for breach of contract...

[56] A party to a fixed term contract is not entitled to later seek to escape its obligations in terms of the contract on the basis that its assessment of the future had been erroneous or had overlooked certain things. Such a question arose in Buthelezi, being based on the alleged unfairness of the application of the common law principle on the employer, who may want to

restructure his business before the end of the term. Jafta AJA stated that;

"I have no hesitation in concluding that there is no unfairness in such a situation. This is so simply because the employer is free not to enter into a fixed term contract but to conclude a contract for an indefinite period if he thinks that there is a risk that he might have to dispense with the employee's service before the expiry of the term. If he chooses to enter into a fixed term contract, he takes a risk that he might have a need to dismiss the employee mid-term but is prepared to take the risk."

[68] On the facts of the matter before us, the parties specifically agreed that the contract of employment may be terminated on the ground of redundancy. In Clause 11.1 of the written contract, the parties agreed as follows;

"This contract may be terminated at any time during the contract period by either party for any of the following reasons:

11.1.1. The employee becomes incapable of performing his/her duties in terms of this agreement and/or for any of the grounds set out in Section 36 of the Employment Act, 1980."

[69] Section 36 of the Employment Act, 1980 recognizes redundancy as one of the grounds upon which a contract of employment can be terminated. Clause 7.8.3 of the agreement deals with the subject matter of what ought to happen in the event that the written contract is prematurely terminated on grounds of redundancy. The said clause provides as follows;

"In the event that the post occupied by the Employee becomes redundant, he/she shall be paid a gratuity as agreed in 7.8.1 proportionate to the period of service completed." (emphasis added)

[70] Clause 7.8.1 of the agreement between the parties provides;

"The gratuity amount payable to each employee shall be paid in two instalments (June and December) of each year. As a percentage of annual salary, the total gratuity shall not be less than 15%."

[71] It is an undisputed fact is that the parties expressly agreed that in the event the written contract has to be terminated on the ground of

redundancy, the employer would, in such circumstances, pay gratuity in accordance with Clause 7.8.3 of the contract. In January 2015, the contract of employment between the parties was terminated and the sole reason given by the Appellant for such termination was redundancy as envisaged by Clause 7.8.3 of the contract.

[72] Since the termination of the contract occurred in January 2015 and was based on redundancy. Payment of gratuity in terms of Clause 7.8.3 from January 2015 was unavoidable. Conscripted in the application of Clause 7.8.3 is that payment of such gratuity shall be **"proportionate to the period of service".** The total period of service of the Respondent with the Appellant plays itself out in the following; The Respondent commenced working for the Appellant in August 2013 and was stopped in January 2015. This gives a total of seventeen (17)months' of service namely;

(a) August 2013 to December 2013 = 4 months

(b) January 2014 to December 2014= 12 months

(c) January 2015 = 1 month

Total months = 17 months

[73] In applying Clause 7.8.3 to the duration of seventeen (17) months' worked by Respondent, calculated at the rate of 15% (in terms of Clause 7.8.1), one inevitably arrives at a total sum of **E 35,700.00 (Thirty Five Thousand Seven Hundred Emalangeni)**. The Respondent has however claimed the sum of E 25,200.00 (Twenty five thousand emalangeni) as gratuity in his papers and this amount cannot be changed by this court as it formed part of the pleadings before Court.

[74] On the notice Notice pay claim, the court recognizes that the parties freely and voluntarily agreed as follows in Clause 8.2 of the written contract;

"In the event the post in which the employee is engaged becomes redundant, a three months' salary shall be paid to him/her as notice. In the event that less than three months remain of the normal contract term, then such notice pay shall be for that shorter period instead of the three months."

[75] This court has concluded herein above that Respondent had seven (7) months left of the fixed term contract of employment when it was prematurely terminated in January 2015. This means Clause 8.2 is fully

applicable to the facts of the matter. The Respondent submitted that only a months' pay was made by the Appellant on termination of the contract. thus leaving out a balance of the two months. The two months unpaid notice amounts to the sum of E 28, 000.00 (Twenty Thousand Emalangeni) only.

[76] The remedies available when there is a breach of a common law fixed term contract of employment have been discussed at length above. Consequently the Respondent in this matter had an option to either;

(a) treat the contract as cancelled and claim damages (being remaining months of the contract); or, as an alternative,

(b) hold the Appellant to the contract and claim specific performance.

[77] Under category (a), the damages or relief claimable on the facts in *casu* were expressly agreed upon by the parties in their contract of employment. The parties agreed that damages claimable or the relief available to the Respondent are three (3) months' notice as well as

gratuity for the full length of service, calculated at the rate of 15% of the Respondent's monthly salary.

[78] Under category (b), namely specific performance, the Respondent could have elected to reject the ground of redundancy advanced by Appellant as a basis for terminating the contract, and claimed to be paid, either for the remaining period i.e seven (7) months or, that he be allowed to continue rendering service to the Appellant for the remaining seven (7) months. In such a case, the payment of gratuity and three (3) months' notice pay would not be available to him.

[79] We take judicial notice that the Courts in South Africa have firmly ruled that in addition to the common law remedies available to an employee whose fixed term contract of employment is unlawfully terminated by an employer, a claim for award of compensation for unfair dismissal in addition to the claim for damages in their law exist simultaneously with that of an unfair dismissal. Thus in the *Magopeni* case (*supra*), the Court held as follows;

"[49] In terms of the common law the damages that an employee is able to claim for breach of contract, is limited to the amount

still due for the remainder of the period of the contract. Whilst in terms of the LRA, an employee may in certain circumstances be able to claim more if an employer prematurely terminated the fixed term contract, *See PSA o.b.o Mbiza v Office of the Presidency and Others (2014) 3 BLLR 275 (LC)*, as premature termination of employment may also amount to an unfair dismissal. This means that employers may be held liable to pay compensation in addition to the amount paid out in terms of the contract…"

[80] We reject this 'double- barrelled' approach as propounded by the South African Jurisprudence, that over and above the payment of damages resulting from breach, an employer should still be required to pay compensation for unfair dismissal. The amount payable as compensation for unfair dismissal substitutes damages in the case of breach of contract. It would not accord substantive justice that an employer be called upon to pay twice for the same unlawful act.

[81] A cause of action founded under the common law fixed term contract of employment stands on a separate legal principle from a cause of

action founded on a statutory contract of employment. The legal remedies available under each of these heads, likewise differ significantly.

[82] When initiating a claim either at the shop-floor level, at CMAC or Industrial Court, it is important that all employees must clearly identify themselves as to whether they are 'common law employees' or 'employees to whom Section 35 of the Employment Act, 1980 applies. This demarcation ought to speak for itself from all internal engagements of the parties, the reporting of a dispute at CMAC, and finally in the pleadings at the Industrial Court.

[83] An employer who enters into a common law fixed term contract of employment and who unlawfully terminates such contract prior to the agreed date, is liable *inter alia*, to pay to such employee, an amount equivalent to the remaining period of the contract. The Court, in such circumstances, exercises a discretion and retains the power to consider an appropriate amount payable to the employee against the remaining period of the contract. As for common law fixed term contract of employment, the provisions of Section 2 (compensation for

automatically unfair dismissal) and, Section 16 (compensation for unfair dismissal) of the Industrial Relations Act, and the other statutory remedies, i.e notice pay and severance pay, do not apply. What applies in such an arrangement are the remedies available under the common law as fully described above. Likewise, when a claim is initiated as a statutory claim, *i.e* employee to whom Section 35 of the Act applies, the remedies available under this heading are not those ordinarily found under the common law, but those specifically outlined in the relevant statutes.

[84] In *casu*, even though the Respondent has based his claims on both the common law and statute (statute being the Employment Act and Industrial Relations Act), which this court holds in principle to be unacceptable, this Court has, notwithstanding, found that the Respondent has established a case under the common law. He properly pleaded and justified in the Court papers the remedies for gratuity and the outstanding two (2) months' pay.

[85] That being the case, and having accepted the termination on the ground of redundancy as being lawful i.e by filing a claim for gratuity and

notice pay, the Respondent could not procedurally and substantively claim for either unfair dismissal or for payment of damages *in lieu* of the remaining months of the contract. The election by Respondent of accepting the repudiation and claiming payment for gratuity and two months' notice pay constitutes a bar to the other claims which he could have legitimately filed. Put conversely, it is only a claim of specific performance that could have required the Court to determine whether or not the redundancy as alleged by Appellant validly existed, so as to bring about an end of the contract.

AWARDING OF LEGAL COSTS BY COURT *A QUO*

[86] On the issue of legal costs awarded by the Court *a quo* in favour of the Respondent, it is our finding that the Court *a quo* exercised its discretion judiciously in awarding costs against the Appellant. The Appellant entered into a fixed term contract of employment with the Respondent. In this agreement, the Appellant held itself to be liable to make payment of gratuity and three (3) months' notice pay in the event that the contract was terminated on the ground of redundancy.

[87] The Appellant's refusal to, at the very least, pay the sums of money agreed to between the parties when the contract of employment was terminated on the ground of redundancy, works against it and renders it liable to pay the Respondent's costs. In declining to pay to Respondent his due gratuity and notice pay, the Appellant informed the Court *a quo* that it had already made such payments to the Respondent in the past. The employer's reasoning was wrong and does not accord with the contract provisions. Accordingly, if there was any payment made to Respondent prior to January 2015, it was for something else i.e 13th cheque or bonus and not on account of termination of the contract of employment. We will therefore not disturb the order as to costs made by the Court *a quo.*

[88] In the circumstances of the case, the Court comes to the conclusion that the Appellant's appeal partially succeeds in so far as the Court *a quo*;

(a) failed to examine whether or not the contract of employment between the parties was still in force when Respondent's contract was terminated in January 2015;

(b) failed to examine the nature of the contract of employment between the parties;

(c) allowed payment of six (6) months' compensation as an award for unfair dismissal when the cause of action should have been a claim of unlawful breach of contract.

[89] The Respondent's cross-appeal also partially succeeds in that;

(a) the Court *a quo* erred by not awarding two (2) months' notice pay as agreed between the parties;

(b) the Court *a quo* also erred in not awarding gratuity as specifically agreed upon between the parties that such would be paid on termination of the contract on the basis of redundancy.

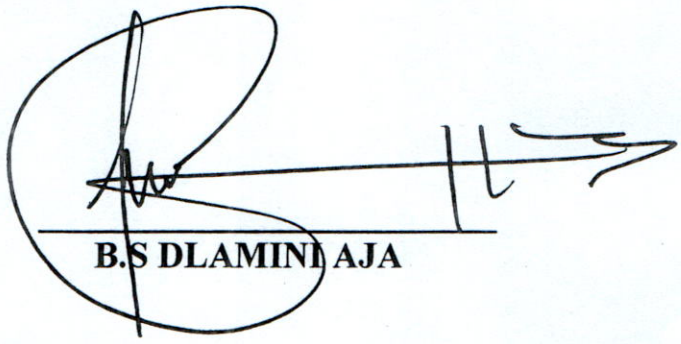
[90] The Court accordingly substitutes the orders issued by the Court *a quo* and replaces them with the following orders;

(a) **The Respondent (MA Dlamini Consulting Engineers (Pty) Ltd) is ordered to pay to the Applicant (Bonginkhosi Zweli Mathunjwa) the following sums of money;**

(i) **Gratuity in the sum of E 25,200.00 (Twenty Five Thousand Two Hundred Emalangeni);**

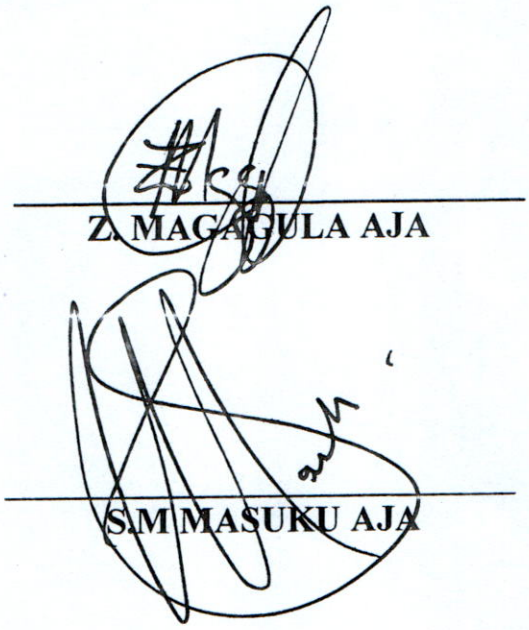
(ii) **Two (2) months' notice pay in the sum of E 28,000.00 (Twenty Eight Thousand Emalangeni) only.**

(iii) **Costs of suit (for Industrial Court proceedings).**



B.S DLAMINI AJA

I, agree,



Z. MAGAGULA AJA

I, agree,

S.M MASUKU AJA

For Appellant: ***Attorney Mr. N.D Jele***

(Robinson Bertram Attorneys)

For Respondent: ***Attorney Mr. Tengbeh***

(S. V Mdladla & Associates)