IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

APPEAL CASE NO.54/09

In the matter between:

USUTHU PULP COMPANY LTD	**APPELLANT**
VS	
THE PRESIDENT OF THE INDUSTRIAL COURT N.O. DEREK	**1st RESPONDENT**
CHARLES MCMILLAN PIETER	**2nd RESPONDENT**
JACOBUS VAN DER MERWE	**3rd RESPONDENT**

CORAM	**RAMODIBEDI ACJ**
	EBRAHIM JA
	MASUKU AJA

FOR THE APPELLANT	**ADV. P.E. FLYNN**
FOR THE 1st RESPONDENT	
FOR THE 2nd & 3rd RESPONDENTS	**MR. M.M. SIBANDZE**

JUDGMENT

EBRAHIM JA:

The second and third respondents applied to the Industrial Court for a determination of their unresolved dispute against the appellant. It was their case that they were employed by the appellant and that when it terminated their services on the grounds of localisation it did so unfairly and unreasonably. They sought compensation for what they considered unfair dismissal. They asserted that the termination of their services was automatically unfair as the appellant had unfairly discriminated against them when it localised their positions. They sought an award of up to 24 months remuneration as compensation.

The appellant denied that respondents were its employees and alleged that they were employees of Sappi Management Services (Pty) Ltd (hereinafter referred to as SMS). The appellant alleged that the respondents were seconded in terms of a contract to it by SMS and conceded that the secondment contracts were later terminated for localisation purposes. The respondents then returned to SMS, where they were retrenched for reasons based on operational requirements and were paid an exit package. It was the appellant's case that it did not terminate the services of the respondents and denied that it was liable to pay compensation for unfair dismissal. It also denied that localisation amounts to unfair discrimination and that the termination of the respondents' employment was automatically unfair.

Both the respondents testified as to the individual circumstances of their employment and the termination of their employment.

The 3rd respondent testified first before the Industrial Court. It was his evidence that he joined the Sappi Group in 1989 when he was employed by Sappi Forests (Pty) Limited as a Forestry Manager. He was later promoted to be an Area Manager as from 1st February 1994 and with effect from 1st April 1998 he was the Regional Manager. Towards the end of 2003, following a meeting of Sappi Forests Senior Managers, he was offered the position of Project Manager in Pietermaritzburg. He declined the offer and expressed a preference to be given the position of the Forest Manager in Swaziland at Sappi Usuthu. He was told to apply and advised that Sappi Usuthu would offer him a 3 year contract but was told that there was no guarantee of another position with Sappi Forests thereafter. In December 2003 he was interviewed by the appellant's General Manager and Human Resources Manager and was employed on the same day. He commenced working on 2nd January 2004.

The parties entered into an agreement which agreement is headed "EMPLOYMENT AGREMENT by and between USUTHU PULP COMPANY LIMITED ("the company") and A.J. van der Merwe ("the employee"). In terms of this Agreement the 3rd respondent was employed by the appellant on a full time basis as Forest Manager for a 3 year period from 1st January 2004 to 31st December 2006. The agreement provided for the remuneration and benefits to be enjoyed by the 3rd respondent and it was signed by him in Swaziland. It was also signed by the appellant's General Manager.

It was the 3rd respondent's evidence that he reported for work as from 2nd January 2004 and did so every day at Sappi Usuthu. He reported to the General Manager of the appellant until he was

made redundant and thereafter reported for duty to the Sappi Divisional Forestry Manager, who was based at Sappi Forests. Whilst with Sappi Usuthu his remuneration was paid by the appellant and he paid his income tax in Swaziland. He was aware that in terms of the agreement between the parties it was incumbent on him to obey all lawful orders given to him by the appellant and persons employed by the appellant in authority over him. The Employment Agreement also provided that the 3rd respondent shall be a member of and contribute to a provident fund arranged by the appellant. It was also the 3rd respondent's evidence that his membership of the pension fund operated by the Sappi Group would continue and that the appellant would pay the employer's contribution into the fund.

During the course of his employment with the appellant, he discussed with the Managing Director of Sappi Forests that Mandla Dlamini should be groomed to take over his position as Forest Manager at the end of his contract period. He deposed that the Managing Director assured him that his full contract period would be honoured.

It was on or about 2nd June 2005 that 3rd respondent received a letter from the Divisional Forestry Manager advising him of the termination of his employment with the Appellant. The letter was on the appellant's letterhead and was in the following terms:

> **"Termination of Secondment to Usuthu Pulp Company Ltd**
>
> **As you are aware the prevailing poor financial condition of Usuthu Pulp Company has necessitated management to implement steps to curtail costs. The company has considered numerous ways of reducing overall costs, including reduction of head count via retrenchment and localization of positions.**

It is with regret that I hereby advise you that the company has decided to localize your position. In compliance with your secondment contract, the company hereby gives you three month's notice of termination of your secondment to Usuthu Pulp Company. The notice period will run from 1st July 2005 to 30 September 2005. Termination of your secondment contract means that you will revert to Sappi Management Services, who will attempt to find a suitable alternative position for you.

The benefits as highlighted in the contract between Usuthu Pulp Company and yourself will be payable to you upon termination. (See attached extract from the contract).

The value of these benefits is reflected in the attached schedule."

On 16th June 2005 the 3rd respondent received a further letter, again on the appellant's letterhead to the following effect:

"Retrenchment

The letter dated 2nd June 2005 refers.

As a result of the termination of your secondment to Usuthu Pulp Company with effect from 30th September 2005, in accordance with your contract of employment, Sappi Management Services has endeavoured to find you alternative employment. It is with regret that you are advised that the company is unable to offer you an alternative position. You are hereby given three month's notice of termination of your employment with Sappi Management Services. The notice period will run from 1st July 2005 to 30th September 2005."

The 3rd respondent was provided with a summary of the exit package due to him. The package is headed SAPPI USUTHU but under his employment details, his date of engagement is shown as 1st March 1989, and his employment is shown as 16 completed years. The summary recorded two alternative packages, an exit package on transfer back to SMS and an exit package in the event of retrenchment. The latter package, which was to be paid to the 3rd respondent included severance pay and was in the amount of R408, 874.49.

The 3rd respondent disputed that his employer was SMS, that he had been seconded to the appellant and that the Employment Agreement he had entered into with the appellant was a secondment agreement. It was his case that he never entered into any contract with SMS nor was he aware of any arrangement to second him to the appellant. The first time any reference was made to secondment was in the letter terminating his services. He said that he had been employed by Sappi Forests (Pty) Ltd until 31st December 2003, and thereafter he was employed by the appellant. His membership of the Sappi Pension Fund continued because it is a Group Pension Fund separate from the individual Sappi Companies. He also retained his years of service with the Sappi Group, for purpose of calculating his benefits on termination of service. It was his assertion that he understood the reference to "reverting to SMS" in the letter dated 2nd June 2005, referred to above, as indicating that the Sappi Group would find him another position. He did not deny, however that the severance allowance was paid by SMS in terms of South African Law, in addition to the benefits to which he was entitled under his agreement with the appellant but he considered this allowance to be payable because of his cumulative years of employment under the Sappi Group at Sappi Forests and Sappi Usuthu. He had not been paid any severance allowance when his employment with Sappi Forests came to an end.

It was the 3rd respondent's case that any employment arrangement between the appellant and SMS was never discussed with him and that the first time he received any indication that he was considered an SMS employee was when he

received the letter of 16th June 2005 after the appellant had terminated his services.

That then, was the evidence of 3rd respondent before the Industrial Court.

The 2nd respondent also gave evidence. It was his case that he had applied for a post of Procurement Manager at Sappi Ngodwana. He had not previously worked for the Sappi Group. The post was filled internally, but he was offered the post of Commercial Manager at Sappi Usuthu in Swaziland instead. In his case, he was interviewed by the General Manager of the appellant who told him that his appointment was subject to Sappi head office approving his profile. Subsequently the appellant's Human Resource Manager telephoned him to say he had the job. He later received a letter dated 21st November 2003 on the letterhead of SMS. It was signed by the Managing Director of Sappi Kraft (Pty) Ltd and stated:

> **"We have pleasure in confirming our offer of employment with Sappi Management Services with effect from 1st January 2004. You will be seconded to the Usuthu Pulp Company Ltd as Commercial Manager and will be accountable to the General Manager for the execution of your duties."**

This letter set out various terms and conditions of his appointment including:

- **"the 1st applicant's (2nd respondent's) SA notional remuneration package" will be R29, 900 per month, reviewed annually at Usuthu.**

- **Whilst on secondment he would be paid his salary and receive benefits in accordance with Usuthu's remuneration policies and practices; he would become a member of Swazimed Medical Aid; and his leave would be determined by Usuthu's leave policy.**

■ **he would become a member of one of the Sappi Retirement Funds.**

■ **He would be eligible for an annual bonus under the Management Incentive Scheme operated by SMS.**

■ **Income tax would be payable in Swaziland.**

The letter contained a clause which stated:

'Should your employment with Usuthu be terminated for whatever reason this employment contract will also be terminated *ipso facto.* There will be no obligation on the company to provide alternative employment in this event.'"

The second respondent was not happy with this additional clause and questioned the signatory of the letter, who said the clause would be changed and a revised contract would be sent to him. The 2nd respondent deleted the clause and signed the letter on 3rd December 2008 agreeing to be bound by the rules and regulations of SMS. He never received a revised contract.

Shortly, thereafter, however, he received an Employment Agreement containing his conditions between himself and the appellant. In terms of this agreement the 2nd respondent was employed by the appellant on a full time basis as Commercial Manager for a fixed period of three years from 1st January 2004 to 31st December 2006. The 2nd respondent signed the agreement as did the General Manager of the Appellant on 12th December 2003.

The 2nd respondent was stationed at the appellant's mill at Bhunya in Swaziland. He reported to the Appellant's Financial Manager who reported to the Appellant's General Manager. He was paid his remuneration by the appellant and he regarded the appellant as his employer because his work performance was governed by the contract he signed with the appellant. In his

view he had nothing to do with SMS after the interview he attended at head office.

On 2nd June 2005 he received a letter from the appellant informing him that it had decided to localise his position. He was given three months notice of termination of his secondment to the appellant and noted in a letter addressed to him that he would revert to SMS which would try to find him an alternative position for him. The letter this respondent received was identical in terms of the letter received by the 3rd respondent terminating his contract with the appellant. On or about 20th June 2005 he received a further letter from the appellant giving him three months' notice of termination of his employment with SMS. This letter was similar to the letter received by the 3rd respondent.

The 2nd respondent subsequently received a letter from SMS, dated 3rd August 2005 which terminated his services with SMS "for reasons based on operational requirements." He received a summary of his exit package and he was paid a retrenchment package which included severance pay based on South African Law.

These broadly were the facts deposed to by the 2nd and 3rd respondents before the Industrial Court. The only witness the appellant called was Chris Jonker. He is the Human Resources Manager responsible for the Human Resources functions of the appellant.

It was his evidence that Sappi employees sent on international assignment are employed by SMS to protect their security of tenure and to ensure equality of treatment within the Sappi Group and then seconded to a particular Sappi Company in the foreign country of assignment. He said the international assignments are governed by a policy document posted on the Sappi website. The policy applies to all SMS employees who are seconded off shore. He explained that an SMS employee on international assignment enters into an employment agreement with the local company to accommodate local conditions and legal requirements.

It was Jonker's evidence that the 3rd respondent was employed by SMS and seconded to the appellant. This was not only denied by the 3rd respondent but the appellant could not produce an employment contract between SMS and the 3rd respondent nor was he able to produce any form of notification to the 3rd respondent that he was being seconded to the appellant by SMS. He said, however, that in terms of Sappi Policy the 3rd respondent should have been employed by SMS and seconded to the appellant. It was Jonker's assertion that the 3rd respondent was retrenched by SMS and relied on his letters to him dated the 2nd and 26th June 2005 to support this contention. These letters were, however, written on the appellant's letterhead and Jonker's explanation was that this may have been because the Divisional Forestry Manager might have been in Swaziland and simply made use of the local letterhead for convenience sake.

It was not disputed by Jonker that both respondents received their entire remuneration from the appellant and that they were fully under the control and discipline of the appellant's management in performance of their work in Swaziland but he

said such management employees were employed by SMS. No other evidence was led to corroborate this contention.

Jonker was tested on his assertion as regards who had control and discipline of the respondents, by his attention being brought to a disciplinary enquiry held by the appellant in relation to a Dr. Lemmer who worked for the appellant as Health Services Manager. He deposed that Lemmer had been subjected to the enquiry by SMS. This contention was not supported by the documentary evidence produced, in that, notices and minutes which were produced pertaining to the Lemmer enquiry were on the appellant's letterhead and were signed by appellant's Mill Manager. The minutes, too, were recorded under the heading "SAPPI USUTHU DISCIPLINARY ENQUIRY" between Lemmer as employee and Sappi Usuthu as employer.

Jonker doubted but could not deny that the 3rd respondent was assured he would be able to serve out his contract. He accepted that the respondents were "localised" because of their nationality i.e. because they were not Swazi nationals. This then is a summary of the ***viva voce*** evidence led before in the Industrial Court in this matter.

Against the background of the facts the learned President of the Industrial Court came to the conclusion that there was a strong *prima facie* case to establish that the 3rd respondent was employed by the appellant. He based this finding on the fact that the written contract was compiled between 3rd respondent and the appellant. That in addition it was the evidence of the 3rd respondent, that he rendered his services to the appellant at its place of business and that he was subject to the direct authority,

control and discipline of the appellant, its officers and managers and that he was paid his remuneration by the appellant. The court held that there was no evidence led to substantiate the appellant's claim that the 3rd respondent was employed by SMS. No written contract or a letter of appointment between the 3rd respondent and SMS nor evidence of any oral negotiations was tendered to hold otherwise.

The Industrial Court was not impressed by the appellant's sole witness Jonker's assertion that it could be implied that an employment contract existed between the appellant and the 3rd respondent because the appellant's senior managers to whom the 3rd respondent reported are employees of SMS and the policy of Sappi is that managers on international assignment are employed by SMS and seconded to the local company and also because the 3rd respondent did not query the letters terminating his alleged secondment to the appellant and reverting him to SMS.

The first respondent concluded at pages 35 and 36:

> **"Chris Jonker stated unequivocally that the policy governing international assignments applies to employees of SMS. If SMS failed to employ 2nd applicant (3rd respondent) then the policy never applied to him. Using the policy to prove employment by SMS simply begs the question."**
>
> **We find that there are no grounds for implying an employment contract between the 2nd applicant (3rd respondent) and SMS, nor for implying that the 2nd applicant (3rd respondent) ever considered himself to be employed by SMS. He has no direct dealings with SMS, and none of the evidence of a relationship of employer/employees existed."**

It seems to me that the findings of fact are unassailable given the evidence led before the Industrial Court supported as this was by the documentary evidence tendered to the court. In my view it cannot be said that these conclusions on fact were unreasonable or for that matter grossly unreasonable.

In Section 2 of the Employment Act 1980 (hereinafter referred to as "the Act") the word "employee" is defined to mean "any person to whom wages are paid or are payable under a contract of employment." No contract or any other form of a document was placed before the Industrial Court to show that the 3rd respondent was employed by SMS. On the contrary there was evidence to show that the 3rd respondent's wages were payable in terms of Employment Agreement by the appellant.

The learned President held at page 36 that:

> **"There is substantial and compelling evidence that the 2nd applicant (3rd respondent) was employed by the respondent (appellant) and a significant lack of evidence proving any employment relationship with SMS. We have no hesitation in finding as a matter of fact that the 2nd applicant (3rd respondent) has proved on a balance of probabilities that he was employed by the respondent (appellant) and that he was an employee to whom section 35 of the Employment Act 1980 applied."**

In my view this was a perfectly sensible and common sense conclusion given the evidence led before the Industrial Court. I have perhaps been a little pedantic in outlining, in great detail the evidence that the Industrial Court had before it, but I considered it necessary to do so in order to emphasise why I consider, given the evidence, that the Industrial Court had before

it, that it came to findings which in my view are well supported by the evidence tendered before it.

It was not in dispute that the services of the 3rd respondent were terminated by the appellant as a result of the localisation of his post. He was to be replaced by a Swazi national on the premise that since 3rd respondent was not a Swazi national the appellant terminated his services.

Having concluded that the 3rd respondent was employed by the appellant for the reasons outlined above, it becomes necessary to consider the legal requirements to legitimately terminate the employee's services.

Section 35(2) and (3) of the Act provides as follows:

> **"(2) No employer shall terminate the services of an employee unfairly.**
>
> **(3) The termination of an employee's services shall be deemed to be unfair if it takes place for any one or more of the following reasons -**
>
> **(1) the employee's membership of an organisation or participation in an organisation's activities outside working hours or, with the consent of the employer, within working hours;**
> **(2) because the employee is seeking office as, or is acting or has acted in the capacity of an employee's representative;**
> **(3) the filing in good faith of a complaint or the participation in a proceeding against an employer involving alleged violation of any law or the breach of the terms and conditions of employment under which the employee is employed;**
> **(4) the race, colour, religion, marital status, sex, national origin, tribal or clan extraction, political affiliation or social status of the employee;"**

Against the background of the provisions, I have no difficulty with the correctness of the learned President's conclusion that the

termination of the 3rd respondent's services is "deemed to be unfair."

The Industrial Relations Act 2000 stipulates in Section 2 that: "automatically unfair dismissal" means a dismissal where the reason for the dismissal is -

> **"(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;"**

The learned President surmised at page 38 that the -

> **"The above definition does not expressly refer to unfair discrimination on grounds of national origin. "Ethnic origin" denotes origin by birth or descent rather than nationality - see The Concise Oxford English Dictionary (9th ed).**
>
> **Nevertheless the inclusion of the phrase "on any arbitrary ground, including" is a clear indication that the list of prohibited grounds is not intended to be exhaustive.**
>
> **In our opinion, an 'arbitrary ground' for discrimination in the context of a workplace dismissal is one which has no *bona fide* rationale based on work performance or operational requirements.**
>
> **The respondent has not led any evidence which suggests that Swazi nationality is an inherent requirement for the job of Forest Manager. There is no legislation in place in Swaziland which authorizes an employer to prematurely terminate the services of an employee in order to localize his position. On the contrary, section 35(3) (d) of the Employment Act deems such discrimination to be unfair. We also note that provision for localization in a contract of employment is expressly prohibited by section 29 of the Employment Act, which declares contractual discrimination on grounds of national origin to be unlawful.**
>
> **In our view, the termination of an employee's services on grounds of his national origin is regarded by our employment law as arbitrary discrimination. It follows that the termination of the 2nd applicant's (3rd respondent) services for reason of his national origin was an automatically unfair dismissal."**

These conclusions are in my view eminently sensible and reasonable. See also Section 27 of the Employment Act which provides:

> **"Contracts not to conflict with law.**
>
> **27. No contract of employment shall provide for any employee any less favourable condition than is required by any law. Any condition in a contract of employment which does not conform with this Act or any other law shall be null and void and the contract shall be interpreted as if for that condition there were substituted the appropriate condition required by law."**

The inclusion of the "localisation" clause in the contracts was by its very nature unfair and discriminatory against the respondent in view of the provisions of section 27 as it provides the respondents with less favourable conditions of employment. The clause was void *ab initio* as it was not permitted by the law pertaining to Swaziland.

I now turn to deal with the contractual position of the 2nd respondent which differs from that of the 3rd respondent. It was not in dispute that he entered into a contract of employment with SMS in terms of which he was seconded to the appellant but, thereafter, he signed an employment contract with the appellant.

It was accepted by the Industrial Court that the 2nd respondent was employed by SMS with the specific intention of seconding him to the appellant. The learned President said at page 39:

> **"There can be no doubt that the 1st applicant (2nd respondent) was employed by SMS with the specific intention of seconding him to the respondent. A secondment takes place when an employee is temporarily assigned to work for a different**

> **division of the same employer or a different organization altogether, the idea being that the employee will return to his original position following the termination of the secondment. <u>If the secondment is to another part of the same employer, the substantive employment relationship is not affected</u>, although there may be a need for small changes in the terms of employment to cater for new duties, new reporting structures etc. <u>Where however the secondment is to a separate legal entity, for example to an associated company within the same group of companies as the employer, as in the present case, the question arises as to who will be employer during the period of the secondment</u>."** (my emphasis)

It is correct to say that the nature of the employment relationship depends on the nature of the agreement entered into between the parties. Common sense leads to this conclusion. It is the agreement entered into between the parties which provides the answer as to the nature of the relationship between the parties.

employed by the appellant. The appellant on the other hand took the view that the 2nd respondent was employed by SMS. The issue which fell for determination before the Industrial Court was whether the 2nd respondent was an employee to whom section 35 of the Employment Act 1980 *(supra)* applied. The question was whether the 2nd respondent was an employee of the appellant and whether the Employment Agreement between the 2nd respondent and the appellant was subject to the provisions of the Act. "Employee" is defined in the Employment Act 1980 as

> **"Any person to whom wages are paid or are payable under a contract of employment.**
>
> A **"contract of employment"** is defined in the Act as a **"contract of service, apprenticeship or traineeship whether it is express or implied and, if it is express, whether it is oral or in writing."**

The learned President concluded at page 41:

> **"The essential elements of a contract of service are:**

■ an agreement by the employee to make his personal services available;
■ an obligation on the employer to remunerate him for his services;
■ subordination of the employee to the control of the employer.

(See Rycroft and Jordaan: A Guide to South African Labour Law (2nd ed) at page 35."

It cannot be disputed that the 2nd respondent in terms of the agreement signed by him agreed to make his personal services available to the appellant at its place of business in Swaziland. It was a term of the agreement that he would not without the prior written consent undertake any other work for financial gain.

The SMS letter of appointment expressly provided that whilst on secondment to the appellant the 2nd respondent would be paid his salary and receive benefits in accordance with appellant's remuneration policies and practices. The Employment Agreement provided for, in specific terms, what his remuneration package would be and it provided for the review of the 2nd respondent's salary which was entirely within the discretion of the appellant.

Clause 3 of the Employment Agreement entered between the parties provides:

3. SCOPE OF EMPLOYMENT

3.1 Subject to the provisions of this agreement the Employee -

(5) **shall be employed by the Company on a full-time basis in the capacity specified in the schedule;**

(6) **shall diligently and faithfully and to the best of his ability perform the duties for which he is employed from time to time hereunder, and shall at all times obey all lawful orders given to him by the Company and by persons placed by the Company in authority over him;**

(7) **shall perform his duties in a proper, loyal and efficient manner and use his best endeavours to promote the business interests of**

the Company and to preserve the reputation and goodwill of the Company and shall not do anything which is harmful thereto;

(8) **shall comply with all the customs, rules, regulations, and procedural instructions of the Company now or at any time hereafter in force including, without limitation, the Company's Disciplinary Code and Grievance Procedures, Security, Health and Safety Regulations and Benefit Schemes, and any others governing the management of the Company's business and affairs and the control and good conduct of its Employees, with which customs, rules, regulations and instructions the Employee undertakes to make himself acquainted;**

(9) **shall work overtime as required from time to time by the Company, including Saturdays, Sundays and public holidays;**

(10) **shall not, except with the prior express written consent of the Company in each instance -**

(11) **be directly or indirectly engaged, concerned or interested in any business or activity which may conflict with the interests of the Company or which might undermine the Employee's performance of his duties for the Company; or**

(12) **undertake any other work for financial gain.**

of his duties for the Company; or 3.1.6.2 undertake any other work for financial gain.

3.2 This employment shall mainly be performed in Swaziland but the Employee shall nevertheless, whenever he may be required to do so by the Company, visit other countries form time to time for the purpose of performing therein duties incidental to this employment."

In my view it is clear from these provisions that the 2nd respondent was contractually subject to the direct control by the appellant in the performance of his duties, not only in the end to be achieved but in the detailed manner in which the duties were to be performed. He was also subject to the disciplinary control and authority of the appellant in accordance with its Disciplinary Code. The terms governing the termination of the 2nd respondent's contractual relationship with the appellant are also to be found in the Employment Agreement.

Against the background of these facts the court made the finding that the 2nd respondent was subordinate to the control of the appellant and that the Employment Agreement between the parties contained all the essential elements of a contract of service. In my view this conclusion is unassailable. The court concluded as follows at page 43:

> **"Having regard to the Employment Agreement and the relationship between the 1st applicant, and the respondent in general, the court finds that the 1st applicant (2nd respondent) was an employee of the respondent/appellant (i.e. "a person to whom wages are paid or payable under a contract of employment") during the subsistence of his secondment - see the definitions of "employee" and "wages" under the Employment Act."**

Against the background of the totality of the evidence led before it the learned President of the Court stated at page 45:

> **"The 1st applicant (2nd respondent) is entitled to the protection of section 35(3), which deems the termination of his services by the respondent (appellant) to be unfair because it took place for reasons of his national origin (see *supra* in relation to the 2nd applicant (3rd respondent).**
>
> **We also find that the termination of the 1st applicant's (2nd respondent) services was an automatically unfair dismissal for the same reasons given *supra* in relation to the 2nd applicant (3rd respondent). There is no evidence that being a Swazi national was an inherent requirement for the job of Commercial Manager."**

In my view this was a perfectly proper and legitimate finding - What is apparent on the papers is the following:

1. The 2nd and 3rd respondents entered into Employment Agreements with the appellant on the 12th December 2003, and the 21st January 2004 respectively.

2. Contained in these Agreements which all the parties signed is the clause that the "agreement shall be deemed to

have been executed within the Kingdom of governed by and be interpreted according to the law of such Kingdom."

(13) Also contained in the Agreements is the clause "..., and shall at all times obey all orders given to him by the Company and by persons placed by the Company in authority over him;"

(14) Clause 6.1.2 of their Agreement provides for "such salary" is subject to annual review entirely within the discretion of the Company's Board of Directors.

5. The letters of "termination" written to the 2nd and 3rd respondents on 2nd June were written to them on the Company's (appellant's) letterhead.

6. The following clauses from the Employment Agreements signed between the parties are also significant:

> **"1.1 This agreement shall be deemed to have been executed within the Kingdom of Swaziland and shall in all respects be exclusively governed by and be interpreted according to the law of such Kingdom. The headings to the clauses of this agreement shall have no effect upon its interpretation. The various provisions of this agreement constitute one indivisible contract."**
>
> **"25.1 This agreement constitutes the entire contract between the parties hereto regarding the subject matter of this agreement, and negates, supersedes and cancels all previous communication, negotiations and agreement between them in this regard."**

(15) The 2nd and 3rd respondents being dissatisfied with their treatment at the behest of the appellant sought the assistance of the Industrial Court to rectify what they considered to be their

unfair dismissal by the appellant. They at first sought the help of the Arbitration Commissioner who was unable to resolve the dispute between the parties.

(16) The 2nd and 3rd respondents were successful in their application before the Industrial Court. I have endeavoured to outline the evidence led, before the Industrial Court in some detail earlier in this judgment.

(17) The appellant being dissatisfied with the decision of the Industrial Court took the matter on review before the High Court.

(18) In that court, it failed in its endeavours to overturn the findings on the merits. The Court *a quo* held in broad terms that the findings of fact made by the learned President of the Industrial Court were reasonable in terms of the evidence led before him.

> 11. In this court too, I hold the view, that the findings made by the 1st respondent are eminently sensible and not unreasonable given the evidence, both *viva voce* and on the documentary evidence that was led before the Industrial Court. It seems to me on whatever approach is adopted in evaluating the findings of fact made by the 1st respondent it cannot be said that he misdirected himself in reaching the conclusion he reached. Whether he applied the test of reasonableness or gross unreasonableness the conclusion reached was the only just conclusion on the facts before him.

It follows that it is my view that the Court *a quo* was justified in not interfering with the conclusion reached by the Industrial

Court. Consequently, the appeal on the merits to this court cannot succeed.

The appellant has appealed against the decision of the Court *a quo* on the issue of the compensatory order it made when it considered this matter on review.

I turn now to deal with the award of compensation made in favour of the respondents.

The Court *a quo* did not interfere with the overall quantum of the award made but held that the President of the Industrial Court had erred in categorising the award as it did but found that as the 2nd and 3rd respondents had been automatically unfairly dismissed it was open for the Court to make an award up to the threshold of 24 months wages as compensation. On this basis the High Court simply removed the categorisation in respect of *solatium* and the penalty imposed and did not interfere with the overall quantum awarded as it was below the threshold of 24 months allowed to the 1st respondent in terms of section 16 of the Industrial Relations Act.

The learned judge *a quo* had regard to the case of HARMONY FURNISHERS (PTY) LTD v. PRINSLOO (1993) 14 ILJ 1466(LAC) where in the headnote appears the following:

> **"If the facts revealed before that court laid a basis for an award of damages for an injuria, and if the finding that such injuria amounted to an unfair labour practice was correct, then there was no reason why the Industrial Court could not make the appropriate award of compensation".**

In the Harmony case *(supra)* the learned judge Foxcroft J. stated:

> **"It seems therefore that, the word 'damages' is merely a synonym for 'compensation'. Professor Landman points out that 'compensation' means redress of a loss, and he concludes that since the legislature has decreed that if an employee or employer's organisation had suffered a loss as a result of the commission of an unfair labour practice by another person or body, then the court may provide <u>monetary redress</u>".**
> (emphasis added)

The learned judge continued:

> **"Dealing with the concept of what he calls punitive damages, the writer (Professor Landman) goes on to say that:**
>
> **'It is clear that the Industrial Court may not award compensation as a punitive measure. The purpose is to redress an unfair labour practice in so far as monetary compensation can do this. The Court is not concerned in the exercise of its unfair labour practice jurisdiction with punishing the perpetrator of the labour practice'.**
>
> **Perhaps the President of the Industrial Court in the present matter had these remarks in mind when he said that it has now been widely accepted that the Industrial Court may not award compensation as a punitive measure.**
>
> **What the President obviously meant was that the purpose of the hearing in an Industrial Court is to redress a wrong as far as monetary compensation can go, and to go no further."**

The learned judge Foxcroft J stated:

> **"Put differently, the purpose of the award is to <u>compensate</u> and not to punish the offender",** (emphasis added)

He continued:

> **"The Industrial Court is not a court of law but one of equity..."**

I agree with the conclusions by the learned judge and which conclusions are apposite to the instant case.

What the High Court did on the facts of the case on hand was to exercise its review jurisdiction and substituted its own award within the overall quantum of the award made by the Industrial Court which it was entitled to do.

See also ELLERINE HOLDINGS LTD v. DU RANDT (1992) 13 ILJ 13 611 (LAC).

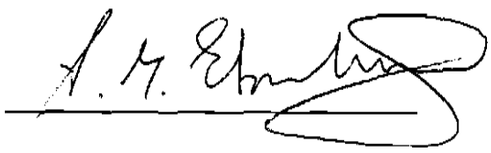
The approach of the learned judge *a quo* is also consistent with what was stated by the learned author John Grogan in his book DISMISSAL, DISCRIMINATION AND UNFAIR LABOUR PRACTICES published by Juta, 2nd edition where at page 588 he states:

> **"the compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances but not more than the equivalent of 24 months remuneration on the date of dismissal".**

Whilst the learned judge in the High Court disagreed with the labels attached to the various categories of the award made by the Industrial Court she agreed with the quantum of the award and adopted it. In my view she was entitled to do so.

Accordingly the appeal to this court must fail in its entirety.

The appeal is dismissed with costs.



A.M. EBRAHIM
Justice of Appeal

I agree

M.M. RAMOblBEDI Acting
Chief Justice

T.S. M ASUKU
ustice of Appeal

I agree

Delivered in open court on the 26th day of November 2009.