IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

JUDGMENT

Case No. 06/2023

In the matter between:-

A.G. THOMAS (PTY) LIMITED	Appellant
And	
MFANAWEKHAYA DLAMINI	1st Respondent
THEMBA MAHENGUELA	2nd Respondent
LIZERIO MAHLALELA	3rd Respondent
SIBONANGAYE NTIMBA	4th Respondent
HUA ALBERTO JUVERANCE	5th Respondent
BERNARDO SAMBO	6th Respondent
SAMKELISO MLOTSA	7th Respondent

Neutral citation: A.G. Thomas [Pty] Ltd vs Mfanawekhaya Dlamini and Six Others (06/2023) [2023] SZICA 01 (19th February 2024)

Coram: **D. MAZIBUKO JA, S. NSIBANDE JP AND A.M. LUKHELE JA**

Last Called: 17th October 2023

Delivered: 19th February 2024

Summary: 1. CLAIM FOR UNFAIR DISMISSAL

1.1 The Industrial Court found the employer to have dismissed the employees unfairly, substantively and procedurally. The Honourable Court ordered that the employees be paid compensation for unfair dismissal plus additional notice.

1.2 The Honourable Court also ordered that the employees be paid food allowance and also out of country allowance for the period the employees were on duty outside the country. The latter order was based on the Legal Notice No. 184 of 2010 also known as The Regulation of Wages (BUILDING AND CONSTRUCTION INDUSTRY ORDER, 2010).

1.3 Held: that the Industrial Court has a discretion in determining the amount of compensation payable to an employee who has been declared to have been dismissed substantively and/or procedurally unfair. The Court must exercise its discretion within the confines of section 16(1) to (9) of the Industrial Relations Act.

1.4 Held further that: a relationship between employer and employee is governed by a contract. The law of contract applies in the

formation, maintenance and termination of a contract of employment. The consequences of termination of a contract of employment are, inter alia, governed by the provisions in the Employment Act as read with the Industrial Relations Act and any other applicable law. An employer who dismisses an employee from work has a legal obligation to comply with the law or face the consequences of an unfair dismissal.

2. *INTERPRETATION OF STATUTES.*

One of the canons of interpretation of a statute is that; the Court must have regard to the mischief that the statute was promulgated to remedy.

3. *SECTION 19(1) OF THE INDUSTRIAL RELATIONS ACT.*

The Industrial Court of Appeal is authorised by law to hear and determine appeals on questions of law only.

4. *HIGH COURT RULE 18(6)*

High Court rule 18(6) compels a litigant, who relies on a contract in support of his case or defence, to plead that contract and inter alia, state whether it is written or oral, where, when and by whom it was concluded. Failure by a litigant to comply with High Court rule 18 (6) is fatal to a case or defence that is based on a contract.

5. *HIGH COURT RULE 22 (2)*

High Court rule 22(2) compels a litigant to state in its pleading, clearly and concisely all material facts upon which he relies. Failure by a

litigant to comply with High Court rule 22 (2) in its pleading, will render that pleading defective.

D. MAZIBUKO JA

JUDGEMENT

BACKGROUND

1. The matter before Court is an appeal of a judgment of the Industrial Court which was delivered on the 31st March 2023.

   1.1 The Appellant namely: A.G. Thomas (PTY) LTD is a company that carries on business in civil engineering and construction. The Appellant's principal place of business is in Matsapha town in Eswatini. The Appellant will also be referred to as the employer.

   1.2 The Respondents are Mr Mfanawekhaya Dlamini and 5(five) others. The Respondents are former employees of the Appellant.

   1.3 At the Industrial Court the Appellant was the Respondent and the current Respondents were the Applicants.

1.4 It is common cause that Sibonangaye Ntimba, who was cited as the 4th Respondent, withdrew his claim against the Appellant.

2. The Industrial Court has summarized certain facts pertinent to the matter before Court as follows:

2.1 In February 2009 the Appellant concluded a business contract which enabled it [Appellant] to carry out construction work in Botswana, and

2.2 that a company known as PONESO Holdings (Pty) Ltd, which carried on business in Botswana, agreed to work in association with the Appellant in order to carry out the construction work aforementioned, and

2.3 that in February 2009 the Appellant temporarily relocated its employees to Botswana, particularly the Respondents and certain of their colleagues, in order to carry out the construction work as aforementioned, and

2.4 that while the Respondents were on duty in Botswana, their contracts of employment with the Appellant were governed by the laws of Eswatini, and

2.5 that the Appellant and its employees had a dispute regarding the allowances that the employees expected to receive from the Appellant, while the employees executed their duties in Botswana.

3. About the 5th June 2011, the Respondents (duly assisted by their attorney), raised a grievance in writing with the Appellant. The Respondents contended that they were entitled to, but had not received payment, inter alia, for: out of country allowance as well as food allowance, while they served as the Appellant's employees in Botswana.

4. The Respondents submitted that on the 27th June 2011, they were summoned to the Appellant's offices in Matsapha. The Respondents met a director of the Appellant namely; Mr Percy Thomas, in order to discuss their grievances. The parties differ on what took place at that meeting.

4.1 According to the Respondents, the proposed discussion escalated into a heated argument which culminated in Mr Thomas summarily dismissing them (Respondents) from work.

4.2 The Respondents further submitted that the Appellant offered to pay them terminal benefits which (in their opinion) were based on a wrong

calculation. Certain of their benefits, such as notice pay, had been excluded from the computation aforesaid.

5. About the 28th June 2011 the Appellant (duly assisted by its attorney) responded, in writing, to the Respondents' grievances. The Appellant contended that the Respondents were not entitled to payment of the allowances they had claimed and for that reason, the Appellant would not pay.

6. About the 12th August 2011 the Respondents reported a dispute to the Conciliation, Mediation and Arbitration Commission. The Commission issued a Certificate of Unresolved Dispute. The Commission subsequently issued an amended certificate dated 13th August 2013.

7. About the 18th November 2013, the Respondents filed their claim before the Industrial Court for unfair dismissal plus ancillary relief.

   7.1 The Respondents claimed that they had been summarily dismissed from work by the Appellant's director namely; a Mr Percy Thomas, when they demanded payment of allowances due to them, following their temporary deployment to Botswana.

7.2 The Respondents claimed that they were dismissed without proof of misconduct on their part. Furthermore they claimed that were denied a hearing before dismissal. Therefore the Respondents have categorized their dismissal as being substantively and procedurally unfair.

8. In the amended Reply (dated 12th April 2019), the Appellant denied that the Respondents were dismissed from work. The Appellant averred that the Respondents' contracts of employment came to an end. The Appellant further averred that they paid the Respondents the contractual benefits due to them at the end of their contracts. The Appellant denied that they owed the Respondents the allowances that the latter were claiming.

9. The Industrial Court found in favour of the Respondents. The Honourable Court ordered that each Respondent be paid: compensation, additional notice, out of country allowance and food allowance.

10. The Appellant being dissatisfied with the judgment of the Industrial Court has noted the present appeal. The Notice of Appeal is dated 15th May 2023.

11. The Appellant has duplicated the grounds of appeal and as such they are voluminous, alternatively, the grounds overlap each other.

1ST GROUND OF APPEAL

12. The 1st ground of appeal reads thus:

"1. The Court a quo erred and/or misdirected itself when the Court at the outset failed to direct its mind to the true question before it – namely whether Respondents in the presentation of their complaint had proved that at the time that the Respondents' services were terminated, Respondents were employees to whom section 35 of the Employment Act 1980("the EA 1980) applied."

(Record pages 80 – 81)

13. In the 1st ground of appeal the Appellant argued that: the Industrial Court made an error of law in arriving at its finding that the Respondents (employees) were employed by the Appellant on an open – ended employment contract as opposed to a fixed - term contract. With the 1st ground of appeal the Appellant –

(i) is challenging the legal status of the Respondent's contracts of employment, and

(ii) is also challenging the *locus standi* of the Respondents in instituting the lawsuit against it [Appellant], before the Industrial Court.

13.1 The Appellant has *inter alia* referred to section 35 of the

Employment Act no.5/1980 (as amended).

An excerpt of Section 35 reads thus:

"35 (1) This section shall not apply to –

(a) an employee who has not completed the period or probationary employment provided for in section 32:

(b) an employee whose contract of employment requires him to work less than twenty-one hours each week;

(c) an employee who is a member of the immediate family of the employer;

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

(2) No employer shall terminate the services of an employee unfairly."

13.2 The Appellant submitted that it had employed the Respondents, each on a fixed - term contract, whose term had expired. The Appellant further submitted that the Respondents had not been dismissed, instead their contracts of employment had terminated by effluxion of time. The Appellant based its argument on Section 35 (1) (d) of the Employment Act.

13.3 In support of its submission, the Appellant referred this Court to some of the exhibits it had tendered before the Industrial Court. The said exhibits are examined herein below.

FIXED -TERM AGREEMENTS AND THE PARTICULARS OF CLAIM

14. The Appellant referred to a document entitled '*SHORT FIXED TERM EMPLOYMENT AGREEMENT*' between itself and the 1st Respondent (Mr Mfanawekhaya Dlamini). This document is not dated but it is signed in the space provided for the employer and employee.

14.1 According to the said document the 1st Respondent was engaged by Appellant, as a driver, from the 26th February 2011 to the 25th June 2011.

14.2 Attached to the said document is another document with the title: '*WRITTEN PARTICULARS OF EMPLOYMENT*'. The latter document is not dated, but it is signed in the spaces provided for the employer and employee.

14.3 According to the *WRITTEN PARTICULARS OF EMPLOYMENT*, the 1st Respondent was employed by the Appellant, as a driver, with effect from the 1st November 2001.

14.4 The exhibits that the Appellant had presented before the Industrial Court confirm that when the Appellant concluded the '*SHORT FIXED TERM EMPLOYMENT AGREEMENT*' with the 1st Respondent (on the 26th February 2011), the Appellant had an existing contract of employment with the 1st Respondent which was concluded on the 1st November, 2001.

14.5 The contract of employment which the Appellant and the 1st Respondent had concluded on the 1st November 2001 subsisted beyond the 25th June 2011.

14.6 The contract of employment which the Appellant and the 1st Respondent had concluded on the 1st November 2001, had no agreed termination date.

15. The Appellant further referred to another document which is entitled '*SHORT FIXED TERM EMPLOYMENT AGREEMENT*' between itself and the 2nd

Respondent (Mr Themba Mahenguela). This document is not signed by the proposed parties, and it is not dated.

15.1 According to the said document the 2nd Respondent was engaged by the Appellant as a *LAB TECHNICIAN* from the 26th February 2011 to the 25th June 2011.

15.2 There is another document attached thereto which is marked '*WRITTEN PARTICULARS OF EMPLOYMENT*'. In the written particulars it is stated that the 2nd Respondent was employed, by the Appellant, as a *LAB TECHNICIAN,* on the 1st November 2001. The latter document is not signed by either of the proposed parties.

15.3 Provided that the alleged '*SHORT FIXED TERM EMPLOYMENT AGREEMENT*' and the '*WRITTEN PARTICULARS OF EMPLOYMENT*' had been lawfully executed between the Appellant and the 2nd Respondent, and consequently a valid contract of employment had been concluded in each document, that state of affairs would mean that –

15.3.1 when the Appellant concluded the aforesaid '*SHORT FIXED TERM EMPLOYMENT AGREEMENT*' with the 2nd Respondent,

(on the 26th February 2011), the Appellant had an existing contract of employment with the 2nd Respondent, and,

15.3.2 that the aforesaid existing contract of employment, was the one concluded on the 1st November 2001, and

15.3.3 that the contract of employment that the Appellant and the 2nd Respondent concluded on the 1st November 2001, had no agreed termination date, and

15.3.4 that the contract of employment that the Appellant and the 2nd Respondent concluded on the 1st November 2001, subsisted beyond the 25th June 2011.

15.3.5 Later in this judgment, the Court deals with the legal effect of a purported written employment contract that has not been signed by the intended parties.

16. The Appellant referred to another document that is marked '*SHORT FIXED TERM EMPLOYMENT AGREEMENT*' between the Appellant and the 3rd

Respondent (Mr Lizerio Machalele). This document is not dated but has been signed in the spaces provided for the employer and employee.

16.1 It is stated in the document aforementioned that the Appellant had engaged the 3rd Respondent as Assistant Mechanic from the 26th February 2011 to the 25th June 2011.

16.2 Attached to the document aforementioned, is another document that is marked '*WRITTEN PARTICULARS OF EMPLOYMENT*'. The latter document is not dated but it is signed in the spaces provided for the employer and employee.

16.3 It is stated in the latter document that on the 7th January 1998, the 3rd Respondent was employed by the Appellant as ASSISTANT MECHANIC.

16.4 The exhibits that the Appellant had presented before Court confirm that: when the Appellant concluded the aforesaid 'SHORT FIXED TERM EMPLOYMENT AGREEMENT' with the 3rd Respondent (on the 26th February 2011) the Appellant had an existing contract of employment

with the 3rd Respondent which was concluded on the 7th January 1998. The contract of employment that the Appellant and the 3rd Respondent concluded on the 7th January1998 had no agreed expiry date.

16.5 As at the 26th February 2011, the 3rd Respondent had an existing contract of employment with the Appellant. The contract of employment that the Appellant concluded with the 3rd Respondent on the 7th January 1998 subsisted beyond the 25th June 2011.

17. The Appellant further referred to another document marked '*SHORT TERM EMPLOYMENT AGREEMENT*' between the Appellant and the 5th Respondent, (MR ALBERTO HUA JUVERANCE). This document is not dated and is not signed by the intended parties.

17.1 It is stated in this document that the Appellant engaged the 5th Respondent as a SCREED OPERATOR, from the 26th February 2011 to the 25th June 2011.

17.2 There is another document that is attached to the one aforementioned with the title: '*WRITTEN PARTICULARS OF EMPLOYMENT*'. The

latter document is not dated and also not signed in the space provided for the intended contracting parties, viz: the employer and employee.

17.3 It is provided in the written particulars, that the Appellant employed the 5th Respondent as a SCREED OPERATOR as from the 7th January 1996.

17.4 Provided that the alleged '*SHORT FIXED TERM EMPLOYMENT AGREEMENT*' and the '*WRITTEN PARTICULARS OF EMPLOYMENT*' had been lawfully executed between the Appellant and the 5th Respondent, and consequently a valid contract of employment had been concluded in each document, that state of affairs would mean that –

17.4.1 when the Appellant concluded the aforesaid fixed term agreement with the 5th Respondent, (on the 26th February 2011), the Appellant had an existing contract of employment with the 5th Respondent, and

17.4.2 that the existing contract of employment was the one concluded on the 7th January 1996, and

17.4.3 that the contract of employment that the Appellant and the 5th Respondent concluded on the 7th January 1996, had no agreed expiry date, and

17.4.4 that the contract of employment which the Appellant and the 5th Respondent concluded on the 7th January 1996, subsisted beyond the 25th June 2011.

17.5 As aforementioned, this Court, later in this judgment, will deal with the legal effect of a purported written contract of employment that has not been signed by the intended parties.

18. The Appellant referred to another document marked: '*SHORT FIXED TERM EMPLOYMENT AGREEMENT*' concluded between the Appellant and the 6th Respondent (Mr Bernado Sambo). This document is not dated, but it is signed in the spaces provided for the employer and employee.

18.1 According to the document aforementioned the 6th Respondent was engaged by the Appellant as SCREED OPERATOR from 26th February 2011 to 25th June 2011.

18.2 Attached to the document aforementioned is another document marked: '*WRITTEN PARTICULARS OF EMPLOYMENT*'. The latter document is not dated but has been signed in the space provided. According to the latter document the 6th Respondent was employed by the Appellant on the 7th January 1996 as a SCREED OPERATOR.

18.3 The exhibits that the Appellant had presented before Court confirm that: when the Appellant and the 6th Respondent executed the '*SHORT TERM EMPLOYMENT AGREEMENT*' (on the 26th February 2011), the Appellant had an existing contract of employment with the 6th Respondent which was concluded on the 7th January 1996.

18.4 The contract of employment that the Appellant and the 6th Respondent concluded on the 7th January 1996, had no agreed expiry date.

18.5 The contract of employment which the Appellant had concluded with the 6th Respondent on the 7th January 1996 subsisted beyond the 25th June 2011.

19. The Appellant referred to another document marked: '*SHORT FIXED TERM EMPLOYMENT AGREEMENT*' between the Appellant and the 7th Respondent (Mr Samkeliso Mlotsa). This document is not dated but is signed in the space provided, for the employer and employee signatures.

19.1 According to the said document the 7th Respondent was engaged by the Appellant as a HEAVY DUTY DRIVER from the 26th February 2011 to the 25th June 2011.

19.2 Attached to the document aforementioned is another document that is marked '*WRITTEN PARTICULARS OF EMPLOYMENT.* The latter document is not dated but it is signed in the spaces provided for the employer and employee.

19.3 It is stated in the latter document that the 7th Respondent was employed by the Appellant as a HEAVY DUTY DRIVER on the 1st October 2005.

19.4 The exhibits that the Appellant had presented before the Industrial Court, confirm that: when the Appellant concluded the aforesaid '*SHORT FIXED TERM EMPLOYMENT AGREEMENT*' with the 7th Respondent (on the 26th February 2011), the Appellant had an existing contract of

employment with the 7th Respondent which was concluded on the 1st October 2005. The contract of employment that the Appellant and the 7th Respondent concluded on the 1st October 2005, had no agreed expiry date.

OPEN – ENDED CONTRACTS OF EMPLOYMENT

20. The question that is of paramount importance in determining the 1st ground of appeal is: whether each of the Respondents was employed by the Appellant on a fixed - term contract or in an open –ended contract (also known as a contract for an indefinite period.) The legal consequences of each contract is significantly different from the other.

21. Legal authority recognizes a distinction between these 2 (two) methods of employment and has explained the distinction as follows:

"The employee is someone who assists the employer in the conduct of their business ... . There are only two broad categories that we might consider, namely the employee on an open – ended contract, and the employee on a fixed – term contract. No other category exists.

...

An employment contract does not usually specify a date on which it will end. In other words, the employment relationship is open – ended. The presumption is that it will continue until such time as the employee decides to end it or the employer decide to end it with fair and proper reason."

(Underlining added)

LEVY A et al: LABOUR LAW IN PRACTICE, BOOKSTORM, 2010 (ISBN 978 -1-920434-04-5) pages 24-25.

REFERENCE LETTERS

22. This Court was further referred to reference letters that the Appellant had issued to each of the Respondents. All 6 (six) reference letters are dated 30th June 2011.

23. In respect to the 1st Respondent (Mr Mfanawekhaya Dlamini) the Appellant stated as follows in the reference letter:

"30th June, 2011

Re: Dlamini Mfanawekhaya

This serves to confirm that the above mention has been employed by A.G. Thomas (Pty) Ltd as a Truck Driver from November 2001 to June 2011."

(Record page 142)

23.1 In the aforementioned letter, the Appellant (as employer), confirmed that; it had employed the 1st Respondent from November 2001, and also that, that contract of employment was terminated in June 2011. In the reference letter there is no mention of a fixed term contract.

23.2 In the Particulars of Claim, the 1st Respondent averred that he was employed by the Appellant from 1st November 2001. An excerpt of paragraph 1 in the Particulars of Claim reads thus:

"The 1st Applicant [1st Respondent]... Mfanawekhaya Dlamini ... was employed by the Respondent [Appellant] ... on the 1st November 2001 ..."

23.3 In the Reply, the Appellant admitted the 1st Respondent's averment, particularly that the Appellant employed the 1st Respondent on the 1st November 2001. As excerpt of the Reply reads as follows at paragraph 2.1.

"2 AD PARAGRAPHS 1,2,3,4,5,6,7.

2.1 Save to state that each of the Applicants [Respondents] were employed in terms of the written contract of employment, the contents of these paragraphs are admitted"

(Underlining added)

1ST RESPONDENT DISCHARGED HIS ONUS

23.4 The admission by the Appellant that it employed the 1st Respondent, particularly on the 1st November 2001, meant that the 1st Respondent had discharged the onus to prove that allegation.

23.5 The admission that is contained in paragraph 2 of the Appellant's Reply applies *mutatis mutandis* to the allegations that were made by the other Respondents in the Particulars of Claim, as shown below.

24. In respect to the 2nd Respondent (Mr Themba Mahenguela) the Appellant wrote the following statement in the reference letter:

"30th June, 2011

Re: Themba Mahenguela

This serves to confirm that the above mentioned person was employed by A.G. Thomas (Pty) Ltd as a General Labourer in November 2001 and later trained as an Asphalt Laboratory Technician, a task he was performing up to the completion of his contract in June 2011."

(Record page 138)

24.1 In the aforementioned letter the Appellant (as employer) confirmed that; it had employed the 2nd Respondent from November 2001, and that, that contract of employment was terminated in June 2011. In that letter there is no mention of a fixed - term contract.

24.2 In the Particulars of Claim, the 2nd Respondent averred that he was employed by the Appellant from 1st February 2000. An extract of paragraph 2 in the Particulars of Claim reads thus.

"2 The 2nd Applicant [2nd Respondent] Themba Mahenguela ... was employed by the Respondent [Appellant] ... on the 1st February 2000 ..."

2ND RESPONDENT DISCHARGED HIS ONUS

24.3 In its Reply, the Appellant admitted the allegation that was contained in paragraph 2 of the Particulars of Claim. The Admission by the Appellant particularly that it employed the 2nd Respondent on the 1st February 2000, meant that the 2nd Respondent had discharged his onus to prove that he was employed by Appellant as alleged.

25. In respect to the 3rd Respondent (Mr Lizerio Mahlalela), the Appellant wrote the following statement in the reference letter:

"*30th June, 2011*

Re: Lizerio Mahlalela

This serves to confirm that the above mentioned person was employed by A.G Thomas (Pty) Ltd as an Assistant Mechanic from January 1998 to June 2011."

(Record page 139)

25.1 In the aforementioned letter the Appellant (as employer) confirmed that, it had employed the 3rd Respondent from January 1998 and that, that contract of employment was terminated in June 2011. There is no mention of a fixed - term contract in that letter.

25.2 In the Particulars of Claim, the 3rd Respondent averred that he was employed by the Appellant in May 1998. An excerpt of paragraph 3 in the Particulars of Claim reads thus:

"3. The 3rd Applicant [Respondent] Lizerio Mahlalela ... was employed by the Respondent [Appellant] in May 1998 ... ."

3RD RESPONDENT DISCHARGED HIS ONUS

25.3 In the Reply, the Appellant admitted the contents of paragraph 3 in the Particulars of Claim. In particular, the Appellant admitted that it employed the 3rd Respondent in the year 1998. That admission meant that the 3rd Respondent had discharged his onus to prove that he was employed by the Appellant as alleged.

25.4 A reading of the pleadings and the supporting documents indicates that the 3rd Respondent was referred to either as Mr Lizerio Machelele or Mr Lizerio Mahlalela.

26. In the respect to the 5th Respondent (Mr Alberto Hua Juverance) the Appellant wrote the following statement in the reference letter:

"30th June, 2011

Re: Alberto Hua

This serves to confirm that the above mentioned person was employed by A.G. Thomas (Pty) Ltd as a General Labourer in 1993 and later trained as a Screed Operator, a task he was performing up to the completion of his contract in June 2011."

(Record page 143)

26.1 The aforementioned letter is confirmation by the Appellant that it had employed the 5th Respondent from the year 1993 and that, that contract of employment was terminated in June 2011. There is no mention of a fixed - term contract in that letter.

26.2 In the Particulars of Claim the 5th Respondent averred that he was employed by the Appellant on the 4th February 1993, an excerpt of paragraph 5 in the Particulars of Claim reads thus:

"*5. The 5th Applicant [5th Respondent] ... Hua Alberto Juverance ... was employed by the Respondent [Appellant] ... on the 4th February 1993 ....*"

5TH RESPONDENT DISCHARGED HIS ONUS

26.3 In its Reply the Appellant admitted that it employed the 5th Respondent as averred in the Particulars of Claim. That admission meant that the 5th Respondent discharged his onus to prove that he was employed by the Appellant as alleged.

27. In respect to the 6th Respondent (Mr Bernado Sambo) the Appellant wrote the following statement in the reference letter:

"30th June, 2011

Re: Sambo Bernado

This serves to confirm that the above mentioned person was employed by A.G. Thomas (Pty) Ltd as a General Labourer in January 1996 and later trained as a Paver Operator, a task he was performing up to the completion of his contract in June 2011."

(Record page 141)

27.1 The aforementioned letter is confirmation by the Appellant that it had employed the 6th Respondent from January 1996 and that, that contract of employment terminated in June 2011. In that reference letter there is no mention of a fixed - term contract.

27.2 In the Particulars of Claim, the 6th Respondent averred that he was employed by the Appellant in the year 1996. An excerpt of paragraph 6 of the Particulars of Claim reads thus:

"6. *The 6th Applicant [Respondent]... Bernado Sambo ... was employed by the Respondent ... in the year 1996 ..."*

6TH RESPONDENT DISCHARGED HIS ONUS

27.3 In the Reply the Appellant admitted that it employed the 6th Respondent as averred in the Particulars of Claim. That admission meant that the 6th Respondent had discharged his onus to prove that he was employed by the Appellant as alleged.

28. In respect to the 7th Respondent (Mr Samkeliso Mlotsa) the Appellant wrote the following statement in the reference letter:

"30th June, 2011

Re: Mlotsa Samkeliso

This serves to confirm that the above mentioned person was employed by A.G Thomas (Pty) Ltd as Truck Driver from October 2005 to June 2011."

(Record page 140)

28.1 The aforementioned letter is confirmation by the Appellant that it had employed the 7th Respondent from October 2005 and that, that contract of employment was terminated in June 2011. In that letter there is no mention of a fixed - term contract.

28.2 In the Particulars of Claim the 7th Respondent averred that he was employed by the Appellant in September 2006. An excerpt of paragraph 7 in Particulars of Claim reads thus:

"The 7th Applicant [Respondent] ... Samkelo Mlotsa, ... was employed by the Respondent ... in September 2006 ..."

7TH RESPONDENT DISCHARGED HIS ONUS

28.3 In the Reply, the Appellant admitted that it employed the 7th Respondent as averred in the Particulars of Claim. That admission meant that the 7th Respondent had discharged his onus to prove that he was employed by the Appellant as alleged.

APPELLANT ADMITTED OPEN – ENDED EMPLOYMENT CONTRACTS WITH THE RESPONDENTS

29. The Court re-iterates that the Appellant admitted in paragraph 2.1 of its Reply that: it had employed each of the Respondents as alleged in paragraphs 1, 2, 3, 5, 6, and 7 of the Particulars of Claim. The contracts of employment that the Respondents had pleaded in paragraphs 1, 2, 3, 5, 6, and 7 of the Particulars of Claim were not fixed term. Instead they were open – ended contracts of employment.

30. The Appellant alleged further that the contracts of employment that it concluded with the Respondents, as pleaded in paragraphs 1, 2, 3, 5, 6, and 7 in the Particulars of Claim were in writing.

30.1 The Appellant however failed to attach, to its pleading, copies of the alleged contracts of employment or part thereof which the Appellant relied on.

RULES THAT REGULATE PLEADINGS

30.2 In terms of the High Court rule 18(6), it is mandatory for a party who relies on a written contract in its pleadings, to attach thereto, a true copy of that contract or partthereof which the party relies on. The sub-rule reads thus:

"A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading."

(Underlining added)

30.3 This principle is also supported by case of law, for instance, in the case of: VAN TONDER VS WESTERN CREDIT LTD 1996 (1) SA 189 F, where the Court stated as follows, Per Van Winsen J:

"Rule 18(6) ... which provides that a party who in his pleadings relies upon a contract shall state whether the contract is written or oral, and when, where and by whom it was concluded' must be complied with at the pleading stage."

(Underlining added)

30.4 In terms of Industrial Court rule 28 (a), the High Court rules are *mutatis mutandis* applicable at the Industrial Court.

30.5 The Appellant failed to support its allegation viz; that the contracts of employment that it admittedly concluded with each of the Respondents, and which are pleaded in paragraphs 1, 2, 3, 5, 6 and 7 of the Particulars of Claim, were in writing. The failure by the Appellant to provide proof of its averment meant that its averment is without merit. The conclusion is inescapable that the contracts of employment that the Respondents pleaded in paragraphs 1, 2, 3, 5, 6 and 7 of the Particulars of Claim were not in writing and therefore oral.

APPELLANT FAILED TO DISCHARGE ITS ONUS

30.6 It is the Appellant who made an allegation that the various contracts of employment (as pleaded in paragraphs 1, 2, 3, 5, 6 and 7 of the Particulars of claim) were in writing. The onus was therefore on the Appellant to prove its allegation. The Appellant has failed to discharge that onus and that failure was fatal to the allegation that the Appellant had made. Among the fundamental principles in law is that:

"... *the party who alleges or, as it is sometimes stated, the party who makes a positive allegation must prove.*"

CLASSEN C.J. : DICTIONARY OF LEGAL WORDS AND PHRASES ,vol 3, BUTTERWORTHS, 1976 (SBN 409 01892 9) page 78.

ABSENCE OF SIGNATURE IN A DRAFT CONTRACT

31. The Appellant (as employer) has referred to each of the documents marked '*SHORT TERM EMPLOYMENT AGREEMENT*' and the '*WRITTEN PARTICULARS OF EMPLOYMENT*', on the assumption that each constitutes a binding agreement between the intended parties. It is however evident from the documents aforementioned that certain of them were not signed, and that the

absence of signatures presents a legal barrier to the validity of the alleged contracts of employment.

31.1 Both documents that referred to the 2nd Respondent (Mr Themba Mahenguela) as employee, were not signed.

31.2 Likewise, both documents that referred to the 5th Respondent (Mr Hua Alberto Juvenance), as employee, were not signed.

31.3 The aforementioned documents were drafted in such a manner that; upon signature by the proposed parties, the contents therein would there and then become a contract that would bind the parties thereto. According to authority:

31.3.1 "*The effect of appending a signature, is in general, that the party in question is bound*:

...

KERR AJ: THE PRINCIPLES OF THE LAW OF CONTRACT, 6th edition, Butterworths 2003,

(ISBN 0 409 03753 2) pages 102 -103.

31.3.2 *"The function of a signature is to signify that the writing to which it pertains accords with the intention of the signatory. It conveys an attestation by the person signing of his approval and authority for what is contained in the document; and that it emanates from him."*

Per HOEXTER JA: JURGENS AND OTHERS VS VOLKSKAS BANK LTD 1993 (1) SA 214 at 220 E.

31.4 The absence of signatures on the draft documents means that the contents therein do no amount to a contract. Consequently, each of the documents that the Appellant had presented before the Industrial Court in respect to the 2nd and 5th Respondents does not constitute an employment contract. This legal position was brought to the attention of the Appellant's counsel during argument.

31.5 The Appellant's counsel confirmed the legal position, particularly that-

31.5.1 the absence of signature means that the 2nd and 5th Respondents did not consent to the contents of the draft contract, and

31.5.2 that the absence of consent means that a contract was not concluded between the Appellant and the 2nd Respondent, and also between the Appellant and the 5th Respondent.

31.6 Following the aforementioned confirmation by the Appellant's counsel, of the correct legal position, learned counsel raised another argument. According to counsel; parties can conclude an oral agreement and subsequently confirm the terms of that oral agreement in writing. That proposition as advanced by counsel, is legally correct, but it is not applicable in this case.

31.6.1 The difficulty with the latest argument by the Appellant's counsel is that: that is not the case that the Appellant had pleaded. Furthermore, that is not the argument that was presented in the Appellant's submission before this Court.

31.6.2 The documents that referred to the 2nd and 5th Respondents as employees do not state that the Appellant was confirming an earlier- oral agreement. Therefore the submission by the Appellant's counsel has neither evidential nor legal support, and it is therefore dismissed.

31.6.3 The Appellant's case before the Industrial Court and which had been pleaded by the Appellant is that: it concluded fixed-term employment contracts in writing, with all the Respondents (which included the 2nd and 5th Respondents). That is the case that the Industrial Court decided. It is not permissible for learned counsel to introduce a different argument at this stage, and especially one which is not supported by the pleadings.

DOCUMENTS SIGNED UNDER DURESS

32. The Respondents raised another argument in order to challenge the aforementioned '*FIXED TERM EMPLOYMENT AGREEMENT*' and the '*WRITTEN PARTICULARS OF EMPLOYMENT.*' The Respondents argued that the purported agreements are invalid and therefore unenforceable because: in respect to those agreements that were signed, the Respondents were made to sign under duress.

32.1 The Industrial Court captured the challenge against the validity of the aforesaid employment agreements as follows at paragraphs 20 to 20.1 of the judgment:

"During the evidence in chief, the Applicants denied that they were employed in terms of fixed term contracts. They denied that they signed fixed term contracts in the volume 11 of the Respondents' documents. They told the Court that even if they may have signed some of those documents, the contracts were not valid because;

"20.1 they signed under duress as they were told by a certain employee of the Respondent by the name of Albert Masilela that if they did not sign, the gate was open; ..."

(Underlining added)

32.2 Both counsel for the Appellant and counsel for the Respondents were in agreement that this particular phrase.'... *if they did not sign, the gate was open ...'*, meant that if the Respondents refused to sign the draft fixed term agreements and the annexed particulars of employment, they would there and then lose their employment. It also not in dispute that those words amounted to a threat.

32.3 According to the Industrial Court, it is not in dispute that –

32.3.1 the threat was issued by a representative of the Appellant (namely Mr Albert Masilela), and

32.3.2 that the effect of that threat coerced the Respondents to sign the draft documents in order to avoid loss of employment, even though they did not agree with the contents therein.

32.4 When analyzing the evidence, the Industrial Court came to the conclusion that the Appellant (employer) had failed to lead evidence to gainsay the evidence of the Respondents (employees); that they signed the draft agreement under duress. An excerpt of the judgment reads thus at paragraph 21 and 21.4:

"21. The Court taking into account all the evidence before it, will accept the version by the Applicants [employees] that they were in continuous employment by the Respondent [employer] because of the following reasons:

...

21.4 The Respondent [employer] failed to lead the evidence of Albert Masilela and Bongiwe Dlamini to deny the Applicants'

[employees'] *evidence that they were made to sign the documents under duress ... .*"

32.5 The Industrial Court was correct in arriving at a conclusion that the Appellant did not challenge the evidence of the Respondents; particularly that they signed the draft – fixed term employment agreements and the annexed particulars of claim under duress.

32.6 The Honourable Court came to a correct conclusion that the Appellant failed to defend the validity of the documents that which it had presented before the Honourable Court; as fixed - term employment contracts. Consequently, the only employment contracts that the Honourable Court accepted as valid, between the Appellant and each of the Respondents, were the open – ended contracts that the Respondents had pleaded in paragraphs 1, 2, 3, 5, 6 and 7 of the Particulars of Claim.

32.7 Furthermore, the Industrial Court arrived at a correct decision that the Respondents were in continuous employment by the Appellant in terms of the employment contracts that are pleaded in paragraphs 1,

2, 3, 5, 6 and 7 of the Particulars of Claim, and these are the only binding contracts of employment between the Appellant and each of the Respondents.

FIXED -TERM AGREEMENT DECLARED VOID AND A NULLITY

33. The question whether or not the alleged fixed - term contracts (which the Appellant relies on in its defence) amounted to valid contracts of employment, is determinable also from the principles in the law of contract.

33.1 A contract is defined as follows:

"A contract is a lawful agreement, made by two or more persons within the limits of their contractual capacity, with the serious intention of creating a legal obligation, communicating such intention, without vagueness, each to the other and being of the same mind as to the subject – matter, to perform positive or negative acts which are possible of performance."

GIBSON JTR: SOUTH AFRICAN MERCANTILE AND COMPANY LAW, 7th edition, Juta, 2003, (ISBN 0 7021 5809 7) page 9.

33.2 One of the essential elements of a contract is that: there must be a '*lawful agreement.*' In other words the parties to a written contract of employment must have signed the draft – document willingly, as opposed to signing under duress. The presence of duress in concluding a contract, vitiates consent. In the absence of consent on the one party, there is no agreement.

33.3 Duress is defined by authority as follows:

"*DURESS [is] action by a person which compels another to do what he would not otherwise do. ... the manifestation of assent required for a valid contract is defeated if the assent is compelled by duress.*"

GIFIS S.H. : LAW DICTIONARY, 3rd edition, Baron's Educational Series. (ISBN 0-8120 0 4628 -5) page 150.

33.4 Furthermore, legal authority emphasizes the principle that: the agreement that is required for the purposes of concluding a contract must invariably be obtained by consent.

33.4.1 *"In order to decide whether a contract exists, one looks first for the agreement by consent of two or more parties."*

(Underlining added)

CHRISTIE RH: THE LAW OF CONTRACT, 4th edition, Butterworths, 2001 (ISBN 0 409 01836 8) page 23.

33.4.2 "*There is a wealth of authority for regarding agreement by consent as the foundation of contract.*"

(Underlining added)

CHRISTIE R.H. (supra) page 24.

33.4.3 "*In order to be binding in law the agreement must comply with a number of essentials. If one of the essentials is absent, the agreement is void. Although the term 'void contract' is used, there is no contract at all. No rights or duties arise from the purported contract. It is a complete nullity and may be disregarded by the parties at will. A Court will refuse to enforce such an agreement whether or not the point is taken by one of the parties'*

GIBSON JTR (supra) page 9.

33.5 According to authority, a purported contract is void and a complete nullity, if it lacks one of the essentials of a contract.

33.6 In the case before Court, each of the alleged fixed - term employment contracts is void and a complete nullity since each lacks the consent of the relevant Respondent in concluding a contract. Consequently, no rights and duties can arise from that purported contract, and in law it is considered a complete nullity.

33.7 A nullity has been explained by authority as follows:

"*NULLITY*

in law, [is]a void act or an act having no legal force or validity ..."

GIFIS S.H. (supra) page 327.

34. Before the terms of a contract can be interpreted and/or implemented, it must first be established whether or not there is a valid contract in existence. Likewise, before an alleged contract of employment can be said to have terminated, it must first be established whether there is a valid employment contract in existence. The fact that a document has

been given the title of - a *contract or agreement*, does not make it a contract or agreement.

34.1 The Appellant has interpreted the fixed - term contracts it allegedly concluded with each of the Respondents, to mean that the said contracts would terminate on the 25th June 2011. The Appellant has proceeded to implement its interpretation as if it were legally correct. In particular, the Appellant has treated the said contracts as if they had terminated.

34.2 Based on the aforementioned authorities, the conclusion is inescapable that the purported fixed - term contracts that the Appellant relies on are unenforceable because they are void, and each purported contract is a complete nullity. No rights or duties arise from the aforesaid purported contracts. A purported contract that has been declared a complete nullity by law, cannot commence operation. It is only a valid contract that can commence operation. A contract that cannot commence operation, cannot also be subject to termination by effluxion of time.

34.3 The only valid contracts of employment that the Appellant concluded with each of the Respondents are those that the Respondents pleaded in

paragraphs 1, 2, 3, 5, 6 and 7 in the Particulars of Claim. This Court re-iterates that those contracts are open – ended.

34.4 Contracts of employment that are open-ended are not subject to termination by effluxion of time. It is only fixed - term employment contracts that terminate by effluxion of time. According to authority:

"*Contracts which are entered into for a specified period terminate by effluxion of time.*"

(Underlining added)

KERR AJ: (supra) page 539.

APPELLANT PRESENTED SELF-CONTRADICTORY SUBMISSION

35. This Court has noted also that the evidence and submission that the Appellant had presented before the Industrial Court, and this Court, differed and is self-contradictory.

35.1 In paragraph 2.1 of the Reply, the Appellant's defence is that it employed the Respondents by written contracts, and that the said employment contracts began on the 26th February 2011 and ended on the 25th June 2011. The Appellant's Reply has been reproduced in paragraph 23.3 above.

35.2 The Appellant failed to disclose in its Reply; the fact that it had already employed the Respondents on various dates, prior to the 26th February 2011, in contracts that were open-ended. The Appellant had a legal duty to plead that material fact in its Reply. According to High Court rule 22(2): a Respondent *"... shall clearly and concisely state all material facts upon which he relies."*

35.3 A failure by a litigant to comply with High Court rule 22(2) in its pleading would render that pleading defective and that is the case in the present matter.

35.4 In the reference letters aforementioned the Appellant acknowledged the fact that it had employed the Respondents on various dates prior to the 26th February 2011, in contracts that were open – ended. The reference letters are mentioned in paragraphs 23 to 28 above.

35.5 In paragraph 2.1 of its Reply as well as its submission, the Appellant attempted to deny the existence of the open-ended contracts of employment which it had concluded with each of the Respondents, yet in

the reference letters the Appellant admitted the existence of those contracts.

35.6 The Industrial Court was correct in rejecting the Appellant's defence. A litigant cannot establish a case or defence on evidence that is self-contradictory. Likewise an Appellant cannot successfully argue an appeal based on submission as well as evidence that is self - contradictory.

NOVATION OR TERMINATION OF CONTRACT NOT APPLICABLE

36. The Appellants' argument can also be considered from the principle of novation. Novation is explained as follows:

36.1 *"Novation occurs where the parties agree on a new contract which replaces the old one completely. The original contract is, therefore, terminated and a new contract comes into being."*

...

Whether or not a novation has taken place is a question of fact. <u>Did the parties intend to replace one valid contract with another valid contract</u> ...?

(Underlining added)

GIBSON JTR (supra) page 112.

36.2 *"Novation, ... is essentially a matter of intention and consensus. <u>When parties novate they intend to replace a valid contract by another valid contract.</u>"*

(Underlining added)

Kerr AJ (supra) page 541.

36.3 The purported fixed - term, written contracts of employment, that the Appellant relied on in its defence, did not and could not terminate or novate the open –ended contracts of employment that the Respondents had pleaded in paragraphs 1,2,3,5,6 and 7 of the Particulars of Claim.

36.3.1 Firstly, the purported written contracts of employment that the Appellant relied on, have been declared by authority to be void and a complete nullity. Consequently no rights or obligations could arise from the purported contracts. A purported contract that has been declared by authority to be void and a nullity, cannot be used to novate a valid contract.

36.3.2 Secondly, even if the purported written contracts had not been declared void and a complete nullity, by this Court, still those contracts could not assist the Appellant in its defence. The

purported written contracts do not mention the open – ended employment contracts at all. As at the 26th February 2011, the open –ended contracts that the Appellant had concluded with each of the Respondents remained valid and operational. There is no agreement in the purported written contracts to terminate or novate the open - ended contracts.

36.3.3 Thirdly, in law there is a presumption against a novation. According to authority:

"The presumption of law is against the existence of a novation ... . It must be clear on all the facts of the case that there are not simply two co-existing independent contracts ... ."

GIBSON JTR (supra) page 112.

36.4 The Industrial Court arrived at a correct decision when it made a finding that the Respondents were in continuous employment with the Appellant on the open –ended contracts. The Honourable Court was correct in law where it rejected the notion of fixed –term contracts of employment between the Appellant and each of the Respondents.

36.5 Furthermore, the Industrial Court arrived at a correct decision when it determined that the Appellant had a legal obligation to ensure that the dismissal of each and every Respondent was substantively and procedurally fair. The Appellant failed to comply with that legal obligation. Consequently, the Industrial Court correctly found that the dismissal of each of the Respondents was substantively and procedurally unfair.

36.6 The Appellant's 1st ground of appeal has no merit, and it is accordingly dismissed.

2ND GROUND OF APPEAL

37. The Appellant's 2nd ground of appeal is that the Industrial Court failed to uphold the Appellant's argument viz: that the termination of the Respondents from employment was based on Section 35(l), (d) of the Employment Act. Section 35 (1), (a) to (d) of the Employment Act has been reproduced in paragraph 13.1 above. The 2nd ground of appeal has already been considered when this Court dealt with the submission that was made in the 1st ground of appeal. However, a further analysis, may clarify the issue.

37.1 It has already been determined that: the purported written, fixed-term employment contracts which the Appellant relied on, as its defence to the Respondents' claim of unfair dismissal have been declared by authority and this Court, to be void and a complete nullity. The Respondents were therefore not employed on fixed - term contracts.

37.2 It has already been determined also that the Respondents were employed by the Appellant on contracts that are open – ended. Consequently, the Respondents are protected against unfair dismissal, *inter alia*, in terms of Section 36 as read with 42(2) (a) and (b) of the Employment Act.

37.3 The open-ended contracts of employment which the Appellant had concluded with each of the Respondents, did not terminate by effluxion of time, as alleged by the Appellant. The Respondents were dismissed from work by the Appellant on the 27th June 2011. The Industrial Court has determined that the dismissal of the Respondents was substantively and procedurally unfair.

37.4 An excerpt of a decision of the Industrial Court reads thus at paragraph 17:

"17. ...The dismissal of the Applicants [Respondents] was therefore substantively and procedurally unfair. It was substantively unfair because it was not for any of the reasons stated in Section 36 of the Employment Act no 5 of 1980 as amended. Further, the dismissal of the Applicants [Respondents] was procedurally unfair because there was no disciplinary hearing that was held against the Applicants [Respondents] where they would have been afforded the opportunity to be heard before the adverse decision was taken by the employer [Appellant]"

37.5 Section 42 (1) and (2) of the Employment Act reads thus:

"42 (1) In the presentation of any complaint under this Part the employee shall be required to prove that at the time his service [sic] were terminated that he was an employee to whom section 35 applied.

(2) The services of an employee shall not be considered as having been fairly terminated unless the employer proves –

(a) that the reason for the termination was one permitted by section 36; and

(b) that, taking into account all the circumstances of the case, it was reasonable to terminate the service of the employee."

ONUS BORNE BY THE RESPONDENTS

37.6 In Section 42 (1), of the Employment Act, the onus is on the employee to prove that his contract of employment is not subject to the limitations that are embodied in Section 35 (1), (a) to (d) of the same Act. In this case, the Respondents had the onus to prove that they had been employed by the Appellant, in contracts that were open – ended.

RESPONDENTS DISCHARGED THE ONUS

37.7 In this case the Respondents (as employees) have discharged the onus that rested on them. The Respondents have proved that their contracts of employment with the Appellant were open-ended and are regulated under Section 35 (2) as read with 42 (2) (a) and (b) of the Employment Act.

ONUS BORNE BY THE APPELLANT

37.8 According to Section 42 (2) (a) and (b) of the Employment Act, the onus is on the employer [Appellant] to prove that the termination of the employment contracts was in compliance with section 36 of the Employment Act and also that the termination was reasonable in the circumstances.

37.9 The law demands that: when an employer terminates a contract of employment, the termination must be reasonable and also fair, substantively and procedurally. There must be a justifiable reason to terminate the said employment contract and the reason must be based on a fair procedure. This rule is cast on stone.

37.9.1 The Appellant failed to give the Industrial Court a justifiable reason for terminating the Respondents' contracts of employment. The Respondents' contracts of employment were therefore terminated without justifiable reason. If there was a justifiable reason, it would have been pleaded and supported with evidence.

37.9.2 The Appellant failed to present before the Industrial Court evidence, to prove that it followed a fair procedure when it terminated the Respondents' contracts of employment.

APPELLANT FAILED TO DISCHARGE ITS ONUS

37.10 The Appellant failed to discharge its onus regarding the manner the Respondents' employment contracts were terminated.

37.11 This Court re-iterates that the Industrial Court arrived at a correct decision viz that the Respondents' contracts of employment were unfairly terminated by the Appellant. The 2nd ground of appeal is consequently dismissed.

3RD GROUND OF APPEAL

38. In the 3rd ground of appeal, the Appellant attacked the decision of the Industrial Court as follows, at paragraph 6 of the Notice of Appeal:

"... the Court a quo erroneously characterized the primary dispute between the parties as being whether or not the dismissal of respondents was automatically unfair."

38.1 In order for the Industrial Court to determine whether a dismissal was automatically unfair or not, the Honourable Court had to determine first whether or not there had been a dismissal.

38.2 The primary dispute before the Industrial Court therefore was whether the Respondents were employed on fixed - term contracts or open – ended contracts. The Court found that the employment contracts were open-ended.

38.3 The secondary dispute was the reason for the termination of the open – ended contracts of employment. The phrase: '*automatically unfair dismissal*' depended entirely on the reason for the dismissal.

38.4 Regarding the claim by the Respondents that their dismissal was automatically unfair, the Honourable Court decided that claim in the Appellant's favour. At paragraph 18 of the judgment the Honourable Court stated as follows:

"Furthermore, the Court is of the view that the dismissal of the Applicants cannot be characterized as being an automatically unfair dismissal."

38.5 This Court finds no error in the manner the Industrial Court approached the question that was before it and also in the finding that it made. The 3rd ground of appeal has no merit and it is accordingly dismissed.

4TH GROUND OF APPEAL

39. The 4th ground of Appeal concerned a conclusion that the Court arrived at, concerning a meeting that took place on the 27th June 2011, between a director of the Appellant (Mr Thomas) and the Respondents. The Honourable Court made the following finding:

(i) *"... the atmosphere at the meeting became emotionally charged and the employer [Appellant] summarily dismissed the Applicants [Respondents]."*

(At paragraph 12)

(ii) *"Rather, the facts show that the Respondents' director decided to dismiss the Applicants[Respondent] because he did not agree with them that they were entitled to be paid allowances, not that he dismissed them for raising the grievances"*

(At paragraph 16)

39.1 The Appellant has challenged the finding by the Industrial Court. At paragraph 12 in the Notice of Appeal, the Appellant submitted the following:

"*Firstly there was no evidence that the atmosphere at the meeting became emotionally charged.*"

39.2 The question whether or not the meeting of the 27th June 2011 became emotionally charged, is a question of fact. The Industrial Court arrived at that conclusion after assessing the facts before it. It is also a finding of fact that the Appellant's director dismissed the Respondents at that meeting. As shown in paragraphs 39 above, that finding of the Industrial Court was based on fact as opposed to law.

39.3 The Appellant admitted in paragraph 2 of its Heads of Argument that its attack on the Industrial Court judgment is based on fact, (and not law) as shown below:

"2 AG Thomas [the Appellant] will seek to demonstrate in these heads of argument, that the judgment is marked by one central and

erroneous finding of fact, namely that on the 27th June 2011 AG Thomas summarily dismissed the seven Respondents herein"

(Underlining added)

39.4 An appeal before this Court is limited to a question of law. Section 19(1) of the Industrial Relations Act no1/2000 (as amended) provides as follows:

"There shall be a right of appeal against a decision of the Industrial Court ... on a question of law to the Industrial Court of Appeal."

(Underlining added)

39.5 As shown above, the Appellant is attacking a finding of fact that the Industrial Court arrived at. This Court has no jurisdiction to entertain and determine questions of fact.

39.6 The 4th ground of appeal has no merit and it is accordingly dismissed.

5TH GROUND OF APPEAL

40. In the 5th ground of appeal, the Appellant submitted that: the Industrial Court erred in failing to make a determination that: the Respondents had compromised their claims of unfair dismissal, by accepting from the Appellant, payment of terminal benefits, and as the argument goes: that after accepting payment of terminal benefits, the Respondents could not turn around and claim unfair dismissal and the consequent relief, against the Appellant.

40.1 The Appellant's claim regarding an alleged compromise was raised in argument before the Industrial Court. The Honourable Court analysed the law relating to the question at issue and concluded that: the alleged compromise did not take place in the matter between the parties.

40.2 Legal authority acknowledges the right of litigants to settle a legal dispute between themselves in order to avoid going to Court. This principle is explained as follows:

"If an employer realises that it has fouled up a dismissal, nothing prevents it from making an offer of settlement before the matter comes to court or before an arbitration. If the employee accepted the settlement, he cannot normally proceed to litigate against the employer,

because acceptance of the offer constitutes a waiver of his rights against the employer. However, the offer must be made and accepted in good faith and the employee must be aware of the consequences of his acceptance."

(Underlining added)

GROGAN J: WORKPLACE LAW, Juta, 10th edition, 2009,

(ISBN 13: 978 – 0- 7021-8185 -6) page 180.

40.3 In law a compromise is explained as follows:

"... if there is an offer of a compromise and that offer is accepted no further claim is possible."

KERR AJ: (supra) page 536.

40.4 *"... a contract requires the actual consensus ad idem of the minds of the parties"*

MILLIN P et al: WILLE AND MILLIN'S MERCANTLE LAW OF SOUTH AFRICA, 16th edition, Hortors, 1967, (ISBN not provided) page 78.

40.5 The principle that is emphasized by authority is that: a compromise is a contract. A compromise must therefore have an offer and an acceptance which should result in a '*consensus ad idem*'. It is also emphasized by authority that: there is no contract in the absence of '*consensus ad idem*'.

40.6 According to the Industrial Court: there is no evidence that the Appellant made an offer to the Respondents to compromise the Respondents' claims (of statutory relief - following a substantively unfair dismissal), by paying certain sums of money into the Respondents' bank accounts. There is also no evidence that the Respondents accepted an offer from the Appellant of compromise of the Respondents' aforesaid claims.

40.7 The Honourable Court arrived at a correct decision in law that: in the absence of an offer and acceptance, there is no contract. Consequently, in the case before the Industrial Court, there was no compromise of the Respondents' right to claim relief against the Appellant for an unfair dismissal.

40.8 The 5th ground of appeal is also dismissed for lack of merit.

41. The Appellant's argument: that the Respondents accepted payment of terminal benefits and thereby compromised their right to claim unfair dismissal against the Appellant (together with ancillary relief), deserves further attention, especially from the point of view of the rules of pleadings.

41.1 According to High Court rule 18(6); a litigant who relies on a contract in his case or defence, is legally obligated to plead that contract in his papers before Court. This rule has been reproduced in paragraph 30.2 as read with 30.4 above.

41.2 Compliance with High Court rule 18 (6) is mandatory to every litigant (before the Industrial Court), who intends to rely on a contract in support of his case or defence. Consequently, failure to comply with High Court rule 18(6) is fatal to a case or defence that is based on a contract.

41.3 The aforementioned determination by Court, is supported by authority, as shown below:

"The sub-rule [18 (6)] makes it clear that it is now necessary to state whether the contract relied upon is written or oral, and when, where and by whom it was concluded, ..."

...

"The provisions of this sub-rule must be complied with at the pleading stage:"

(Underlining added)

NATHAN C et al: UNIFORM RULES OF COURT, 3rd edition, Juta, 1984 (ISBN not provided) page 128.

41.4 This Court reiterates the legal position: that a compromise is a contract. The Appellant was obligated therefore to plead the alleged compromise, in its pleadings, before it could rely on it in its argument and submission. The Appellant failed to plead the alleged compromise in its Reply or amended Reply. A litigant is not permitted to argue before Court, a case or defence which it has not pleaded. Consequently, the Appellant's argument which involves a compromise, is dismissed for being in conflict with the rules of Court, that regulate the drawing of pleadings.

41.5 In addition to the aforegoing, the Appellant's 5th ground of appeal is dismissed for failure to comply with High Court rule 18 (6), in a matter where compliance with that rule was mandatory.

6TH GROUND OF APPEAL

42. On the 6th ground of appeal the Appellant submitted that: it had denied that the Respondents' employment contracts were terminated and further submitted that: the Industrial Court erred in arriving at a determination that the Appellant unfairly terminated the Respondents' employment contracts. This ground of appeal reads thus:

"*12 ... Appellant very clearly at all times denied having dismissed the respondents.*

13 The Court a quo ought to have found that the Respondents neither proved that they were dismissed, nor proved that at the time their services were terminated, they were employees to whom section 35 of EA 1980 applied, and that that [sic] their services were unfairly terminated by Appellant. In so far as the Court a quo found otherwise, it erred and/or misdirected itself."

42.1 Certain aspects of this ground of appeal have already been determined in the previous paragraphs; for instance –

42.1.1 the element that deals Section 35 (1), (a) to (d) of the Employment Act and,

42.1.2 the question whether or not the Appellant unfairly dismissed the Respondents from employment.

42.2 It may however he helpful to the parties to add another detail in addressing this ground of appeal.

42.3 In paragraph 3.1 of the amended Reply the Appellant stated as follows:

"Save to admit that the Applicants [Respondents'] services were terminated on the 25th of June 2011 after their contracts lapsed and the project for which they were engaged came to an end in Eswatini. The Applicants [Respondents] were paid their full terminal benefits ..."

(Underlining added)

42.3.1 The employment contracts that were terminated on the 25th June 2011 are those that are pleaded in paragraphs 1, 2, 3, 5, 6 and 7 of the Particulars of Claim.

42.3.2 The Appellant correctly pleaded that the Respondents' contracts of employment were terminated ... *"on the 25th June 2011."*

42.3.3 The Appellant however, erroneously pleaded that the Respondents' contracts of employment. "... *were terminated after their contracts lapsed ...* ."

42.3.4 It is not clear to this Court what the Appellant meant when it stated in its Reply that: the employment '*contracts lapsed*'. The law of contract recognizes the principle that: an offer may lapse; if it is not accepted within the time that is prescribed for acceptance or within a reasonable time. Hereunder are excerpts from legal authorities which are meant to emphasize the principle that: it is an offer than can lapse and not a contract. A contract cannot lapse but it can be terminated.

(i) "*An offer lapses if it is not accepted within the prescribed time* ..."

KERR AJ: (supra) page 74

(ii) "*An offer may lapse in several ways.*"

MILLIN P et al: (supra) page 13.

42.3.5 In fairness to the Appellant, it could be that the Appellant used the words '*contracts lapsed* ', erroneously, intending to mean

that the Respondents' contracts of employment terminated by effluxion of time. If that be the case, this Court re-iterates that the contracts of employment that the Respondents pleaded in paragraphs 1,2,3,5,6 and 7 in the Particulars of Claim were not subject to termination by effluxion of time, but could be terminated by either party or by agreement.

42.3.6 The Appellant further mentioned (in the same quotation), that it paid the Respondents'... '*their full terminal benefits* ...' The Appellant did not state whether the alleged terminal benefits were calculated on a principle of fair or unfair dismissal. According to the Respondents, the alleged terminal benefits were unilaterally determined by the Appellant and were not based on law.

42.3.7 Once a contract is concluded, the parties have a duty to comply with the consequences of that contract. In this case, the Appellant (as employer) had a duty to comply with its legal obligation in relation to the termination of the Respondents' contracts of employment. The Appellant cannot be permitted to

bypass or avoid the consequences of an unfair dismissal of the Respondents from employment.

42.3.8 In paragraph 15 in the Notice of Appeal, the Appellant made the following submission: "... *the respondents were always employed in fixed-term contracts*." This submission is contradicted by the evidence that the Appellant had presented before the Industrial Court. The correct state of affairs is that: at all times material to this case, the Respondents were always employed by the Appellant in terms of the contracts of employment that are pleaded in paragraphs 1, 2, 3, 5, 6 and 7 of the Particulars of Claim. The Industrial Court was correct in rejecting the Appellant's submission.

42.3.9 The 6th ground of appeal is also dismissed for lack of merit.

7TH GROUND OF APPEAL

43. In its 7th ground of appeal, the Appellant attacked the judgment in the manner the Honourable Court interpreted the Legal Notice No 184 of 2010, also

known as: The Regulation of Wages (Building and Construction Industry Order,2010).

44. In order to arrive at its decision regarding the said Legal Notice, the Industrial Court referred to the facts of this case as summarized in paragraphs 2 to 2.5 above.

45. The Appellant's submission is that the Honourable Court erred when it ordered the Appellant to pay each of the Respondents: an out of country allowance and also food allowance.

46. When deciding the matter, the Honourable Court referred, *inter alia*, to various excerpts of Legal Notice no 184 of 2010, as shown below:

46.1 Regulation 14(4)

"*An employee who is absent on duty overnight away from his normal place of employment shall in respect of each night's absence be provided by his employer with;*

(a) free food and accommodation or night allowance of E45.00 in lieu thereof, or

(b) free accommodation and an allowance of E25.00 in lieu of food; or

(c) free food and an allowance of E25.00 in lieu of accommodation;"

46.2 Regulation 14 (5)

"An entitlement to free food, accommodation or allowances under sub regulation 4 and 9 shall not cease until the employee is back to his normal place of employment."

46.3 Regulation 14(9)

"An employee who is absent on duty outside the country for a period not exceeding 5 days at a time shall be provided with free food, accommodation and shall [be] entitled to out of country allowance of E100.00 a day."

46.4 The said Legal Notice has defined certain related phrases as follows:

46.4.1 *"Normal place of work [:] means a place where an employee reports for duty on a daily basis;"*

46.4.2 *"Normal place of engagement [:] means a work station where an employee was first engaged."*

46.5 The said legal notice has not defined the phrase: '*normal place of employment.*" The Industrial Court has however interpreted that

phrase to mean: the usual place where the employee was obligated to carry out his duties, in terms of the contract of employment. In the case of the Respondents, the '*normal place of employment*' was at Matsapha in Eswatini, particularly at the Appellant's place of business.

46.6 This Court does not find any error in the manner the Industrial Court interpreted the phrase: '*normal place of employment*'.

47. After analyzing regulation 14(4), and 14(5) of Legal Notice 184 of 2010, the Industrial Court made a finding (which is in addition to what had been stated in paragraphs 2 to 2.5 above), as follows –

47.1 that the Appellant had deployed the Respondents together with their colleagues to work temporarily in Botswana, and

47.2 that in total the Respondents together with their colleagues spent 497 (Four Hundred and Ninety Seven) days intermittently, in Botswana on duty, and

47.3 that from the day the Respondents were deployed to work in Botswana, they were entitled to receive from the Appellant (as

employer), free food and accommodation or an allowance in lieu of food and accommodation ; and

47.4 that the entitlement to free food and accommodation or an allowance in lieu of food and accommodation, would not cease until the Respondents are returned to their normal place of employment, which is at Matsapha in Eswatini;

48. This Court finds no error in the manner the Industrial Court interpreted and applied regulation 14(4) and 14 (5) of Legal Notice no 184 of 2010.

49. The Honourable Court interpreted regulation 14 (9) of Legal Notice 184 of 2010 as follows, at paragraph 31 of the judgment:

"[31] In the view of the Court, the proper interpretation to be given to regulation 14 (9) is that for every period of five days that the Applicants were absent on duty outside the country, they were entitled to be paid the out of country allowance of E100.00 a day. These periods of five days are to be reckoned separately taking into account the language employed in sub-regulation (9) which states that the period must not exceed 5 days "at a time." Any other interpretation

would result in unfair discrimination against employees who are absent on duty outside the country at the instance of the employer for periods longer than five days at a time. Further, any other interpretation would be illogical and an affront to the principles of equality and fairness at the workplace. It would also lead to absurd results as employers would opt to send employees to perform duties outside the country for periods exceeding five days at a time because they want to avoid the payment of out of country allowance."

49.1 According to the Industrial Court, the out of country allowance, is payable at E100.00 (One Hundred Emalangeni) per day in every 5 (five) day cycle.

49.2 The Appellant's submission is that: the out of country allowance is payable to an employee who is out of the country, on duty, for 5(five) days only, at a time. An employee who is out of the country, on duty for more than 5 (five) days at a time, is therefore not entitled to payment of the said allowance.

49.3 As a means to guide the Courts when interpreting statutes, legal authority has provided as follows:

49.3.1 *"To assist it in deciding on the true intention of the legislature, the court may have regard to 'the mischief' that the Act was designed to remedy"*

COCKRAM GM: INTERPRETATION OF STATUTES, 2nd edition, Juta 1983, (ISBN 0 7021 1389 1) page 68.

49.3.2 *To arrive at the real meaning [of a statute] we have ... to consider, (1) what was the law before the measure was passed; (2) what was the mischief or defect for which the law had not provided ..."*

(Underlining added)

Per Van Den Heever, J.A. in the matter of: HLEKA VS JOHANNESBURG CITY COUNCIL 1949 (1) SA 842 at 852 – 853.

49.4 The purpose of regulation 14(9) is to alleviate hardship that an employee would suffer, when he is on duty, outside the country. The longer the period an employee is on duty, outside the county, the more

sever the hardship, and that was the mischief that regulation 14 (9) was designed to remedy.

49.5 The provision by the employer to the employee of food and accommodation or payment of an allowance in lieu of food and/or accommodation, and also payment of night allowance, is meant to provide the employee or enable the employee to access; basic necessities of life, such as food and accommodation, while the employee is on duty outside the country.

49.6 It would not make sense for regulation 14 (9) to make provision to alleviate hardship for an employee who is on duty, outside the country, for 5(five) days at a time, but fail to make similar provision for an employee who is on duty, outside the country for a period exceeding 5 (five) days at a time.

49.7 The Honourable Court was correct in rejecting the Appellant's submission. The Appellant's submission ran contrary to the purpose for which regulation 14 (9) was promulgated.

49.8 This Court does not find error in the manner the Industrial Court interpreted regulation 14 (9). The 7th ground of appeal is also dismissed for lack of merit.

8TH GROUND OF APPEAL

50 In the 8th ground of appeal, the Appellant submitted that the Industrial Court made an error in awarding the Respondents compensation for unfair dismissal.

50.1 It has been mentioned above; that the Industrial Court had decided that the Respondents had been dismissed from employment by the Appellant and that the dismissal was substantively and procedurally unfair.

50.2 At paragraph 33 of the judgment the Honourable Court stated as follows:

"The Court taking into account all the evidence before it comes to the conclusion that the Applicants [Respondents] were in continuous employment by the Respondent, and that they were dismissed for a reason not stated in section 36 of The Employment Act. The evidence before the Court revealed that no disciplinary hearing was held by the

employer before the dismissal of the Applicants, the Court therefore comes to the conclusion that their dismissal was substantively and procedurally unfair."

50.3 This Court finds that the Industrial Court decision is supported by evidence and that it is correct in law.

50.4 Following a finding of unfair dismissal, the Honourable Court proceeded to issue an award for compensation to each of the Respondents. The Honourable Court's action was consistent with section 16 (1) (c) of the Industrial Relations Act, and it reads thus:

"*16(1) If the Court finds that a dismissal is unfair, the Court may –*

...

(c) order the employer to pay compensation to the employee."

50.5 The Industrial Court's decision to award compensation to an employee who had been dismissed unfairly, is justified in law. There is therefore no error in the decision that the Honourable Court made. This ground of appeal is therefore dismissed for lack of merit.

9TH GROUND OF APPEAL

51 In the 9th ground of appeal, the Appellant has attacked the amounts that the Industrial Court had awarded each Respondent as compensation.

51.1 The Industrial Court has a discretion, based on the evidence before it, to determine a fair amount for compensation which is due to an employee who has been unfairly dismissed from employment.

51.2 An excerpt of this ground of appeal reads thus:

"19 Only in so far as it be found that Respondents were unfairly dismissed, which is denied, the Court a quo erred and/or misdirected itself in ordering Appellant to pay as compensation for a dismissal found to be both substantively and procedurally unfair an amount of:

19.1 9 months remuneration for the five of the respondents who worked for appellant for more than 10 years, and,

19.2 four months remuneration for S Mlotsa (A7) who worked for appellant for 5 years."

51.3 The Respondents had claimed maximum compensation for automatically unfair dismissal. As aforementioned, the Industrial

Court rejected the Respondents' claim for automatically unfair dismissal. The Honourable Court however made a determination that the Respondents had been dismissed unfairly, substantially and procedurally.

51.4 In terms of section 16 (6) of the Industrial Relations Act, an employee whose dismissal from employment has been determined by the Industrial Court to be substantially unfair, is entitled to claim compensation from the employer for an amount which:

"... *must be just and equitable in all the circumstances, and not more than the equivalent of 12 months remuneration calculated at the employee's rate of remuneration on the date of dismissal.*"

51.5 In this case, the Honourable Court did not award each of the Respondents an equivalent of 12 (twelve) months remuneration, as compensation, because the Honourable Court did not consider that amount to be just and equitable in the circumstances. The Honourable Court was authorised by its exercise of discretion to make that determination.

51.6 Instead, the amounts that the Honourable Court issued to each of the Respondents, as compensation for unfair dismissal, varied from a low of 4 (four) months to a high of 9 (nine) months - remuneration. Even though the circumstances surrounding the dismissal of the Respondents were similar, in the eyes of the Court - their personal circumstances were different, hence the difference in the amount that was awarded for compensation. The Industrial Court exercised its discretion within the limits of the authority given by section 16 (6) of the Industrial Relations Act.

51.7 Furthermore, the Honourable Court exercised its discretion in determining which Respondent is awarded an equivalent of 9 (nine) months and which is awarded an equivalent of 5 (four) months remuneration, as compensation. This Court is not authorised to enquire as to which facts were taken into consideration when the Industrial Court exercised its discretion. As aforementioned, this Court is not authorised to make an enquiry or determination on the facts of the case.

51.8 The Appellants have failed to demonstrate before this Court; what and why (in the circumstances), would be just and equitable compensation for unfair dismissal for each Respondent, as opposed to the compensation that the Honourable Court had ordered.

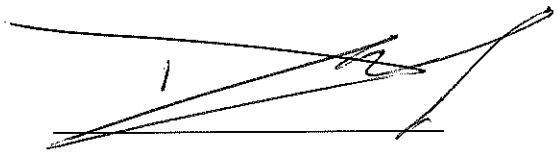
51.9 There is no error in the manner the Industrial Court issued an award for compensation to each of the Respondents, for substantively unfair dismissal. There is no evidence of improper exercise of discretion. Consequently the 9th ground of appeal is also dismissed for lack of merit.

52 Counsel for the Appellant and counsel for the Respondents confirmed, during argument, that despite a thorough search, they have not been able to locate a Court judgment that deals with the provisions of Legal Notice no.184 of 2010. Consequently, the litigants have presented a novel legal argument before Court. Taking into consideration the legal issues that have been determined in this appeal, it would be fair and in the interests of justice that each party bears its costs.

53 Wherefore this Court makes an order as follows:

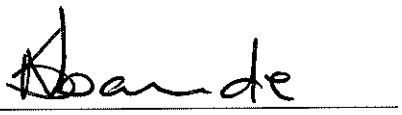
53.1 The appeal is dismissed

53.2 Each party is to pay its costs.



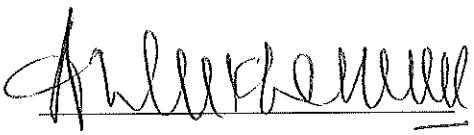
D. MAZIBUKO
JUSTICE OF THE INDUSTRIAL
COURT OF APPEAL

I agree



S. NSIBANDE
JUDGE PRESIDENT OF THE
INDUSTRIAL COURT OF APPEAL

I agree



A.M. LUKHELE
JUSTICE OF THE INDUSTRIAL
COURT OF APPEAL

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