IN THE COURT OF APPEAL (S W A Z I L A N D)

CRIMINAL APPEAL NO.18/96

In the matter between:

THEMBA MDLULI AND 7 OTHERS 1ST APPELLANT

JABULANE DLAMINI AND 67 OTHERS 2ND APPELLANT

and

EMASWATI COAL (PROPRIETARY) LIMITED....... RESPONDENT

CORAM

: SCHREINER JA

: LEON JA

: STEYN JA

FOR THE APPELLANTS : MR. A.S. SHABANGU

FOR THE RESPONDENT : MR. P.E. FLYNN

JUDGMENT

Schreiner JA:

This appeal arises from a labour dispute between certain employees at the Emaswati Coal Mine and the Respondent. It appears that the Union was originally involved in the dispute up to a certain stage when some employees broke away and formed their own group or groups. Two actions were commenced against the present Respondent which is now in liquidation and during the trial the necessary amendment to the name of the defendant was made. The Notice of Appeal

cites the Respondent as Emaswati Coal (Pty) Ltd and I have headed this judgment in this way.

However it was stated in Court that the liquidators of Emaswati were undertaking the defence and had authorised Counsel to conduct it. Despite the heading therefore this judgment will be binding upon the liquidators.

Evidence was led at the trial which to a substantial degree dealt with activities of the employees as a group and individuals were not identified specifically as being responsible for particular actions.

However it seems clear that the Plaintiffs did form a group which was responsible for the events attributed to the employees who ultimately became parties to the two actions instituted against the Respondent. The two actions were later consolidated into one so that the evidence, to the extent that it mentions the employees of the mine, can be accepted as concerning the individual persons cited as plaintiffs in the two actions.

The Appellants' claims allege that they were employed by the Respondent or its predecessor in title to a certain coal mining operation. The employment contracts with the predecessor were assigned to the Respondent. In terms of the employment agreements the Appellants were, as at the 12th January,

1991 entitled to wages calculated at daily rates shown in the schedule to the declaration.

It is then alleged that on the 12th January, the Respondent,

by letters distributed to them, prevented the Appellants from entering the mining premises for the purpose of carrying out their duties under the employment agreements. The letters which were admittedly written on behalf of the Respondent form the centre point of the dispute between the Appellants and the Respondent and are in the following terms:

"EMASWATI COAL (PTY) LTD NOTICE TO THE EMPLOYEES AT EMASWATI COAL 12th January 1991

Thank you for attending this Meeting. Management and the Directors are concerned about the safety of employees both underground and on surface.

Under the present circumstances of threats and intimidation it is not possible for officials to properly perform their duties of ensuring the safety of workers.

The discipline on the mine has broken down and safety instructors are being ignored.

Employees are not using the grievance procedure to bring matters of concern in respect of safety to management's attention but are acting in a unilateral manner.

Management's relationship with the Union has broken down following the Union's withdrawal from involvement in the recent dispute. Without a Union, or properly electoral employee representatives, management cannot hold proper discussions and negotiations with the workforce on

matters of importance such as safety.

Finally the fact that the mine is not working normally, but is involved in a slow strike, is itself dangerous because workers' minds are not on the job but are focussed on the outcome of the dispute.

Management is looking to each employee to agree individually that they will:

1. Work normally and in accordance with the laid down procedures and standards of Emaswati Coal.
2. Abide by the disciplinary and grievance procedures which have been agreed between management and the Union.
3. Abide by the recognition agreement which was agreed between management and the Union.
4. Accept that if they break this understanding they may be dismissed in accordance with the disciplinary procedures.

Management has decided that due to the unsafe conditions at the mine, operations will be suspended with immediate effect.

There will therefore be no work at the mine today and work will not resume unless employees are prepared to sign the undertakings which I described.

Employees can collect pay owing to them up to today on Monday. After today (Friday) there will be no pay until work starts again.

If employees would like more information on this I am available to talk with individual employees on their representatives at any time.

Any employee who wants to sign the agreement to work normally and abide by the agreed procedures can contact me or any member of the management team. Any employee who signs this agreement will be allocated work in a safe area and will be paid normally from the date on which they sig

the agreement.

Thank you."

The Appellants' declarations then proceed to refer to the undertaking which employees were required to sign before being permitted to work. It is substantially identical to what was required by the letter set out above.

However, in contrast with paragraph 4 of the letter which states that if the understanding is broken the employee may be dismissed, the undertaking states that the employee will be dismissed if he is found guilty of breaking the undertaking.

The declaration then alleges that the Respondent's conduct amounted to a lock out. This, so it is alleged, was unlawful in that it did not comply with the provisions of Part VII of the Industrial Relations Act as there was no dispute reported to the Labour Commissioner. The dispute to be reported was whether or not the Appellants were obliged to sign the undertaking. Furthermore it is alleged that the dispute was not certified as unresolved and no notice had been given by the Respondent that it intended to take action by way of lock-out in accordance with Section 29(1), (2) and (3) of the Industrial Relations Act.

The declaration further alleges that the Respondent's conduct in writing the letter and insisting on the signing

on the undertaking over a long period amounted to a repudiation of the contracts of employment by the Respondent. The Appellants, it is said, at all times tendered their services under their individual contracts of employment. This state of affairs continued until the end of August 1992 when the Respondent closed the mine and the Appellants deemed their employment to be terminated.

The Appellants' declarations finally allege that the employment agreements were, subject to certain terms of the contract and other provisions of the law, to terminate when each of them reached the age of fifty-five and that they were entitled to damages for the period between the 1st September 1991 to the date when each of them would have retired on reaching fifty-five.

The Respondent in its plea, in essence, contends that on the 12th January 1991 it suspended the Appellants until the 14th January i.e. over the weekend following the circular letter of the 12th. It says that it extended the date for signature of the undertaking to the 31st January. It states further that the services of the employees were lawfully terminated on the 1st February for reasons permitted in terms of Section 36 of the Employment Act of 1980. The misconduct relied upon and set out in paragraph 7.2 of the plea are alleged to have consisted of the following:

1. Two unlawful strikes on the 25th to the 27th October

1990 and the 20th to 21st November and an unlawful go slow strike from the 29th October

1990 to the 12th January 1991.

2. Acts of violence on the 12th December 1990 against employees of the Respondent.
3. Acts of violence on the 27th and 28th January 1991.
4. Endangering the safety of the Respondent's undertaking and persons employed by it and preventing the Defendant from fulfilling its legal obligations under the Mines and Works Act.
5. Refusing to adopt safety measures or to follow instructions in regard to the prevention of accidents.

The Respondent denied lock-out action and alleged that the Appellants service contracts were lawfully and fairly terminated with effect from the 12th January 1991. It therefore denied that it was liable in respect of any moneys due after the 12th January.
An application to compel further particulars to the plea was brought and dismissed by Hull CJ on the 4th June 1995. Thereafter an exception was taken to the plea. The exception was upheld to the extent that it was held that there was no valid defence made out to the claim to payment during the period between the 14th January and the 1st February 1991. An elaborate application to amend was then filed by the Respondent which was opposed by the Appellants. This resulted in judgment being given for the amount of the Appellants' wages for the period of the 14th January 1991 to the end of that month. I do not think that it was correct

for the learned Chief Justice to have given judgment in respect of part of the claim in proceedings on exception before the whole" the case had been decided. However, it has the merit of convenience and left for decision at the trial only the issue of entitlement, if any, to payments of wages or other amounts and damages for the period from the 1st February until retirement at the age of fifty five.

These were the issues which came before Sapire ACJ. It was agreed that he would make no determination on the quantum of any entitlement by the individual Appellants.

The learned Acting Chief Justice heard evidence concerning the background facts and came to various conclusions some of which have bearing on the present appeal. He found that one of the terms upon which the Appellants were employed was that they could be dismissed upon one month's notice and that the reference to retirement at the age of 55 years was subject to the right vesting in the Respondent to terminate the employment on one month's notice. This conclusion cannot be faulted. The result is that the contention that any damages for breach by the Respondent of the employment contracts must be assessed upon the basis that there was no undertaking by the Respondent to employ the Appellants until they reached the age of fifty five.

The central issue in the case appears to be the proper interpretation and legal effect of the circular letter of the 12th January 1991 read with the undertakings presented

to the Appellant which brought to a head a lengthy history of dispute between some employees and the employer going back to the middle of 1990. I do not think that it is necessary to analyse in detail the events which occurred during the second half of 1990 and the first months of 1991. There were disputes concerning most of them. The Appellants deny that there were any illegal strikes during October and November; that there was a go slow strike from the middle of December 1990 until the 12th January 1991, that there was any interference with mine officials carrying out their duties in relation to mine safety; that they were responsible for riotous behaviour at the miners' houses which resulted in damage to the buildings (although they do not deny that some persons could well have done damage probably after drinking at the near-by bar) and generally that there was any misbehaviour on the part of the employees at the Mine.

I refer now to the state of the record of the trial which has a bearing on the background facts in this appeal. The majority of the errors and omissions have been corrected but the omission of the last item has not. The record ends at a stage when there was a postponement in order to hear the evidence of two witnesses for the Respondent. The tape recording at the postponed hearing which lasted less

than an hour has been lost and Counsel's notes have also been lost. It does not appear that the learned Chief Justice has been approached to discover whether he had any record which he

was prepared to allow to be used to reconstruct the record of the lost hour of the trial. In an affidavit prepared for the appeal Mr. Shabangu gives a detailed history of his attempts to find out what happened to the record. He says:

"In fact the evidence of both witnesses was directed at proving that there was a strike at the Respondent's mine on the dates alleged in the plea. Their evidence however was no more than that at or about the months as alleged in the plea there were occasions when employees at the Respondent's mine were seen by them having mass meetings with the Respondent's General Manager who was a defence witness number one in the trial. They both testified that they themselves did not know why the Respondent's employees had not gone underground on those occasions. They also testified that on those occasions the Respondents were in a mass meeting with the Respondent's General Manager. These witnesses testified that they believed .....the Respondent's General Manager and that they themselves were not in a position to form an independent view as to whether the Respondent's employees were indeed on strike. The court a quo repeated this evidence and found that the allegation in defendant's plea that there was a strike, amongst other allegations were not proved."

The learned Acting Chief Justice makes the general finding that the allegations in paragraph 7.2 of the plea which are set out above have not been proved. He was of the view that reports made to management were sufficiently serious to explain and justify the belief that safety was being jeopardised and to justify temporary closure. But he finds further that the facts alleged in paragraph 7.2 "were not

the immediate ground for the termination of Plaintiff's employment." He found, correctly in my view, that the immediate cause of the purported termination of employment was the refusal or failure by the Appellants to sign the undertaking presented to them on the 12th January 1991.

I do not think that the evidence of the witnesses whose evidence was not recorded is sufficiently material to require that this Court should refuse to hear the appeal. It follows that the alleged acts of misconduct alleged in paragraph 7.2 of the plea are not of importance because they were overtaken by the events of January 1991.

The learned Judge found that because the undertaking required by management demanded nothing more than compliance with the terms the original contracts of employment, it was lawful to require them to be signed on pain of dismissal. I do not think that this is so. In my view, even on the assumption that the undertaking contained nothing more than compliance with existing contractual obligations, it was not lawful to require a repetition in another written document of those obligations and to attach to that requirement a threat that, if the undertaking was not signed, dismissal would follow. The obligations of the Appellant were contained in the contracts of service or terms implied therein and do not include any obligation to sign documents repeating the duties in different words.

Be that as it may, the signature of the undertaking of the 12th January 1991 would not have left the terms of the original contract of employment unaltered. The last words of the undertaking namely; "I agree that I will be dismissed if I am found guilty of breaking this undertaking," do not admit of any latitude in the form of a lesser penalty. Any breach of the draft undertaking which does not mention in detail those misdemeanours which in the ordinary event would justify a reprimand or lesser punishment could in the case of a signatory of the undertaking lead to inevitable dismissal. This is a material and very important difference in the positions respectively of a signatory of the undertaking and a non-signatory.

The action of the Respondent in giving the circular letter of the 12th January 1991 to the Appellants and, pursuant to its terms, preventing access to the mine premises constituted a lock-out. By Section 2 of the Industrial Relations Act 1980:

"lock-out" means "a total or partial refusal by an employer or group of employers to allow his or their employees to work, if such refusal is done with a view to inducing compliance with any demand or with a view to inducing the abandonment or modification of any demand."

The Respondent on the 12th January refused to allow the Appellants to work and this was done with a view to inducing compliance with the demand that they should sign the undertaking.

Part VII of the Industrial Relations Act contains detailed provisions for the resolution of disputes including reports to the Labour Commissioner, the ultimate declaration by him of the dispute as an unresolved dispute and the subsequent taking by employer or employee of action by way of lock-out or strike. No lock-out may take place before the Labour Commissioner has been required to certify under Section 58 that a dispute is an unresolved one and a specified period of time after such certification has elapsed (Section 59(1). No declaration of an unresolved dispute was required from the Labour Commission in the present case. If any lock-out takes place otherwise than in conformity with the provisions of Part IV of the Act the employer is guilty of an offence and, in addition to a fine and in default, imprisonment, he "shall be liable for the unpaid wages, salary and other remuneration that an employee may reasonably be expected to obtain in respect of any period during which the lock-out action took place, and an employee may recover such wages, salary and other remuneration as if it were a civil debt without prejudice to any other manner in which proceedings may be taken for the recovery thereof." (Section 62(l)(a))

There was a lock-out which was unlawful in that the basis for it, namely, the circular letter of the 12th January read with the undertaking to be given and the exclusion of the Appellants from the property was therefore unlawful.

In addition, the provisions of Part IV of the Act were not

complied with.

The next question is the period for which remuneration is recoverable. The Appellants say that they did not accept the purported dismissal at the beginning of February and remained ready and willing to work until finally in August 1992 they accepted that in fact there was a termination of their employment. This was when the mining operation came to a halt following voluntary liquidation. The dismissal of February 1991 was based upon the unlawful circular lock-out letters of two weeks earlier which could have been, and indeed were, rightly ignored by the Appellants. The lock-out would therefore have continued and nothing occurred which altered the situation until August 1992.

During argument the question arose as to whether there was any basis upon which it could be contended that, notwithstanding the election by the Appellants to continue their contracts of employment in spite of the repudiation by the Respondent, the employment contracts must be regarded as having come to an end one some date before August 1992. There seems prima facie to be something anomalous in a situation where a contract of employment is to continue indefinitely at the behest of the Appellants though nothing is being done pursuant to it. The Appellants were in a position to do no work but to claim to be paid as employees merely because they had offered to work while the deadlock situation continued. The answer to this apparent anomaly is

that the Respondent was at any stage entitled to terminate the contracts of employment on giving one

month's notice. It saw fit to rely upon the validity of its circular letter and draft undertaking of January 1991. There is some authority for the proposition that a dismissal can be effective even though the grounds for doing so do not justify it (See GRACIE VS HULL, BLYTHE & COMPANY 1931 CPD 539 @541; BEETON VS PENINSULA TRANSPORT CO. (PTY) LTD 1934 CPD53 @59; ROGERS VS DURBAN CORPORATION 1950(1) SA65 (D&C) @65; NGWENYA VS NATALSPHUIT BANTU SCHOOL BOARD 1965 1 SA692 (W) @696 F to G). However, if this is so, the employee would be deprived of the right of election which gives him the option of putting an end to the contract between himself and the employee or disregarding the repudiation and insisting that the parties should continue to be bound by it.

The approach which in my opinion is the correct one was set out by Ramsbottom J in VENTER VS LIVNI 1950(1) SA524(T) @528 as follows:

"A master cannot by a unilateral act of dismissal terminate a contract of employment unless he has good grounds for doing so, but in such latter case he would in law be accepting a prior repudiation by the servant. If, without cause, he seeks to terminate a contract of service the servant may accept the termination and bring the contract to an end or he may refuse to accept the termination and keep the contract alive until the end of its term; but in the latter case the servant's right is to claim wages as and when they fall due, or at

the end of the term to claim damages for wrongful dismissal."

Venter's case was concerned ultimately with the right of an employee to remain in occupation of property belonging to the employer which she occupied in order to carry out her duties but to the possession of which she was not entitled by virtue of any stipulation giving a right of occupation in terms of the contract. Van Winsen J in MYERS VS ABRAMSON 1952(3) SA121(C) @123 quotes the above cited passage from VENTER'S case with approval and recognises the right of the injured party in a contract of employment to decide whether he will ignore the repudiation and hold the other party to the contract and claim specific performance. (See too NATIONAL UNION OF TEXTILE WORKERS VS STAG PACKINGS (PTY) (LTD) 1982(4) SA15l(T)).

The view of certain Judges that in the case of a contract of employment the employer may terminate it without good cause and pay any damages which may be suffered has its origin, it seems, in the belief that a contract of employment is not as a matter of law specifically enforceable because the relationship of master and servant is of such a personal nature that it would be wrong to compel a continuation of it at the option of either party. In SCHIERHOUT VS MINISTER OF JUSTICE 1926 AD 99 @107 Innes CJ appeared to adopt the rule of English law that the only remedy available to a servant who is wrongfully dismissed is an action for damages and the Court's will not decree specific performance against, the employee nor will order the payment of the servant's wages

for the remainder of his term. However the Full Bench of the Transvaal Provincial Division in the NATIONAL UNION OF TEXTILE WORKERS case (supra) interpreted SCHIERHOUT'S case as not laying down a rigid rule of law whereby a master and servant contract is not specifically enforceable, but merely decides that, on the facts of that case, where the employee was a servant of the State the discretion which vests in the Court to refuse specific performance should be exercised against the employee. Once it is accepted that the remedy of specific performance is not excluded as a matter of law in the case of a master and servant contract there should be no objection to applying the general rule that, where there has been a fundamental breach by one party, the other party usually has the option to terminate the contract or to keep it alive and demand compliance. The principle in VENTER'S case and MYERS' case (supra) is therefore to be preferred to cases such as NGWENYA VS NATALSPRUIT BANTU SCHOOL BOARD 1965(1) SA692(W), GRUNDLINGH VS BEYERS AND OTHERS 1967(2) SA131(W) and MABASO AND OTHERS VS NEL'S MELKERY (PTY) LTD 1979(4) SA358(W) where it was accepted that specific performance can never be ordered in a master and servant case.

The question as to either and, if so, in what circumstances a contract of service is specifically enforceable has developed in recent times in both England and South Africa. We have not been referred to any authority of the Court of Appeal in Swaziland dealing with the subject so that it

would appear that this Court is at liberty to deal with the matter as it thinks fit. In doing so, however, the view of Courts in England and South Africa are of substantial assistance. Being more industrialised countries, questions of labour law under modern conditions are likely to have arisen and been considered before this has happened in Swaziland.

Specific performance wa a remedy available in the Courts of equity in England and thus has a different origin to the remedy under the Roman-Dutch system. However, in modern times they seem to have arrived at similar though not identical positions. (CT BENSON V S.A. MUTUAL LIFE ASSURANCE SOCIETY 1986(1) SA 776(A)). It is not necessary for the purposes of the present matter to discuss all issues arising in a case where specific performance of a contract is sought. As it appears from ROSSOUW V SAID-AFRIKAANSE MEDIESE NAVORSINGSRAAD 1990(3) SA296(C) certain of the South African authorities have followed the earlier English decisions and appear to have excluded entirely an order for specific performance where the contract sought to be enforced is one of master and servant. This has been generally based upon what has now been held to be too wide an interpretation of SCHIERHOUT'S case. It seems to me that the Courts of Swaziland should adopt as the basic principle in master and servant cases that they are generally specifically enforceable but that there may be circumstances where the Court, in the exercise of discretion vesting in

it, should refuse to grant such an order. The situation where the relationship between master and servant is of so personal a nature as to make enforcement undesirable or impossible is an example (SEE THE LAW CONTRACT 3RD EDITION BY R.H. CHRISTIE P.580 TO 585).

In the present case there seems to be no reason for refusing the employees their right, if they see fit, to abide by the contract and, on tendering to carry out this obligation, to insist upon performance by the Respondent. There is nothing in the relationship which requires personal compatibility. The cause of the dispute was something which arises in the field of industrial relations and did not per se depend upon any personal conflict.

I have been unable to find any authority which suggests that in a situation such as the present there should be some limit placed upon the length of time during which the Appellants may insist on compliance by the Respondent with the terms of the employment contracts and claim payment of their monthly wages. There is no principle of which I am aware which would justify this and in VENTER'S case (supra) Ramsbottom J specifically mentions keeping the contract alive "until the end of its term."

The termination of the contracts of employment in August 1992 at the instance of the Appellants would render it unlikely that additional damages could be proved. They

elected to insist on the continuation of the contract for a period of eighteen or nineteen months from the date of their purported dismissal. During that period the unlawful lock-out continued and the employees did not accept the breach by the Respondent and elect to cancel. They terminated the contracts themselves in August 1992 and it is difficult to appreciate how they suffered loss when they had elected to continue their relationship with the Respondent for such a substantial period. I have already expressed the view that there is no basis for contending that the contracts were to continue until the employer reached the age of fifty-five.

I am therefore of the view that the appeal should be upheld and the following substituted for the order of the Acting Chief Justice:

1. The Appellants, in addition to the amounts awarded to them in terms of the judgment of Hull CJ dated the 4th May 1994, are entitled to payment of wages from the 1st February 1991 to the 31st August 1992 together with any severance allowance to which they may be entitled in respect of that period.
2. Interest is payable on the amounts due to each employee from time to time at nine percent per annum from the end of the month for which it is payable todate of payment.
3. The matters are referred back to the High Court for the determination of the amounts due to each of the

Appellants save for Majunzile Ndwandwa in respect of whom no payment is due.

4. The costs" of appeal, save and except those costs which have been directed to be payable by the Attorney of the Appellants, are to be paid by the Respondent.
5. The costs incurred in the High Court to date, save and except any costs already awarded in proceedings before Hull ACJ in terms of his Order of the 4th May 1994, shall be paid by the Respondent.

W. H. R. SCHREINER JA

I agree :

R.N. LEON JA

I agree

J.H. STEYN JA

Delivered on this 23 day of September1997