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widows: 0; orphans: 0">
<font face="Arial, serif"><font size="2" style="font-size:
10pt"><span lang="en-US">IN
THE HIGH COURT OF SWAZILAND</span></font></font></p>
<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-
height: 100%; widows: 0; orphans: 0">
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widows: 0; orphans: 0">
<font face="Arial, serif"><font size="2" style="font-size:
10pt"><span lang="en-US">Civ.
Case No. 1/94</span></font></font></p>
<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-
height: 100%; widows: 0; orphans: 0">
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widows: 0; orphans: 0">
<font face="Arial, serif"><font size="2" style="font-size:
10pt"><span lang="en-US">In
the matter between:</span></font></font></p>
<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-
height: 100%; widows: 0; orphans: 0">
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<p align="justify" style="margin-left: 6.35cm; text-indent: 1.27cm; margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">  
<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">Jason  
Dlamini</span></font></font></p>  
<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">  
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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">And  
</span></font></font>  
</p>  
<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">  
<br>  
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<p align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">  
<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">Swaziland  
Development and Savings Bank</span></font></font></p>  
<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">  
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<p align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">  
<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">CORAM:  
Hull, CJ.</span></font></font></p>  
<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">  
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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">FOR  
APPELLANT Mr.  
Dunseith</span></font></font></p>  
<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-



meantime.</span></font></font></p>  
<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">  
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<p align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">  
<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">He subsequently applied to the Industrial Court for orders (inter alia)  
</span></font></font></p>  
</ol>  
<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">  
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</p>  
<ol>  
    <ol type="i">  
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            <font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">The appellant is not seeking reinstatement as such, and the rule of law  
            or of practice whereby a court will not order reinstatement of a dismissed employee does not apply;  
and</span></font></font></p>  
        <li><p align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">  
            <font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">In any event the rule, for reasons explained by Van Dijkhorst J in National Union of Textile Workers and Others v. Stag Packings (Pty) Limited and Another 1982 (4) S.A. 151, is one of practice rather than law.</span></font></font></p>  
    </ol>  
</ol>  
<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">  
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<p align="justify" style="margin-bottom: 0cm; line-height: 100%;

widows: 0; orphans: 0">  
<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">On this last point, Mr. Dunseith submits that in the present case, there is no sufficient reason why a court should not grant in effect a remedy of specific performance. As I understand his argument, he also submits that in the exercise of its discretion the Industrial Court should not have disposed of the issue by a ruling in limine, but should instead have reserved it for determination in light of the whole of the evidence.</span></font></font></p>  
<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">  
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<p align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">  
<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">Mr. Sapire's response can be put very shortly, I think, without the risk of injustice. He says that the rationale for the rule that the courts will not order the reinstatement of dismissed employees is that it amounts to an order for specific performance. As explained in the leading South African case of Schierhout v. Minister of Justice 1926 S.A. 99 A.D. at page 107 (which has been followed in a line of subsequent South African decisions) the reasons are, first, the inadvisability of compelling one person to employ another whom he does not trust in a position that imports a close relationship, and secondly the absence of mutuality (in that a court could not effectively compel an employee for his part to work faithfully and diligently).</span></font></font></p>  
<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">  
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<p align="right" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">  
<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">4</span></font></font></p>

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<p align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">

<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">What

the appellant is seeking is in effect reinstatement and in any event

relief by way of specific performance because on the alleged facts on

which he himself relies, the respondent removed him from his post as

computer operator.</span></font></font></p>

<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">In

principle, there is no difference between that situation and dismissal from service, and thus the same objections to the granting

of the relief arise as in the latter

case.</span></font></font></p>

<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">

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<p align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">

<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">Moreover,

says Mr. Sapire, whether or not National Union of Textile Workers modifies the decision in Schierhout (which, as I understand it, Mr.

Sapire does not concede) the position in Swaziland is governed by the

decision of the High Court in Ubombo Ranches Limited v. President of

the Industrial Court and Another 1982 - 1986 (1) SLR 264, in which

Will C.J. and Dunn A.J held that at common law, specific performance

was not an available remedy for unfair dismissal and that section 13

of the Industrial Relations Act 1980 did not confer jurisdiction on

the Industrial Court to order

reinstatement.</span></font></font></p>

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<p align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">

<font face="Arial, serif"><font size="2" style="font-size:

10pt"><span lang="en-US">In

the present case, Mr. Sapire concludes the appellant's correct remedy

(if any) can only be in damages.</span></font></font></p>

<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">

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<font face="Arial, serif"><font size="2" style="font-size:

10pt"><span lang="en-US">In

my view, the learned President correctly decided the point in issue.</span></font></font></p>

<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">

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<font face="Arial, serif"><font size="2" style="font-size:

10pt"><span lang="en-US">I

am inclined to think it is usually better to determine legal issues

on a consideration of the whole of the evidence rather than on preliminary points in limine. The first approach, to my mind, is more

conducive to creative judicial decision - making. On a full consideration of all the evidence, it may become apparent that there

are good reasons why an apparently settled rule of law ought to be

modified. The risk in deciding a dispute on a preliminary issue is

that this will not necessarily, at the outset, be evident.

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">In

the present case however I think, with respect, that

Mr.

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">Sapire

has correctly stated the rationale for the rule

that

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">5</span></font></font></p>

<p lang="en-US" align="right" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">a

court will not order the reinstatement of an employee who has been

dismissed. I can see no difference at all in principle between that

situation and the one, as here, where an employer decides that an employee is unsuited to a particular post within the employer's firm

or company. To insist in that situation that the employer should "reinstatement" him to the particular post raises, even



though  
in a narrower context, the same issue of the advisability or  
otherwise of seeking to require a person to employ in a  
particular  
role someone whom he does not trust in that position. It also  
raises  
(though I tend myself to think that this is more of a theoretical  
consideration) the same issue of mutuality - again in narrower  
circumstances, though not in ones which are in essence  
different.

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<font face="Arial, serif"><font size="2" style="font-size:

10pt"><span lang="en-US">Furthermore,  
even if Mr. Dunseith is right on saying that the better view is  
that

the rule, in cases of reinstatement following dismissal, is one  
of

practice - and thus to be applied individually according to the  
circumstances of each particular case - rather than an inflexible  
rule of law, points of this nature are not to be decided in a  
theoretical vacuum. No specific basis at all has been shown in  
the

present case why it may be one in which specific performance may  
be

justified. It is, at best, a theoretical or intellectual  
possibility

and I do not think that is enough.

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<font face="Arial, serif"><font size="2" style="font-size:

10pt"><span lang="en-US">Mr.  
Dunseith referred me to section 26 of the Employment Act 1980. As  
I

understood him, he conceded that the application to the  
Industrial

Court did not seek to rely in that section, but he was saying  
that it

illustrates the point that the industrial Court, under the scheme

of  
that Act, does have power to make orders of the kind that the  
appellant has sought. The problem that the appellant has in that  
regard, however, is that it was not alleged in his application to  
the  
Industrial Court (in any way that is still a live issue) that the  
actions of the respondent resulted in less favourable terms and  
conditions of employment than these previously enjoyed by him. He  
did

not

<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">

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<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">6

</span></font></font>

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<p lang="en-US" align="right" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">

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<p align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">

<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">allege

(in any way that is still maintained) that his removal from the  
post

of computer operator led to a reduction in income or that his  
transfer to Siteki would cause hardship.</span></font></font></p>

<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">

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<p align="justify" style="margin-bottom: 0cm; line-height: 100%; widows: 0; orphans: 0">

<font face="Arial, serif"><font size="2" style="font-size: 10pt"><span lang="en-US">What

he alleged, and all that he alleged, was that these actions were  
made

unreasonably, unfairly and mala fide. His proper recourse for  
that,

if true and if he can show loss, is in my view by way of  
damages.</span></font></font></p>

<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-

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height: 100%; widows: 0; orphans: 0">
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<p align="justify" style="margin-bottom: 0cm; line-height: 100%;
widows: 0; orphans: 0">
<font face="Arial, serif"><font size="2" style="font-size:
10pt"><span lang="en-US">For
these reasons, the appeal is accordingly dismissed, with costs to
the
respondent.</span></font></font></p>
<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-
height: 100%; widows: 0; orphans: 0">
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1.27cm; margin-bottom: 0cm; line-height: 100%; widows: 0;
orphans: 0">
<font face="Arial, serif"><font size="2" style="font-size:
10pt"><span lang="en-US">DAVID
HULL </span></font></font>
</p>
<p lang="en-US" align="justify" style="margin-bottom: 0cm; line-
height: 100%; widows: 0; orphans: 0">
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<p align="justify" style="margin-bottom: 0cm; line-height: 100%;
widows: 0; orphans: 0">
<font face="Arial, serif"><font size="2" style="font-size:
10pt"><span lang="en-US">CHIEF
JUSTICE</span></font></font></p>
</body>
</html>
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