



CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

HELD AT MBABANE

DSPT NO. 1184/05

In the matter between:-

SHINEGIRL MOTSA

1st Applicant

LUNGILE MATSEBULA

2nd Applicant

And

**PRINCIPAL SECRETARY - MINISTRY OF
FOREIGN AFFAIRS AND TRADE**

1st Respondent

**PRINCIPAL SECRETARY - MINISTRY
OF PUBLIC SERVICE & INFORMATION
BUILDING CONSTRUCTION**

2nd Respondent

**THE SECRETARY - CIVIL SERVICE
BOARD**

3rd Respondent

THE ATTORNEY GENERAL

4th Respondent

Coram:

ARBITRATOR : Mrs. K. Manzini

FOR THE APPLICANT : Mr. P. Shilubane

FOR THE RESPONDENT : Mr. D.V. Dlamini

ARBITRATION AWARD

DATE OF ARBITRATION: 8th December 2004

VENUE: CMAC Offices, 1st Floor, Mbabane House

1. PARTIES AND HEARING:

The Applicant in this case is Ms Shinegirl Motsa and a Ms Lungile Matsebula. Both the Applicants use the postal address of P.O. Box 130 Mbabane. I will hereinafter to the Applicants as Ms Motsa, or Ms Matsebula, or as the 1st and 2nd Applicants, depending on the circumstances.

The Respondents in the matter are the Principal Secretary of the Ministry of Foreign Affairs and Trade, the Principal Secretary of the Ministry of Public Service & Information, the Secretary of the Civil Service Board, and the Attorney General. These shall be referred to collectively as the Respondents or the employer.

2. REPRESENTATION

Mr. P. Shilubane from P.M. Shilubane & Associates appeared on behalf of the Applicants, and Ms P. Magagula was also in attendance.

Mr. D.V. Dlamini from the Attorney General's Chambers appeared on behalf of the Respondents.

3. BACKGROUND INFORMATION

The dispute between the parties was reported by both of the Applicants to the Commissioner of Labour on the 18th of August 2005, through their respective Reports of Disputes as per Section 76 and 77 of the Industrial Relations Act, 2000 (as amended). The dispute was transmitted to the Commission (CMAC) on the 1st of September, 2005. Efforts were made to conciliate the dispute, and to help the parties reach an amicable settlement to their dispute, but these proved futile. As a result, a certificate of unresolved dispute was issued, being certificate no. 662/05. The Applicant, on the strength of the certificate then proceeded to file an application at the Industrial Court, claiming all salaries and benefits due to her from January 2004.

A Court Order was issued to the effect that this dispute should be referred back to the Commission for arbitration. The dispute was referred back to arbitration in terms of Section 85 (2) (a) of the Industrial Relations Act, 2000 (as amended), and I was accordingly appointed as arbitrator on the 27th of March, 2006. The arbitration process was slow and there were a number of postponements and a point - in - limine was raised by the Respondent. A ruling on this point in- limine was issued on the 2nd day of June, 2006.

4. SUMMARY OF EVIDENCE AND ARGUMENTS

It is not my intention to summarise all the evidence and arguments led at the hearing, and I have merely highlighted the key issues that relate to my award. A bundle of documents was submitted by the parties and admitted as part of the evidence.

The Applicant's representative called Ms Shinegirl Motsa, and Ms Lungile Matsebula to testify in support

of their case. The Respondent's witnesses were Mr. John Malinga, Ms Memory Mhlanga and Mr. Clifford Mamba.

THE TESTIMONY OF MS SHINEGIRL MOTSA

Ms Motsa testified that she is by profession, an economist, and was previously employed by the Swaziland Government, and based at the Ministry of Economic Planning. The witness stated that she was employed on a permanent and pensionable basis, was confirmed in the year 1987. She stated that early in the year 2003, she had been working in the position of consul, at the Swaziland Consulate in Johannesburg.

According to Ms Motsa, she had been duly appointed to the position of consul, in that in the year 2000 she had received a letter from Civil Service Board, which informed her of her appointment as consul (commercial) in Johannesburg, and subsequent to that the Principal Secretary at the time, of the Ministry of Foreign Affairs and Trade had then handed her a letter of appointment to the position. Ms Motsa stated that the Legal Advisor at the Ministry had prepared the relevant documentation in terms of Section 188 of the Vienna Convention, and sent these to their South African counterparts. According to Ms Motsa, she had then started working at the consul after a response of acceptance had been received from the South African President. The document signifying the South African President's acceptance of her appointment was admitted as part of the Applicant's evidence and labelled "Ex A". A copy of the diplomatic note issued by the South African Government to High Commissioner for the Kingdom of Swaziland, was also handed in by the 1st Applicant as part of her evidence and labelled "Ex C".

The 1st Applicant related how it came about that the 2nd Applicant had gone to work for her in Johannesburg. According to Ms Motsa, there had been a need for a housekeeper at her new official residence in Johannesburg, and Ms Matsebula had applied for the vacant post at the Ministry of Foreign Affairs and Trade. The 1st Applicant stated that Ms Matsebula had then been engaged by the Ministry as a housekeeper, on contract basis. The witness stated that the originals to the copies that she had submitted as part of her evidence, together with the original employment contract of the 2nd Applicant were in her personal file at the Ministry of Foreign Affairs and Trade.

The 1st Applicant stated that she had earned a gross salary of Eight Thousand Emalangeneni per month, and had been entitled to a number of benefits as provided by the Government General Orders, in particular Chapter E of same. She stated that these benefits included; medical aid, children's allowance, education allowance, a fully furnished house, including linen. The 1st Applicant stated that she had not received her salary as from November, 2003, and had also not been able to gain access to the house she had been allocated in Johannesburg, and as a result could not retrieve her personal effects which had been locked in the house by her employers. She stated that the employer had not even given her an opportunity to be heard on the issues before taking the decision to stop her salary, and further more this had happened without her being told that her salary would be stopped. Ms Motsa stated that even the Civil Service Board had not called her to appear before it, and to tell her of the decision to stop her salary.

The 1st Applicant testified that on the 23rd of December, 2003, her minor child and housekeeper were removed from the house she was occupying in Johannesburg. Ms Motsa stated that even though she was not there at the time, she had still been in lawful occupation of the residence. The 1st Applicant stated that a certain Mr. J.T. Malinga from the Johannesburg consulate had secretly arranged for her child to obtain an emergency travel document and had further arranged that this child be transported, together with the 2nd Applicant back to Swaziland. She stated that all this was done without her knowledge, and consent. The witness submitted a copy of the emergency travel document, and it was labelled "Ex E", whilst a letter written by the same Mr. Malinga to the Oshoek Border Post officials was also submitted and labelled "Ex F". According to Ms Motsa, Mr. Malinga's designation at the consulate was that of Labour officer, and yet he had signed the letter as acting consul, which appointment she had not been aware of.

Ms Motsa stated that on this day, her office keys were taken from her house, and handed over to the office, and a criminal case was opened against her by the Swaziland Government, charging her with fraud. Ms Motsa submitted the charge sheet as part of her evidence, and it was labelled "Ex G". The witness related that this case had gone to Court but the charges had eventually been withdrawn against her, as is indicated in the charge sheet. Ms Motsa also submitted a police clearance certificate, which indicated that the South African police confirmed that she had not been convicted of any crime. This certificate was labelled "Ex H".

The witness stated that she had tried to communicate with her employer through a letter dated the 12th of May, 2004 written by her lawyers,

P.L. Semuels Attorneys, the gist of which was to enquire from her employer regarding the following:-

- (a) Her employment status, that is, position as consul for the Kingdom of Swaziland to South Africa.
- (b) Her benefits accruing from her employment, including her salary,
- (c) Her official home at 32 Burn Street, Waverly.

Ms Motsa submitted a copy of this letter and it was labelled "Ex I". Ms Motsa stated that she got a response from the employer in the form of a letter dated the 2nd of March, 2004 from a Mr. Ndlangamandla, who was the secretary to the Civil Service Board. This letter, according to Ms Motsa informed her of her suspension and recall from foreign Services. This letter also had the effect of informing her that she would only be paid half of her salary during her period of suspension. Ms Motsa stated that the letter purported to be sent through the Principal Secretary of the Ministry of Foreign Affairs and Trade, but was not signed by him. This evidence by the 1st applicant was quite contradictory, as she stated that this letter purported to reply the letter sent by her attorneys which was dated 12th May, 2004, and yet it was written before this date, on the 2nd of March 2004. Furthermore she had earlier on said she had received this letter from the Secretary of the Civil Service Board, but later on turned around to say that she had never received the letter, and also did not receive the half pay referred to therein. The letter from the Civil Service Board was submitted by the 1st Applicant as part of her evidence, and labelled "Ex J". This letter had a handwritten note on it, stating that the letter was to be handed to the 1st Applicant's attorneys, but Ms Motsa stated that her attorney had not given this letter to her.

Ms Motsa testified that she was claiming all the monies as stated in her statement of claim, and that she had calculated these amounts together with her attorney. Ms Motsa stated that her salary used to be deposited straight to her account, whilst the allowances were paid to her in cash. The 1st Applicant stated that she did not have in her possession any receipts for the allowances, and that since November 2003, she had not had access to her official residence in Johannesburg, and that the Respondents have prevented her from gaining access to not only the house, but also to her personal belongings inside the house.

Under cross - examination was asked if she had been appointed as consul in the 2000, or simply nominated to the position, as Mr. Dlamini stated that he had been instructed that she was simply nominated. Ms Motsa stated that her letter of appointment was in her personal file at the Ministry of Foreign Affairs and Trade and that she did not see the difference between a nomination and an appointment, because at the end of the day, she had been duly accepted by the South African Government, and started working after this acceptance. The witness was also asked when she was locked out of her house in Johannesburg? The witness stated that this had occurred on the 23rd of December, 2003 when her child and housekeeper were removed from the house without her consent. Ms Motsa stated that her housekeeper had been told by the officers from the Consulate that they would be returned to Johannesburg at a later date, but this had not occurred. Ms Motsa stated that the effect of removing her child and housekeeper, was that by extension, she too was being removed.

Mr. Dlamini asked the witness how she could say she was being removed if she was not there? The witness stated that her child was taken out of the house, and returned to Swaziland, and the house keys were taken from her housekeeper, and when she had been released on bail from the South African Prison, she had requested to be allowed to have her keys back, but such request was turned down, such that she had to find alternative accommodation.

Ms Motsa was asked where exactly she had been on the day the child and 2nd Applicant were removed from the house? The witness stated that she had been out of the country, but had the intention of returning to Johannesburg. The witness was asked why she had not, in her evidence - in - chief revealed that she had been out of the country? Ms Motsa simply stated that she had been the lawful occupant of the house, and did not answer the question.

Ms Motsa was asked to disclose where exactly she had been when the child and housekeeper were taken from the house? Ms Motsa stated that she had actually been in the United States of America, preparing for her children to go to school there.

Ms Motsa was asked if she was granted official leave by her employer at this time? Ms Motsa stated that she had been on leave. The witness was asked to produce evidence to the effect that she was on official leave, but she stated that she did not have such evidence.

Ms Motsa was asked about the allegations she made regarding the document that was prepared by Mr. Malinga in order to have her child removed to Swaziland, and whether she had been there to receive it? The witness stated that the document had

been received by her housekeeper, as she had been away in the United States at the time.

Mr. Dlamini put it to the witness that his instructions were that the documents had been prepared at the behest of the 2nd Applicant, who had appealed to the consulate to assist her and the child to return to Swaziland as the 1st Applicant had abandoned them. Mr. Dlamini further put it to her that evidence would be led to this effect. The witness stated that she was not aware of this, and as far as she was concerned, the child had not been abandoned as her husband, the child's father had been around.

Mr. Dlamini asked the witness if the 2nd Applicant had been in possession of her contact details in the United States of America? The 1st Applicant stated that she had not given these to the housekeeper. Mr. Dlamini further asked the 1st Applicant when her salary was stopped? Ms Motsa stated that her salary had been stopped in December, 2003, and without her being given a hearing on the matter. Mr. Dlamini asked the witness what she had done about the issue when her salary was stopped? Ms Motsa stated that when she had been released on bail, her attorneys in South Africa had written to her employer, and the response had been that she had been suspended on half pay, but she did not receive this half pay. Mr. Dlamini asked the witness if this had really been in the year 2003? Ms Motsa stated that it was in 2004, around March, as the attorney had been responding to a letter from the Attorney General's office (Swaziland). Ms Motsa submitted a copy of this letter which was dated 23rd of June 2004 (and not March as she had stated), and it was marked "Ex H". Ms Motsa also stated that she herself had written to the Civil Service Board, but had not gotten a response, to this end she submitted a

handwritten letter dated the 14th of September, 2005, and it was labelled "Ex K".

Mr. Dlamini put it to the witness that he had been instructed that her salary had only been stopped in January, 2004 and not in December, 2003 as she had earlier stated. Ms Motsa stated that she could not be certain of the dates, and only her bank would have more accurate records, but as far as she was concerned, the salary had been stopped in December, 2003.

Mr. Dlamini put it to the witness that he had been instructed that she had been recalled by the Ministry of Foreign Affairs, from the 7th day of December, 2003 through a letter written to her. Ms Motsa admitted getting a letter from the Acting Principal Secretary of this ministry, but stated that in terms of the Government General Orders, she had been entitled to at least three months, within which to pack her things and arrange her affairs.

Mr. Dlamini further stated that he had been instructed that she had not heeded this recall by the Ministry. Ms Motsa stated that she had in fact heeded the recall, but had been told by her lawyer to return to South Africa, and deal with the police there regarding the fraud charge against her. Mr. Dlamini asked the witness if she acknowledged that she had been recalled? The witness stated that as far as she was concerned, the proper channels of recalling her had not been followed, as she ought to have been recalled by the King of Swaziland, in his capacity as head of state. Ms Motsa stated that this was in keeping with the provisions of the Vienna Convention, which was not followed in the way she was purportedly recalled. Ms Motsa further stated that this was the reason why the High Commissioner of Swaziland to South Africa, had in September, 2004

written a waiver of immunities and privileges in terms of Section 8, of the Diplomatic Immunities and Privileges Act, No. 37 of 2001. This according to the witness, was to allow the South African Government to prosecute her for the alleged fraud she had committed. Ms Motsa stated that she had been referred to as consul in that waiver, and as far as she was concerned she had never been actually withdrawn from her position as consul to this date. Ms Motsa said she was still the consul of Swaziland to South Africa, but had not been able to perform her official duties because she had been locked out of her home and had no access to the office.

Ms Motsa was asked about the official document she had spoken of (namely; the Exequatur) and what its purpose was? Ms Motsa stated that she ought to have been recalled through such a document. Mr. Dlamini put it to the witness that the Exequatur was not meant for her, but for the receiving country, and that it was therefore, not strange for her not to have received it. Mr. Dlamini stated that he had been instructed that the Ministry responsible for Foreign service, merely writes to the officer being recalled. Ms Motsa stated that this might be the case, but Swaziland ought to follow the provisions of the Vienna Convention, the South African Constitution, and the Swazi Constitution, regarding how heads of mission are to be withdrawn.

Mr. Dlamini further put it to the witness that he had been instructed that Ms Motsa, had in not heeding the recall, effectively absconded from her duties. Mr. Dlamini stated that because she had absconded, her salary had been stopped. The witness replied that she had not been aware that she had absconded, but had only received a letter from her employer telling her about being suspended with half pay.

Mr. Dlamini put it to the witness that evidence would be led by the Respondents that she had absconded from duties, and that her whereabouts were unknown to her employers. Ms Motsa stated that since the 16th of November 2003, she had been in contact with her employers through her attorneys, and had even tried to set up a meeting with the Acting Principal Secretary at the Ministry of Foreign Affairs in February, 2004, but she had been told by her lawyer that she return to South Africa to deal with the pending fraud case against her. Ms Motsa stated that in all that time, her employers knew how to reach her.

Ms Motsa was asked if she had documentary evidence to sustain the claim that she earned a sum of E8, 000.00 per month, plus allowance? Ms Motsa stated that she did not have this evidence, but that it could easily be found in her personal file at the Ministry of Foreign Affairs. The witness stated that the only documents she had pertaining to this were to be found in her office in Johannesburg, but she had been locked out of same.

Ms Motsa was asked why she had earlier referred to Mr. Malinga who had written the letter labelled "Ex F" as a Labour Officer?

Ms Motsa stated that she had been the consul, and knew the designations of her subordinates, and that was the designation he had held. Mr. Dlamini put it to the witness that he had been instructed that Mr. Malinga had actually been the Vice - Consular, responsible for labour matters. Ms Motsa stated that that was the diplomatic term, and she had used the simpler term for the same position. She stated that she was not disputing Mr. Malinga's position, but this was another inconsistency on her part, as she had earlier stated that she had not been aware of an

instrument appointing Mr. Malinga to the position of Acting - Consul.

Ms Motsa was asked who exactly had applied for the post of housekeeper because she had earlier stated that the 2nd Applicant had applied for the position? Ms Motsa stated that what she had meant to say was that she herself had applied for an additional post at the consulate through the Ministry of Foreign Affairs and Trade, and that when the post was granted, she had been able to suggest the 2nd Applicant, for whom a contract of employment had been drawn up by the employer.

Ms Motsa was asked if indeed her allowances had been paid to her in cash. Ms Motsa clarified that these had been paid by cheque which could be cashed. She stated that not all the allowances were paid to her, in that she only received the Foreign Service Allowance and children's allowance, and the education allowance was paid straight to the school that the children attended.

Mr. Dlamini stated that in summary, his instructions were that the 1st Applicant had absconded from the service of the Swaziland Government, and that she had subsequently been suspended from employment, and remained suspended as her whereabouts were not known to the employer, as she did not report to the Ministry of Foreign Affairs after the recall. Mr. Dlamini further put it to the witness, that as a result of the foregoing, she was not entitled to the amounts she has claimed in her particulars of claim. Ms Motsa stated that she was not aware that the employer regarded her as having absconded from work, and that the only communication to her from the employer was a letter dated the 2nd of March, 2004 which suspended her from work, and referred to Section 36 of the

Employment Act, 1980. Mr. Dlamini clarified to the witness that the import of that provision was that she had absconded from work.

Mr. Dlamini further put it to the witness that to date there was no document which officially granted the 1st Applicant leave to be away from her duty station, and yet the last time she had been to the office in Johannesburg was the 14th of December, 2003. Mr. Dlamini further stated that Ms Motsa had left her duty station without lawful permission, and traveled to the United States of America, and had not told anyone at her office where she could be found, and worse still she had not even told her own housekeeper who was in charge of looking after her minor children how she could be contacted. Mr. Dlamini further put it to the witness that he had been instructed that there had been no need for the Swaziland Government to send her the exequatur when she was recalled as this was sent to the receiving state, but it had been sufficient for her employer to simply write to her and inform her of her recall. Ms Motsa maintained that she ought to have been recalled in terms of the Vienna Convention, South African Constitution, and the Swazi Constitution.

When the witness was re - examined, she explained that she had tried to communicate with her employer through the letters dated 23rd June, 2004 from her South African attorneys ("Ex H"), and 14th September, 2005 (written by herself and marked "Ex K"), wherein she was enquiring about her work status. Ms Motsa stated that she had not gotten responses to any of these letters. The witness further stated that she had never been summoned by her employer to answer to a charge of desertion of her duties. The witness was asked if she had instructed the 2nd Applicant to request the Ministry of Foreign

Affairs and Trade, to apply for a temporary travel document for her child? Ms Motsa stated that she had not done this. Ms Motsa stated that she also did not accept the procedures followed by her employer in her “so-called recall” from Johannesburg.

THE TESTIMONY OF MS LUNGILE MATSEBULA

Ms Matsebula testified that she is the 2nd Applicant in this matter and had worked for the 1st Applicant as a housekeeper. Ms Matsebula stated that she had started working for the Swaziland Government in the year 2001, and had received a letter of termination from employment on the 13th of May, 2006. The 2nd Applicant stated that she did not however have the letter, and believed that Ms Motsa might have it. Ms Matsebula stated that she was employed by the Swaziland Government to act as housekeeper for the 1st Applicant. According to the 2nd Applicant, she had last received a salary from the Swaziland Government in January, 2004. She stated that she did not know why the employer stopped her salary, as she did not receive any communication to this effect, and that it had never been explained to her why she had stopped receiving a salary.

Ms Matsebula testified that she recalled the incident where Mr. Malinga had applied for a travel document for the 1st Applicant’s child. Ms Matsebula was asked if she had requested Mr. Malinga to do this? The witness denied that she had ever asked Mr. Malinga to do this. Ms Matsebula stated that at the time all of this happened, she and the child were taken from the house in Johannesburg, the 1st Applicant’s husband had been around Johannesburg, and had lived in the house that they lived in.

Ms Matsebula stated that she is claiming unpaid salary and benefits from the Swaziland Government,

dating back from January 2004. The witness stated that she had been entitled to an allowance as housekeeper, and to medical aid. The 2nd Applicant also stated that she was also claiming compensation for her unfair dismissal.

Under cross - examination Ms Matsebula was asked how long she had been employed by the Swaziland Swaziland Government, according to her contract? She stated that the duration was to be determined by the contract, and she believed that she had been engaged for five years. Mr. Dlamini asked the witness if her contract really stated that she was to be employed for five years? Ms Matsebula stated that this was so, and that even her passport had been endorsed with this information. Ms Matsebula was asked if she was not confusing the duration of her employment, with the period of the validity of the travel document? Ms Matsebula stated that that was infact what she meant, and had been referring to the period of validity of her passport.

Ms Matsebula was asked about the letter she had alluded to, which had terminated her employment on the 13th of May, 2006. The witness clarified that she had misunderstood the question, and had meant that she had stopped working for the 1st Applicant on this date. Mr. Dlamini asked the witness where she had been working since January 2004? The witness stated that she had been working for the 1st Applicant, and looking after her children at Siteki. Mr. Dlamini asked the witness if the Swaziland Government had employed her to be housekeeper to the 1st Applicant in Swaziland, or in South Africa? Ms Matsebula stated that as far as she is concerned she was entitled to payment regardless of whether she was in or out of the country, as she rendered the service both in Swaziland and in South Africa.

Mr. Dlamini questioned the witness about the said letter of termination that she had earlier testified to have received on the 13th of May, 2006. Ms Matsebula clarified that she had misunderstood the earlier question, and had actually never received a letter of termination of services from the Swaziland Government; she stated that she had never actually been informed by the employer that she was being dismissed. According to Ms Matsebula she had merely been returned to her house by the officials at the Johannesburg consulate, but had been told that she was going there on leave, and would be later on collected and returned to South Africa. The witness testified that no one had ever returned to collect her since the day she was dropped off at her home.

The 2nd Applicant was asked where exactly she hailed from? Ms Matsebula stated that she was from a place called Mshayankhomo, within the Mbekelweni area. Mr. Dlamini asked the witness if she had ever requested Mr. Malinga's assistance regarding arrangements to transport the 1st Applicant's child to Swaziland. The 2nd applicant denied ever asking the said Mr. Malinga to prepare a travel document for the child. Mr. Dlamini asked the witness if she stood by this response? The 2nd Applicant maintained that she had never asked Mr. Malinga to assist her to take the child back to Swaziland.

Mr. Dlamini then referred the witness to a copy of a handwritten letter dated the 19th of December, 2003 and asked the 2nd Applicant to read the contents aloud, which thing she did. Mr. Dlamini asked the witness if she was aware of the letter? Ms Matsebula stated that she was indeed the author of the letter, and was very much aware of it. Mr. Dlamini asked if it was not true that the letter was written to the High Commissioner, requesting that she be allowed to go to Swaziland, together with the 1st Applicant's

daughter, and to be afforded assistance by the office in achieving this end. The 2nd Applicant stated that she had never asked the office to return her to Swaziland for good, but only temporarily, over the Christmas holidays, so that she could be with her children. Mr. Dlamini stated that he was not interested in knowing whether the request for her to be returned permanently to Swaziland, or not, but what he had wanted from the witness was the truth regarding her request for assistance from the office of the High Commissioner, which resulted in Mr. Malinga's intervention.

Mr. Dlamini proceeded to ask the witness where the 1st Applicant's husband had been when she actually made this request to the High Commissioner? Ms Matsebula stated that he had been around, but had taken the older children out for a visit, and she had taken that opportunity to write the letter. Mr. Dlamini asked the witness if she had taken official leave in December , 2003 when she went to see her children? Ms Matsebula stated that she did not have official documents granting the leave, but had been told by the High Commissioner that she could go to Swaziland. Ms Matsebula stated that she did not fill in any official leave application forms, but had simply written the letter. Mr. Dlamini asked the witness, where precisely the 1st Applicant had been at this time? The 2nd Applicant simply stated that she had not been at home at the time. Mr. Dlamini asked how long the 1st Applicant had been away? Ms Matsebula stated that it had not been for a long time. Mr. Dlamini then asked what then had prompted her to write to the High Commissioner, if the 1st Applicant had not been away long?

The witness simply replied that she had wished to spend the Christmas holidays with her children, and had not been especially bothered by the 1st

Applicant's absence because her husband had been around. This story was especially odd, as it was then difficult to understand why she had not asked for the 1st Applicant's husband for assistance, and had gone over his head, as the father of the child to ask for the High Commissioner's help.

Mr. Dlamini asked the witness if it was not an unduly long a period, because his instructions were that the 1st Applicant had disappeared on the 14th of November, 2003, and she had written to the High Commissioner on the 19th of December, 2003, which meant that the 1st Applicant had been away for over a month? Ms Matsebula stated that this was merely a coincidence, but she had only written the letter so that she could go home for the holidays, and no other reason. Mr. Dlamini asked the 2nd Applicant if she had told the 1st Applicant's husband that she had written to the High Commissioner, requesting assistance? The 2nd Applicant testified that she had not told the child's father this information. Mr. Dlamini then asked the witness if it was normal to take a man's child away from the home, and out of the country, without telling him anything about this? Ms Matsebula admitted that this was indeed not normal, but she had thought that the child was too young to leave in his care. This whole story by the 2nd Applicant was highly improbable, and very difficult to believe, as she was only the child's minder, and she had no business deciding whether or not a child should be left in the care of its natural father.

Mr. Dlamini put it to the witness that his instructions were that the child's father had not been in South Africa at the time she and the child were taken to Swaziland. Ms Matsebula refuted this, and insisted that he had been around, and that Mr. Malinga and the South African Police had even come to the house to speak to him before she had left for Swaziland. Mr.

Dlamini stated that he had been instructed that the 1st Applicant's husband had left with the older children. Ms Matsebula stated that he had indeed left with the other children, but in her knowledge they had been around Johannesburg, and were out on a visit.

Mr. Dlamini asked the witness what allowances she was claiming had been due to her, and how much in terms of wages was being claimed by her? Ms Matsebula stated that she had last received a salary in January, 2004, and wished to be paid her monthly salary from January 2004, up until the Swaziland Government officially terminated her employment, as she had to date not received a communication from her employer dismissing her from employment. The Respondent's representative then asked the witness why then she had told the Commissioner that she had been told by the Swaziland Government that she was no longer employed in May 2006? Ms Matsebula stated that she had been confused at the time and mixed up the issue of being employed by the 1st Applicant, and that of being in the employ of the Respondents.

Ms Matsebula stated that she still expected wages, as the Swaziland Government had not formally dismissed her, and she was still performing the duties she had been hired to do, albeit at Siteki, and not abroad. Pertaining to the allowances, Ms Matsebula stated that she had been paid housekeepers allowance every month, and also medical aid. Ms Matsebula testified that the housekeeper's allowance was due to her by virtue of being in foreign service. Ms Matsebula was asked what her contract of employment provided regarding the allowance, and whether it was still due to her if she was no longer in foreign service, and was back in Swaziland? The witness stated that indeed it was

true that the allowances was to be paid to her whilst she was a housekeeper abroad, but still wanted to be paid this allowance because she still performed the work she had been hired to do as a per the contract with the Swaziland Government, regardless of her geographical location. Ms Matsebula was asked how she could claim this allowance if she was now based at Siteki? Ms Matsebula simply stated that as far as she was concerned she was still under contract with the employer.

Mr. Dlamini put it to the witness that his instructions were that she was no longer entitled to the allowance as she was no longer performing her duties in a foreign country, and asked the 2nd Applicant for a response to that. The witness stated that she had no response to this, but still expected the allowance, as she had never received any instrument from the Swaziland Government terminating her services.

Ms Matsebula was asked on what premise she based her claim for medical aid? The 2nd Applicant simply stated that this was what she had been promised under the contract of employment, and she stated that she had actually received such payments before her salary was stopped. Mr. Dlamini stated that his instructions were that she was not entitled to the payment of medical aid. The 2nd Applicant simply stated that she believed that according to the General Orders, she was entitled to the payments.

Under re - examination, the witness explained that when she had written to the High Commissioner to assist her to return to Swaziland, this assistance had actually been rendered and she and the 1st Applicant's child had been driven to Swaziland by a car from the High Commission's offices. She stated that therefore there had been no question that he employers knew where she was, and had their

permission to be away from her work station. The witness stated that she had been told by Mr. Malinga that he would send someone to collect them to return them to Johannesburg, but this did not take place.

Ms Matsebula stated that her contract of employment did not say that she would only be paid the allowances when she was abroad only, and that it did however provide that she was entitled to be given one calendar months notice upon termination of the contract. The 2nd Applicant stated that the Swaziland Government had never given her such notice, but had proceeded to stop her salary; regardless. It was also Ms Matsebula's testimony that according to her contract, the General Orders governing civil servants also applied to her. Ms Matsebula stated that this is contained in paragraph "E" of her contract. She stated that when the employer stopped paying her, she had been a member of a medical scheme, the name of which she was not sure, but thought that was called "Discovery". Ms Matsebula stated that the employer had paid her contributions to this medical aid scheme. Ms Matsebula reiterated that no one had ever told her that these allowances were only due to her if she was working abroad.

THE TESTIMONY OF MR. JOHN T. MALINGA

The witness testified under oath that he is currently employed by the Swaziland Government, and based at the Department of Labour. Mr. Malinga stated that he used to work at the Swaziland Consulate in Johannesburg, but had returned to start work at the Labour Department in January, 2006. Mr. Malinga stated that he was Vice Consular at the Johannesburg office, and had worked there for about then years.

Mr. Malinga stated that he could testify that he had worked with the 1st Applicant at the consulate up until the 14th of November, which was the last time she had reported for work. Mr. Malinga stated that on Monday, the 17th of November, 2003, he had received a telephone call from the 2nd Applicant, who reported that Ms Motsa was too unwell to come to work on that day. According to Mr. Malinga, when the duration of Ms Motsa's absence become extended, he then reported this to the High Commissioner. After a while, the High Commissioner had instructed that this unexplained absence should be reported to the South African police. According to the witness he had accompanied the police to Ms Motsa's residence, and they had also been in the company of one Mr. Mkhonta, who was based in Pretoria. Mr. Malinga testified that when the police asked Mr. Webb, who is the 1st Applicant's husband, where she was, they were told by him that Ms Motsa had fallen ill, and he had taken her to a clinic, but adamantly refused to disclose which clinic this was. According to the witness, Mr. Webb, had said that it had been agreed between the 1st Applicant and himself that he should not tell anyone which clinic she was hospitalized in. Mr. Malinga stated that the police had then taken Mr. Webb to the police station, and as he had not been allowed into the interrogation room, he therefore, did not know what took place thereafter. Mr. Malinga said that he had asked Ms Matsebula if she had received any communication from the 1st Applicant, and was told that Ms Motsa had telephoned the house once, but she herself had not spoken to her. According to Mr. Malinga, the 2nd Applicant had told him that Ms Motsa had called and spoken to her husband and the children. Mr. Malinga stated that the 2nd Applicant had told him that she had not been told where the 1st Applicant was, and was therefore in total ignorance regarding her whereabouts.

Mr. Malinga stated that in December 2003, Ms Motsa's whereabouts were still a mystery, and on the 19th of the same month, he had received a letter from the 2nd Applicant requesting that she be allowed to go home to her children over the festive season. The witness stated that he had then reported this to the High Commissioner, who then instructed him to make arrangements to transport the 2nd Applicant and the 1st Applicant's daughter. Mr. Malinga stated that he had asked the 2nd Applicant where the older children were; and she had told him that they had been taken to Durban by their father.

Mr. Malinga was asked how long the 1st Applicant was away? The witness responded by saying that despite the fact that there were no official papers to the effect that she would be away, the 1st Applicant had last been to the office on the 14th of November, 2003 and had never been back to the office after this date.

Mr. Malinga testified that he persisted in enquiring from the 2nd Applicant about the Ms Motsa's whereabouts, but she had stated that she was not aware of where 1st Applicant was, but that she did know that on the 17th of November, 2003 she had been instructed to report to the office that she was too ill to come to work.

Mr. Malinga testified that it had been his responsibility as a senior officer representing the Kingdom of Swaziland, in South Africa , to ascertain the whereabouts of Ms Motsa, not only because she was head of the office, but because he needed to know if her illness had taken a turn for the worse. Mr. Malinga stated that he had kept on reporting Ms Motsa's continued absence to the High Commissioner, who was at the time, a Mr. Mpumelelo Hlophe. The witness stated that Mr. Hlophe had

informed him that he would report further to his own superiors.

The witness testified that when the 2nd Applicant had appealed for the offices assistance through her letter of the 9th of December, 2003, he had then prepared a documents for the child to get a temporary emergency travel document, and transported them to Swaziland. Mr. Malinga stated that he was further called upon to assist the 2nd Applicant when she had problems at the Oshoek Border Post, as she was apparently in South Africa illegally, because her travel document did not bear an endorsement to the effect that she was working for the consul in South Africa. Mr. Malinga was asked if the 2nd Applicant had informed him how long she intended to remain in Swaziland? Mr. Malinga stated that Ms Matsebula had not told him when she intended to return to South Africa.

Mr. Malinga was asked what means he had made to ascertain Ms Motsa's whereabouts? Mr. Malinga stated that he could only keep asking around to find out where she might be, but this was to no avail, and it was not until the Court case where Ms Motsa then appeared in Court facing the charge of fraud. Mr. Malinga stated apart from the time in Court, she had not been to the office, even though she was in South Africa. Mr. Malinga stated that this was probably around January or February, 2004, and Ms Motsa had not returned to the office even after the Court Case, and he had been working at this office up until December 2005 when he was recalled by his employers to return to Swaziland.

Mr. Malinga stated that consequent to Ms Motsa's absence from work the High Commissioner had then asked him to act in her position, and he had acted in this position from the time she disappeared, up until

the time he was recalled. He stated that in his place, the Swaziland Government, had appointed another labour officer, but he was not aware if this new vice consular had been appointed to act as consul by the current High Commissioner, or not. Mr. Malinga stated that when he was required to act as consul, no formal instrument had been drawn up to make his appointment official, but he had merely been asked to help out by the High Commissioner, and this was done verbally.

Mr. Malinga was asked if at the time he was recalled, he had known of the 1st Applicant's whereabouts? The witness testified that he had been aware that she has returned to Swaziland, after seeing her in Johannesburg around January or February, 2004 at the Johannesburg Magistrate Court.

Mr. Malinga stated that even though the 2nd Applicant had first reported that Ms Motsa had been ill on the 17th of November, 2004, no documents had been brought by anyone to the office to support this allegation. The witness stated that these medical documents would have been directed to the High Commissioner, and as he was in close contact with Mr. Hlophe at the time, he would have been made aware if such documents had been brought to the High Commissioner's office.

Under cross - examination, Mr. Malinga was asked which law provided that he could act in the consular's position without any formal appointment? Mr. Malinga stated that he had been informally asked to lend a hand in a dire situation, and had complied to his boss's request. Mr. Malinga was asked if he had told Mr. Dlamini about this alleged report of illness by the 2nd Applicant? Mr. Malinga stated that he had only gotten an opportunity to speak to Mr. Dlamini about the matter that very morning. Mr.

Shilubane put it to him that this story about illness was a recent invention by the witness, that is why the issue had never been put to either Ms Motsa, nor Ms Matsebula. Mr. Malinga maintained that this was not a new invention, and had only raised it now, because he had not had the opportunity to testify until now.

Mr. Malinga was asked how he had assisted Ms Matsebula? The witness stated that he had provided her with transport and had arranged that the 1st Applicant's daughter be issued with a temporary passport. Mr. Malinga stated that he had been called upon to further assist the 2nd Applicant when she encountered problems at the Oshoek Border Post, because she did not have a current endorsement in her passport which effectively stated that she could be in South Africa legally whilst working for the consul. Mr. Shilubane took the witness to task about the endorsement which was in the 2nd Applicant's passport, but the witness stood his ground and maintained that the endorsement in her passport at that specific time had not been valid for that year, and if it had been, then Ms Matsebula would not have been given problems by the border officials.

Mr. Malinga was asked if he had gotten the consent of the parents of the child in question, before he had proceeded to secure documents to enable her to cross the border to Swaziland? Mr. Malinga stated that at that point in time, he had not been able to reach either of the child's parents as Ms Motsa had been missing for some time, and Mr. Webb had not been home. Mr. Malinga was asked if he had tried to locate Mr. Webb? Mr. Malinga stated that when he asked Ms Matsebula where Mr. Webb was, she had told him that he had taken the other children to Durban. Mr. Shilubane asked the witness if he had tried to get Mr. Webb's contact number from Ms

Matsebula? Mr. Malinga stated that he had not seen the need to do that, and had written in the letter that Ms Matsebula was the child's guardian. Mr. Shilubane asked the witness what he understood by the term "Guardian"? Mr. Malinga stated that he understood that Ms Matsebula was the child's guardian as she was responsible for looking after the child. Mr. Shilubane put it to the witness that there is a major difference between a guardian, and one who merely looks after a child. Mr. Malinga stated that he had not appreciated the difference.

Mr. Malinga was asked if it is true that the 1st Applicant had been prevented from returning to work, and also to her house? Mr. Malinga testified that the house had been locked by the security personnel who were responsible for looking after the house for safety reasons and this had been under the instructions of the High Commissioner. Mr. Shilubane put it to the witness that the 1st Applicant could not have returned to work as she had been locked out of the house. Mr. Malinga stated that the 1st Applicant's workstation was not inside the house, but at the office, and she had made no efforts to return there. Ms Motsa was not there. Mr. Malinga stated that the last time he had seen Ms Motsa was at the Magistrate's Court in Johannesburg in the year 2004, but had also seen her for the first time after that, at the CMAC offices.

Mr. Malinga was asked if during the time he was trying to locate the 1st Applicant she had been in Swaziland trying to get an audience with the Principal Secretary of the Ministry of Foreign Affairs and Trade. Mr. Malinga stated that he was not aware of this, and he had never called the Ministry to find out if she was there.

Mr. Malinga was asked what he knew about the Swazi Labour Laws, and what these required of an employer whose employee went missing? Mr. Malinga stated that he was not an expert in the field, but as far as he was concerned, the employer did not have to do anything as it was the employee who had gone missing. Mr. Shilubane put it to the witness that what he had said was not in accordance with the law. Mr. Malinga was then asked if he was aware if Ms Motsa was suspended or dismissed from work? The witness stated that he did not know anything about that.

Mr. Shilubane put it to the witness that Ms Motsa's employment was never terminated. Mr. Malinga stated that he was not privy to such information, as he was not the 1st Applicant employer.

Mr. Malinga was asked what was significant about the dates of the 14th and 17th of November, 2003. Mr. Malinga replied that the 14th of November had been the last time that the 1st Applicant had reported to work, and on the 17th of November, he had received a telephone call from the 2nd Applicant, about Ms Motsa's illness and inability to go to work.

Mr. Shilubane asked the witness why he had not instructed the Respondents' attorney about the alleged events of the 17th of November, 2003? Mr. Malinga stated that he had told Mr. Dlamini, and did not know why he had not raised the issue with the Applicants.

Under cross - examination, Mr. Malinga was asked to look at an endorsement in the 2nd Applicant's passport. Mr. Malinga identified the endorsement as a stamp which was issued by the South African Foreign Affairs Ministry, allowing the 2nd Applicant to remain in that country for a particular period of time.

According to the witness, it was not a work permit, and had to be renewed after twelve months. Mr. Malinga was asked to explain about the problem that were encountered by the 2nd Applicant at the border post. According to the witness, the South African border officials had said that Ms Matsebula had been in South Africa illegally as she did not have a valid stamp allowing her to stay in that country for that period, and had initially refused to allow the 2nd Applicant to cross the border into Swaziland. Mr. Malinga stated that he had to intervene and negotiate with the officials, who eventually allowed her through the border.

Mr. Malinga was asked about the issue of his getting consent from the child's parents before arranging that she be transported to Swaziland. Mr. Malinga stated that he had not been able to get their consent, because neither of the child's parents were anywhere to be found.

THE TESTIMONY OF MS MEMORY MHLANGA

The witness testified under oath that she is presently working as an accountant, at the Ministry of Health and Social Welfare, and had been in this position from January, 2005, to date. According to the witness, she had previously been stationed at the Swazi consulate in Johannesburg, and worked there for approximately ten years, from September, 1994, up to December, 2004. Ms Mhlanga stated that her position at the consulate was that of a third secretary (which is the secondment language used).

Ms Mhlanga stated that Ms Motsa had joined them at the consulate in March 2005 and she had worked with them up until the 14th of November , 2003 as this was the last day she had been seen at the office.

Ms Mhlanga testified that her own duties entailed managing the finances of the office, and ensuring that the money that was sent from the Swaziland Government to the office was used properly. She stated that she was in short, responsible for the offices' income and expenditure, and paying rentals that were due, paying for security, and other utility bills. She testified that she also paid all the salaries and allowances of the staff, including children's allowances and school fees of the children whose parents worked at the office.

The witness stated that allowances were paid in such a way that a cheque was issued which the payee could cash, and school fees were paid after she had received the prospectus from the schools in questions. She stated that the foreign service allowance was paid to the officer personally, and the children's allowances was included in the officer's salary. She stated that all other expenses such as school fees (education allowance) utility bills were paid to the service providers.

Ms Mhlanga testified that even the allowance regarding medical aid cover was paid directly to the service provider, which was the Discovery Medical Aid scheme. Ms Mhlanga stated that the allowances she had enumerated were the only ones that she recalled. Ms Mhlanga was asked about the housekeeper's allowance, and she stated that this was an allowance paid to a housekeeper so long as she was still in the employ of the officer who was in foreign service. Ms Mhlanga stated that she recalled that she had paid this kind of allowance to Ms Matsebula, and had also paid for her medical aid cover, but this had been paid directly to the Discovery Medical Aid Scheme, and not to the 2nd Applicant.

Ms Malinga stated that after the 14th of November, 2003 when the 1st Applicant disappeared from work, she had not continued to pay the 1st Applicant these allowances as she was not at work, and disappeared even from her house. Mr. Dlamini asked the witness if she had had authority to stop these payments? Ms Mhlanga stated that these were allowances which were only due to a worker who turned up for work, and the home office could have instructed her differently if she had been in the wrong.

Ms Mhlanga stated that she had last seen Ms Motsa at the office on the 14th of November, 2003, and then only seen her again at the Johannesburg Magistrates' Court on the 8th of June, 2004. Ms Mhlanga stated that since June, 2004, she had not seen the 1st Applicant until she encountered her at the CMAC Offices.

Ms Mhlanga stated that she had only been responsible for the payment of allowances, as the home office dealt with salaries, and only sent the advice slips to the Johannesburg office.

Under cross - examination, the witness was asked why the 2nd Applicant's salary had been stopped since she had not disappeared, and had been assisted to go to Swaziland by the employer? The witness agreed that Ms Matsebula had not disappeared, but stated that she could not be paid because she was no longer working at Ms Motsa's residence in Johannesburg. Mr. Shilubane asked the witness on what authority she had stopped making these payments? Ms Mhlanga stated that she was aware of the existence of an instrument directing that the payments be stopped, but had never seen it herself.

Mr. Shilubane put it to the witness that on the 14th of November, she had herself had not been in the office, as his instructions were that, she has been on leave. Ms Mhlanga stated that she could not recall the exact date when she went on leave, but did not deny that she had gone on leave.

Mr. Shilubane asked the witness on what strength she had made the payments to the Applicants in the first place? Ms Mhlanga stated that her authority was chapter E of the General Orders. Mr. Shilubane asked the witness what the General Orders provided with regards to a worker who went away, and the employer did not know where they had gone? Ms Mhlanga stated that the General Orders provides that absence means no pay, and this had been applied in the case of the Applicants. Mr. Shilubane referred to Chapter E of the General Orders and asked the witness where the provision was regarding the payments that ought to be made to the Applicants? Ms Mhlanga stated that there was a letter of secondment which had stated that they should be paid in accordance with Chapter E of the General Orders. The witness was asked if there was an instrument which countermanded that letter? Ms Mhlanga stated that such a letter would probably be in the 1st Applicant's personal file, and it instructed that an absent worker ought not to be paid.

Ms Mhlanga was asked if she knew of the existence of a provision in the General Orders pertaining to disciplinary procedures for Civil Servants? Ms Mhlanga stated that this provision existed in the General Orders. Mr. Shilubane put it to the witness, that these disciplinary procedures were not implemented in the case of the Applicants and yet they were applicable to them. Ms Mhlanga stated that she was not in a position to know if this had been done or not.

The witness was asked to look at the letter written by the Civil Service Board to the 1st Applicant, and dated 2nd March, 2004. Ms Mhlanga perused the said letter, and noted that it stated that the 1st Applicant ought to be paid half her salary, but she could not comment on that issue as she had only been responsible for the payment of allowances, and then only if the person was at work. Ms Mhlanga stated that the best people who could answer questions on whether, 1st Applicant had or had not received the half salary were at the Ministry of Foreign Affairs and Trade. Ms Mhlanga could only testify that after the 14th of November, the 1st Applicant's pay slips did not get to the office, and did not know if the 1st Applicant had been suspended, or dismissed from employment. Ms Mhlanga was asked why the 2nd Applicant was penalized and yet she had done no wrong? Ms Mhlanga stated that she could not respond to the question as she was not the 2nd Applicant's employer.

Ms Mhlanga was asked if she had ever seen an instrument which appointed Ms Motsa as consul? Ms Mhlanga stated that she had seen a letter of secondment, and had also seen Ms Matsebula's contract of employment. Ms Mhlanga was asked if she had ever seen an instrument that revoked these documents? Ms Mhlanga stated that she had never personally seen the instrument, but that it was probably in the 1st Applicant's personal file.

When the witness was re - examined, she testified that she had been called upon in or about the 8th of June, 2004 to attend a fraud case at Johannesburg Magistrates' Court which had been reported by the High Commissioner against Ms Motsa. Ms Mhlanga stated that in November, 2003, she had been in South Africa, and at her office. She stated that she

may not have been in the office on the 14th of November, 2003, but she had only been on leave for just one day. Ms Mhlanga stated that she was aware that Ms Motsa had last been at the office on Friday, the 14th of November, 2003 as she had seen her at the office on the 13th of that month, and on the 17th of November, which was the next Monday, Ms Motsa was not at work.

THE TESTIMONY OF CLIFFORD S. MAMBA

The witness testified under oath that is currently employed by the Swaziland Government, in the position of Principal Secretary, in the Ministry of Foreign Affairs and Trade. ,Mr. Mamba testified that he has been in this position for the past eighteen months, as he was appointed to the position in the year 2005. The witness testified that prior to holding his present position, he had held the position of Ambassador, representing Swaziland, to the United Nations in New York, and has also represented Swaziland in other missions around the world.

Mr. Mamba stated that he was at the arbitration proceedings to testify that Ms Motsa is not entitled to the claims that she had made in her statement of claim, and that she is no longer consul, as she claims to be, because she absconded from her post on the 14th of November, 2003. According to the witness, Mr. Malinga, the Vice Consul in Johannesburg at the time, had prepared a report and kept the High Commissioner abreast of all developments surrounding Ms Motsa's disappearance from work. The witness submitted a copy of the extract from the Applicant's file which is kept in Pretoria. This extract was the report prepared by Mr. Malinga in the form of a letter, sent to the High Commissioner informing him of the situation which obtained in the

Johannesburg at the time. The letter was submitted as part of the Respondents' case and marked "AA".

Mr. Mamba also stated that, the Principal Secretary of the Ministry of Foreign Affairs and Trade, had written a memorandum, dated the 31st of December, 2003, wherein he had requested the Accountant General to suspend the salary of the 1st Applicant, as she had absented herself from duties without the permission or knowledge of the employer, and without a medical certificate. The same memorandum stated that this instruction was in terms of Section 36 (f) of the Employment Act, 1980. The memorandum required that the suspension of the salary should be effected from the 1st of January, 2004. This memorandum was admitted as part of the Respondents evidence, and marked "BB".

According to the witness, the same Principal Secretary, had then sent another memorandum to the secretary of the Civil Service Board, dated the 23rd of February, 2004. This memorandum requested that Ms Motsa be suspended from duty with effect from the 1st of January, 2004. The secretary to the Civil Service Board was informed through this memorandum of Ms Motsa's abscondment from work since the 14th of November, 2003. The witness further testified that following this memorandum, the secretary of the Civil Service Board, had written to Ms Motsa on the 2nd of March 2003 and suspended her from duties, and informed her that during the suspension period, she would be paid half her monthly salary. The same memorandum recalled her from foreign service, and cited Section 36 of the Employment Act, 1980. The said suspension was to be effective from the 14th of November, 2003, and Ms Motsa was instructed to return back home immediately.

According to Mr. Mamba, the Acting Principal Secretary of Foreign Affairs and Trade, had on the 7th of December, 2003, also written to 1st Applicant, informing her of her recall from foreign service. The letter requested her to make the necessary air travel arrangements, and inform the home office of her arrival date and time, so that transport could be provided for her upon arrival at the Matsapha International Airport. This letter was submitted and marked "C.M.1."

According to the witness the Ministry of Foreign Affairs, had done its level best to deal with Ms Motsa's matter in accordance with the accepted practices and procedures required by the Swaziland Government, and the law. The witness stated that as soon as Ms Motsa was recalled, her status as a diplomat ceased, and she resumed her substantive post which was Principal Commercial Officer. Mr. Mamba stated that the post of consul was not Ms Motsa's substantive post, and stated that this is evidenced by the Swaziland Government Establishment Register, which was submitted and marked "HOP". This document states in paragraph 3, that Ms Motsa's position was Principal Commercial Officer, and this was the post that obtained at the Johannesburg consulate. This could, according to Mr. Mamba, be likened to Mr. Malinga's position which according to the same document, was Senior Labour Officer whilst at the consulate he was known as vice - consular. Mr. Mamba also submitted a letter written to Ms Motsa, by the Secretary of the Civil Service Board, on the 17th of August, 2000, which had the effect of varying her designation from Economist, to that of Principal Commercial Officer. The witness stated that Ms Motsa's claim to be consul cannot be allowed to stand, because on the basis of these documents, she actually held the substantive position of Principal Commercial Officer.

In stressing how the Ministry had taken all the steps due from it, Mr. Mamba referred to the Government General Orders, chapter A & E, in particular. The witness stated that the Ministry in all its actions had been guided by the contents of this document.

General Orders:- A.212 of the General Orders refers to forfeiture of salary and dismissal in the case of an officer who has absented himself without leave from the employer. Whilst General Orders:-E 240 (i) refers to Foreign Service Allowance, and how it is to be paid as from the date an officer arrives in the country where he is posted, and shall cease on the day he leaves the country. General Order:- E 240 (2) provides that this allowance is not to be paid to an officer who is on vacation leave as casual or local leave of up to 10 or 15 days annual as appropriate, and in terms of General Order E 305. The actual purpose of the allowance is provided for in General Order:- E242, where it stated as being intended to assist an officer towards meeting additional expenses which he meets on being posted abroad. These copies of the extracts from the General Orders were submitted and mark "FF" for Chapter A, and Chapter E was marked "EE".

Mr. Mamba then addressed the issue of Mr. Malinga's intervention in transporting the 2nd Applicant together with the 1st Applicant's child to Swaziland. According to the witness, Mr. Malinga was merely performing his official duties, as it is part of the responsibilities of the consular to look after the welfare of the people under that mission. Whilst Mr. Malinga was acting for Ms Motsa, he had to perform these duties on her behalf and had helped Ms Matsebula by doing as she had asked by helping her go home.

Mr. Mamba proceeded to testify to the effect that Ms Motsa's behaviour whilst still a consul was such that it was unbecoming of a diplomat, and as such the idea of her being reinstated to the position of consul was hardly conceivable. Mr. Mamba referred to the case of Swaziland Embassy: The State vs Motsa Hillbrow Case No. 2400/11/2003, wherein Ms Motsa was accused of illegally using Swazi Government Funds to purchase property (a house). Mr. Mamba stated that a Court Order had been obtained under case no. 2004/15613, declaring forfeit to the state a house under Title Deed No. ST041089/2003. The said house was to be sold and the proceeds repatriated back to the Swaziland Government. A copy of the Court Order was submitted and marked "GG". It was further the testimony of the witness that the Swaziland Government was aware that the initial charges had been withdrawn against the 1st Applicant, but has decided to reinstate the charges against her as they are still convinced there is criminal component to her actions. To this end, the witness submitted a document from the Specialized Commercial Crime Unit in Johannesburg, attached to which is a warrant of arrest which was issued against Ms Motsa. This document was marked "HH". Mr. Mamba stressed that the Ministry of Foreign Affairs and Trade, in all its actions, was prompted to take steps against Ms Motsa for the criminal acts she committed and did not act in a vindictive, or malicious way.

Mr. Mamba reiterated that Ms Motsa was not a head of mission in Johannesburg, as that office is only a consulate which is managed by the High Commissioner in Pretoria. Mr. Mamba stated that the position of consul is but a simple designation that obtains in Foreign Service. He stated that although this designation is covered by the Vienna Convention, but it is treated differently from the way

in which a head of mission is actually treated. Mr. Mamba stated that the Swaziland Government had met all the requirements on Ms Motsa's recall.

Mr. Mamba then explained that the officials at the Ministry, had after consulting the contents of chapters A & E of the Government General Orders, written the letters to the Accountant General regarding Ms Motsa's recall, and also the letter to the Civil Service Board on the same matter. According to the witness, the Ministry's mindset was that Ms Motsa was a good candidate for summary dismissal, as she had absented herself from duty for more than three working days, without lawful cause whilst she was in Johannesburg, and had further not heeded the recall sent to her by the Ministry, and by the Civil Service Board. Mr. Mamba stated that Ms Motsa's allegation that she was in the United States preparing for her children to go to school there, is further reason for her to be summarily dismissed, as she had gone there without applying for official leave.

Mr. Mamba stated that even the initial fraud charges against Ms Motsa had been withdrawn on a mere technicality, as she was a diplomat at the time, and could not be arrested and tried in South Africa. The witness stated that this brought about the issuance of a waiver of Immunities and Privileges, which was written by the High Commissioner of the day, Mr. Hlophe. This waiver was issued on the 2nd of September, 2004. Mr. Mamba explained that Mr. Hlophe, as head of mission had the power to suspend or waive any diplomatic immunity which was vusted in Ms Motsa. This letter of waiver was submitted and marked "KK".

Under cross - examination the witness was asked if he had the exequatur in terms of which the 1st

Applicant was appointed in South Africa, and who had written the document? Mr. Mamba stated that the exequatur is prepared by the Ministry of Foreign Affairs, on the authority of the minister. He stated that he was aware of the existence of this document which had appointed the 1st Applicant. Mr. Mamba was asked if the King of Swaziland, as head of state is consulted before such an appointment is made? The witness testified that the King is not really consulted but his approval is sought. Mr. Mamba acknowledged that Ms Motsa had been appointed as Consul in South Africa.

Mr. Mamba was asked if he was aware of a letter written by Ms Motsa's attorneys, dated the 16th of March, 2006 which was addressed to the Office of the Attorney General in Johannesburg? Mr. Mamba was asked if he was indeed aware of the letter, why he had not used it as part of his evidence. Mr. Mamba stated that he was aware of the document, but had not used it as he did not deem it appropriate at the time. Mr. Shilubane stated that the letter was important because it showed that his client had abandoned her opposition of the application for the forfeiture of the immovable property, and therefore, the order of forfeiture was based on an agreement. Mr. Mamba stated that the Order itself did not state that it was by agreement, and he was aware that the letter was merely a proposal to which the South African Attorney General could agree or not.

Mr. Mamba was further referred to the waiver of diplomatic immunity, and why the author of that document still referred to Ms Motsa as consul, in September, 2004, if the employer no longer regarded her as such?. Mr. Mamba explained that the waiver had to be one regarding a certain position, and not an individual, and as such referred to Ms Motsa's designation at the time the matter arose. Mr.

Shilubane asked the witness when as far as the Respondents were concerned, the 1st Applicant ceased to be consul? Mr. Mamba stated that Ms Motsa ceased to be a consul when the Civil Service Board sent her a letter of recall, on the 2nd of March, 2004. Mr. Mamba stated that as far as they were concerned, when she did not turn up for work for more than three working days, and absconded, in November, 2003, she had effectively exhibited her intention to abandon her duties.

Mr. Shilubane asked the witness, why then if she was no longer regarded as a diplomat, did the High Commissioner in the waiver written by him, refer to her as consul in the year 2004? Mr. Mamba explained that he believed that this was done in order to officialise the waiver which could only be written as against a particular position, and not in a vacuum.

Mr. Shilubane then referred the witness to the issue of reinstatement of fraud charges against the 1st Applicant, and asked if the witness had a charge sheet in his position, that was different from the case which had been handed in as part of the Applicants' evidence, indicating that the charge against her had been withdrawn? Mr. Mamba stated that what did he have was a warrant for Ms Motsa's arrest, he stated that Ms Motsa would be the relevant person to have the new charge sheet, as she was the one facing the charges. Mr. Shilubane enquired from the witness if extradition procedures had been put in place? Mr. Mamba stated that the Swaziland Government intended to see to these procedures after the arbitration proceedings had been completed.

Mr. Mamba was then asked if the Ministry of Foreign Affairs and Trade had dismissed the 1st Applicant? Mr. Mamba stated that it was only the Civil Service Board that could dismiss the 1st Applicant, and the Ministry

could only recommend that she be dismissed. Mr. Mamba stated that in the memorandum written by the Principal Secretary of the Ministry of Foreign Affairs, of the 31st December, 2003, the Ministry was in fact of the mind that a dismissal ought to be effected against the 1st Applicant, and as such they had cited Section 36 (f) of the Employment Act, 1980. The Civil Service Board had responded through the letter of suspension and recall which was written to the 1st Applicant on the 2nd March, 2004. Mr. Mamba stated that it was an error for the letters not to refer to dismissal, and the wording was quite unfortunate, but what they had intended was that they refer to dismissal and hence, the citing of Section 36 (f). Mr. Mamba was then asked if the half pay that was referred to in the letter from the Civil Service Board, had been paid to the 1st Applicant?. Mr. Mamba stated that the Ministry could only recommend a suspension of salary, and also stated that he was aware that the half salary was not paid to the 1st Applicant.

Mr. Mamba was asked if the employer had charged the 1st Applicant with absconding from work? Mr. Mamba stated that this could not be done, as she was nowhere to be found, despite being sought by the South African Police, and being recalled to Swaziland, all to no avail. Mr. Shilubane stated that 1st Applicant had been available for a long time since the Court case in South Africa, and the times when the dispute was brought to CMAC. Mr. Mamba stated that the Ministry's position was that Ms Motsa since Section 36 (f) of the Employment Act, 1980 referred to summary dismissal, there was no way of calling her to a hearing. Mr. Mamba stated that Ms Motsa had not made the option of a disciplinary hearing viable for the employer as she frustrated these efforts by making herself scarce.

Mr. Shilubane asked the witness if the employer had ever written to the 1st Applicant calling her to a disciplinary hearing, and notifying her of the charge of abscondment?. Mr. Mamba stated that the employer had recalled Ms Motsa to Swaziland, so that this process could be put in place, but they could not do so as Ms Motsa did not avail herself. Mr. Mamba stated that they could not send her a notification as they did not know where she was. Mr. Shilubane asked the witness, if she was aware if Ms Motsa received the letter of recall which is alleged to have been sent to her? Mr. Mamba stated that though he may not be aware how the letter got to Ms Motsa, it was however, clear that she had received it as it had been used as part of her evidence and was in her possession.

Mr. Shilubane asked the witness if he would not agree that an employee had the right to be informed by the employer of their dismissal? Mr. Mamba stated that the employer could not do this in Ms Motsa's case as she had been nowhere to be found. Mr. Mamba was asked if Ms Matsebula had been informed that her services were terminated by the Swaziland Government? Mr. Mamba stated that the contract between Ms Matsebula and the employer was contingent on Ms Motsa's employment with the Swaziland Government, and also provided how it could be cancelled. Mr. Mamba stated that Ms Matsebula had asked to be brought home, and had never approached the Ministry to tell them that she wished to be returned to her post in South Africa. Mr. Mamba stated that he also understood that Ms Matsebula was no longer even employed by Ms Motsa. Mr. Shilubane put it to the witness that although the General Orders regulated the employment of the Applicants, these General Orders did not supersede substantive law, which law provides that an employee should be subjected to a

disciplinary hearing, and should also be informed of the decision to dismiss them. Mr. Shilubane also stated that the employment contract between the employer and Ms Matsebula had also been breached by the Respondents, as they did not give her written notice of one month stating the intention to cancel the contract. Mr. Shilubane also put it to the witness that the letter from the Civil Service Board to Ms Motsa had no legal effect as it was defective, in that it spoke of suspension from duty, yet it cited Section 36 (f) which is a wrong section which relates to dismissal, and not suspension. Mr. Mamba maintained that he believed that Ms Motsa was dismissed on the basis of that letter, and stated that Ms Motsa, by not heeding the recall dismissed herself. Mr. Shilubane also put it to the witness there was nothing that had prevented the employer from summoning the 1st Applicant to a disciplinary hearing even once the matter had been reported at CMAC, and serving her with the document when they saw her at CMAC. Mr. Mamba stated that he was not very well versed with the law in this regard, but he understood that the letter of 2nd of March, 2004 served as a letter of dismissal.

Mr. Mamba was then asked about the propriety of the letter of recall that was sent to Ms Motsa, and whether it was in keeping with the Civil Service Order, 1973 which provides that Ambassadors, High Commissioners and other Principal Representatives of Swaziland to other countries can only be appointed and removed by the King. Mr. Mamba explained that Ms Motsa was not a principal representative of Swaziland to South Africa, but only a consul. He stated that the Johannesburg consulate was managed by the Pretoria High Commission, and the position held by Ms Motsa had not amounted to head of mission. According to Mr. Mamba, the head of mission in South Africa is the High Commissioner,

and the consul is only in charge of the Johannesburg office. He stated that it was even possible for Swaziland to have various consuls in different cities of South Africa, but all those would be managed by the High Commissioner. The witness stated that in Swaziland the Head of State only appoints the head of mission. He stated that in Swaziland the position of consul is not even gazetted, whereas that of Ambassador, or High Commissioner is gazetted. He stated that the head of state of the host country does, out of sheer courtesy, recognize the appointment of a consul, but this does not mean that the consul is a head of mission or a principal representative of Swaziland to the host country. Mr. Mamba stated that, because the king does not appoint the consul, there was no logic in expecting that the king would be the one responsible for such removal. Mr. Shilubane put it to the witness that the appointment of the consul is gazetted in South Africa. Mr. Mamba responded by stating that he was not aware of how South Africa dealt with the issue, but knew that this was not done in Swaziland. He further stated that Swaziland, as a sovereign state, is not bound to follow suit, just because that is how South Africa does things.

ANALYSIS OF EVIDENCE AND ARGUMENTS.

In the effort to make a finding in this matter, it is important to take note of what is being claimed by the Applicants, and to view these assertions in juxtaposition to the evidence adduced.

The 1st Applicant claims that she was constructively dismissed in that the employer, whilst having recalled her in a manner which she views is improper and contrary to the law, also refused her access to her house in Johannesburg. To counter this argument, the Respondents deny the existence of

constructive dismissal, but allege instead that the 1st Applicant was summarily dismissed, in terms of Section 36 (f) of the Employment Act, 1980 because she disappeared from her work station in Johannesburg, and further refused to heed a lawful recall by the Civil Service Board, and by the Ministry of Foreign Affairs also. In the alternative, the 1st Applicant claims that if indeed the Respondents contend that she absconded from work, then there was a serious procedural defect in the manner in which she was dismissed as she was not subjected to a disciplinary hearing, and also not informed of the employer's decision to dismiss her.

The 2nd Applicant on the other hand claims that she too was dealt with unfairly by the Respondents, as she did not abscond from duty but was transported home with the assistance of Mr. Malinga, and furthermore, her salary was stopped yet she has never been informed that her services were being terminated by the employer. Ms Matsebula contends also that the employer breached the contract of employment by not giving her a months notice before terminating her employment.

In respect of the 1st Applicant, it is alleged that she was constructively dismissed, in that her employer locked her out of the house that she had been provided with in Johannesburg, and also by stopping her salary. On the other hand, the employer denies that Ms Motsa was constructively dismissed, and avers that she had absconded from work.

The Court in the case of Pretoria Society for the Care of the Retarded vs Loots (1997) 18 ILJ 981 (LAC), formulated a test for constructive dismissal. The Court pointed out the following considerations that have to be taken into account:-

- (a) Whether the employer, without reasonable and proper cause conducted itself in a manner calculated, or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.
- (b) Whether the effect of the employer's conduct, in its entirety' when judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.
- (c) Whether when the employee does resign as a result of the intolerable conduct of the employer, the employee is actually indicating that the situation has become so unbearable that the employee cannot go on working for the employer. Such that by resigning, the employer is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created.
- (d) The employee resigns on the basis that he or she does not believe that the employer will reform, or abandon the pattern of creating an unbearable working environment.

The 1st Applicant's assertions that she was constructively dismissed must be viewed as against this framework, due regard being had to the time when she complains that she was locked out of her house, and when her salary was actually stopped. From the evidence of the 1st Applicant, the house was locked whilst she was away, arranging for her children to attend school in the United States of America, and after the 2nd Applicant and her daughter were transported to Swaziland through Mr. Malinga's efforts. The 2nd Applicant also testified that the 1st Applicant had been away from the house for a while, and that she had not been told where the 1st

Applicant was. All of this evidence must be viewed in light of the assertions by the Respondents that Ms Motsa had absconded from work as from the 14th of November, 003.

According to the evidence of both Mr. Malinga, and Ms Mhlanga, Ms Motsa was never again seen at the office in Johannesburg after the 14th of November 2003. Even Ms Motsa in her own evidence did not explain what efforts she made to return to work, after her period of absence, unexplained and unauthorized as the absence was. Ms Motsa did not even adduce evidence on the efforts she may have made to try retrieving the keys to the house from the employer. It was Mr. Malinga's testimony that the house was locked on the High Commissioner's instruction after it was left unoccupied and unattended by the 2nd Applicant when she and 1st Applicant's child were taken to Swaziland. It remains a mystery what had become of Mr. Webb, and the older children when the house was locked, as according to Ms Matsebula, he had just stepped out on a visit around Johannesburg with the older children, and another version was that he had taken the children to Durban as Mr. Malinga was told by the 2nd Applicant. Wherever, he may have been, it remains unclear whether he did try to gain access to the house or not. The Respondents' witness Mr. Malinga testified that the house was locked for security reasons, as it was left unattended.

If Ms Motsa did not make any efforts to return to work after her disappearance, it is difficult to understand how she claim to have been constructively dismissed simply because her house was locked. Ms Motsa worked in her office at the Consulate, and not in the house, and if she never returned to the office, after the 14th of November, 2003, there can be no issue of constructive dismissal

because there is no proof of any intolerable behaviour on the part of the employer towards her. Even the salary that she complains was stopped, was actually suspended in January, 2004. as is seen from the memorandum sent by the Ministry of Foreign Affairs to the Accountant General, dated the 31st of December, 2003. This memorandum sought to have Ms Motsa's salary suspended as from the 1st of January, 2004. This was way after her disappearance from work in November, 2004.

The Respondents allege that the 1st Applicant absconded from work, and this resulted in her summary dismissal. Mr. Mamba's testimony was that the dismissal was in terms of Section 36 (f) of the Employment Act, 1980 wherein it is provided that it shall be fair for an employer to terminate the services of an employee where that employee has absented himself from work for more than a total of three working days in any period of thirty days without either the employer's permission or a medical certificate, issued and signed by a medical practitioner, certifying that the employer was unfit for work on those occasions.

According to Ms Motsa she had been away in America, arranging for her children to go to school there. Nowhere in her evidence does she state that she had been away from work with the employer's permission, and neither does she produce proof of this permission, or of the existence of a medical certificate. Mr. Malinga in his evidence testified that he had tried, in vain, to ascertain Ms Motsa's whereabouts, and was prompted into investigating her absence, by the fact that there was no official record at the office that she would be away at the time. Mr. Malinga drew a complete blank in his investigations, and even elicited the assistance of the South African Police, but still Mr. Webb refused

disclose Ms Motsa's whereabouts. Ms Matsebula too, stated that she did not know where the 1st Applicant was, despite being responsible for the care of her minor children. Mr. Malinga and Ms Mhlanga both testified that Ms Motsa had not been back at the office after the 14th of November, 2003, and that they had only seen her during the fraud case against her at the Johannesburg Magistrates' Court in or around June, 2004.

There is little doubt in my mind that Ms Motsa had indeed absconded from work during her prolonged absence from her work station. Ms Motsa did not even try to send word to the office about her inability to be at work, and instead her husband actively refused to disclose her whereabouts to the employer. I believe Ms Motsa was an ideal candidate for dismissal under Section 36 (f) of the Employment Act, 1980, but the employer did not do this.

The 1st Applicant was further recalled from foreign services by her employers in two different letters. Ms Motsa denies receiving letter, but did not explain in her evidence how the letters of the 2nd of March, 2004, written by the secretary of the Civil Service Board found its way into her possession. It was Ms Motsa's contention that she was improperly recalled, and she further stated that that is why she did not heed the instruction to return home. Ms Motsa contended that as consul she was a head of mission, and therefore, in terms of Section 7 of the Civil Service Order, 1973, could only be recalled by the King of Swaziland. This evidence was countered by Mr. Mamba, who testified that Ms Motsa was not a head of mission, as this position is held by the High Commissioner who is based in Pretoria. Mr. Mamba explained that Section 7 of the Order, only applies to principal representatives of Swaziland in other countries, and the principal representative of the

country in South Africa is the High Commissioner. Mr. Mamba stated that Ms Motsa in her position as consul, had only been in charge of the Johannesburg consulate, which was managed by the High Commissioner in Pretoria. On a balance of probabilities, Mr. Mamba's account seems more plausible. It would be very irregular for Swaziland to send two separate heads of mission to the same country. I am therefore inclined to conclude that there was nothing amiss about the manner in which Ms Motsa was recalled by the Civil Service Board, and her own Ministry. By not heeding the recall, Ms Motsa was in my view continuing with the abscondment from duties which commenced on the 14th of November, 2003, when she disappeared from work, without explanation. It may also be said that Ms Motsa, by not heeding what was a lawful instruction by her employers, was committing an act of insubordination.

It is also apparent from the evidence that the employer did not call the 1st Applicant to a disciplinary hearing to answer to either the charge of abscondment, or even of insubordination. Mr. Mamba in his evidence stated that Ms Motsa had been summarily dismissed in terms of Section 36 (f) of the Employment Act, 1980. It is trite law that an employee can only be summarily dismissed after he had been found guilty by a disciplinary committee of serious misconduct (see Van Jaarsveld vs Van Eck "Principles of Labour Law, 2nd edition, page 124).

Besides the fact that the employer did not call the 1st Applicant to a disciplinary hearing, Ms Motsa was not informed of the employer's decision to dismiss her. Infact all that she did receive was the letter from the Civil Service Board, dated the 2nd of March, 2004 which effectively suspended her from work and recalled her from foreign service. The letter further

informed her that during her suspension period, she would receive only half of her salary. It was argued on Ms Motsa's behalf that although the letter referred to Section 36 (f), Employment Act, 1980, it did not serve the same purpose as letter of dismissal. It was also argued that the employer ought to have given her a hearing before effecting the suspension from duties, and suspending the salary, as she was never even paid the half salary, reliance being had to the case of Councillor Mandla Dlamini vs Manzini City Council, appeal case no. 10/2001.

Mr. Mamba, on the other hand testified that the letter of the 2nd of March, 2004, had been unfortunately worded, because his Ministry at that time had been of the mind that they were requesting that Ms Motsa be dismissed, and not that she be suspended. According to this witness, it was because of this mindset that they had cited Section 36 (f) of the Act, as it refers to summary dismissal, and that as far as his Ministry is concerned, Ms Motsa had been dismissed in that same letter. Mr. Mamba stated that the employer had not been able to serve Ms Motsa with a notice to attend a disciplinary hearing, as she had disappeared, and could not be traced by them, and had further failed to heed a recall by the employer.

The position of the law as regards this is very clear. The general principle of the law is that the holding of a disciplinary hearing is considered to be fundamental pre - dismissal procedure, which helps to dispel any notions or impressions, that an employee was dismissed unfairly or on the spur of the moment (see Van Jaarsveld & Van Eck, "Principles of Labour Law", 2nd edition, page 198 - 199. See also Oscar Z. Mamba vs Swaziland Development & Savings Bank, Industrial Court Case No. 81/1996.

The assertions that the employer had been unable to serve the 1st Applicant with the notice to attend a hearing cannot hold water, as there had been many opportunities for the 1st Applicant to be served with such a notice. The employer wrote to her, recalling her on the 2nd of March, 2003. This letter found its way into Ms Motsa's possession. The 1st Applicant was seen by Mr. Malinga and Ms Mhlanga during the Court case in Johannesburg. Ms Motsa was readily available at the CMAC proceedings, and the employer could have served the notice on her at any of these times. Instead, the employer missed a golden opportunity to charge Ms Motsa with absconding from work.

The letter of suspension that was written to Ms Motsa, cannot in my view be regarded as being the same as a dismissal letter. This is the case, even though Mr. Mamba alleged that the citing of Section 36 (f) of the Act cures the defect, the letter concerned was clear in that it even contained details of how Ms Motsa would only receive half her salary during her suspension period. There is no doubt in my mind that this was a suspension letter. It is clearly stated in several legal authorities that in a dismissal the services of the employee, and the obligations of the employer are terminated, whereas in a suspension the employee is temporarily prohibited from rendering his services to the employer pending an investigation against him. (See Van Jaarsveld & Van Eck (Supra) page 125). The suspension of an employee does not constitute dismissal, and therefore he is entitled to his salary and fringe benefits until he is dismissed (Laws of South Africa, First Reissue Vol. 13, Part 1 para 240, see also Mabilo vs Mpumalanga Provincial Government 1999 ILJ 1818 (LC)).

In the instant case, Ms Motsa was suspended on half pay by the letter, dated the 2nd of March 2004, and remains so suspended even today. The employer left the matter in limbo and did not seek to deal with Ms Motsa's matter with finality. The law as contained in Section 39 of the Employment Act, 1980, regarding suspensions, is very clear. Even though Ms Motsa was said to be suspended on half pay, she was never paid this half salary at any point, so effectively she was suspended without pay. Section 39 provides that an employer may suspend an employee from employment without pay where the employee has or is suspected of having committed an act which, if proven, would justify dismissal or disciplinary action (Section 39 (1) (b)). It is further provided in Section 39 (2) that if an employee is suspended under subsection (1) (b), the suspension without pay shall not exceed one month. In Ms. Motsa's case, she has been on suspension since the 2nd of March, 2003, and her salary was stopped in January of the same year. This is clearly a breach of Section 39 (2) as her suspension has lasted well over a month.

It is my finding that Ms Motsa's employment was never terminated, and she is still an employee of Swaziland Government, since she was never dismissed. It is also clear that since a disciplinary hearing was never held to determine her guilt or otherwise on the charge of abscondment, or any other act of misconduct which the employer may have chosen to charge her with, it cannot be said that the internal structures were exhausted before the dispute was reported to the Labour Commissioner. Hence, this dispute, is with little doubt, prematurely before the Commission for arbitration.

The relief sought by the Applicant such as compensation for unfair dismissal, severance

allowance and notice pay, are remedies to be paid to an employee who has been found to be unfairly dismissed. Ms Motsa has to date, not been dismissed from employment. Furthermore, Ms Motsa has claimed for payment of the benefits, in terms of allowances that were due to her in terms of Chapter E of the Government General Orders. I am unable to find that these allowances were due to Ms Motsa because General Orders:E240(1) provides that foreign service allowance is to be paid from the date an officer arrives in the country to which he is posted, and shall cease on the day he leaves the country. General Order:E240(2) provides that the allowance is not to be paid to an officer who is on vacation leave, except where the officer uses the vacation leave as casual, or local leave of up to 10 to 15 days annual as appropriate, and in terms of General Order: E350. General Order: E242 provides that the purpose of the allowance is to assist the officer concerned in meeting the additional expenses which he encounters by virtue of being posted abroad.

In light of the foregoing, it is clear that Ms Motsa has no need for the foreign service allowance because, not only was she recalled from foreign service, but also because she had left her workstation without her employers' permission on the 14th of November, 2003. It was also Ms Mhlanga's evidence the Education Allowance and the Medical Aid cover were never paid to the officials, but paid directly to the service providers. The same can be said of all the other benefits that Ms Motsa claims because she is now back in Swaziland, and is not at the workstation she was placed at in Johannesburg, nor has she been rendering any form of service to the employer since the 14th of November, 2003.

With regard to the 2nd Applicant, it is very clear from the contract of employment entered into between herself and the Swaziland Government, that her employment was contingent on her performing housekeeping duties for the 1st Applicant whilst Ms Motsa was in foreign service. This can clearly be seen in the first paragraph of the letter/ contract of employment which states that it serves as a “formal offer of appointment as a housekeeper in Swaziland Foreign Service with effect from 1st April, 2001.

It stands to reason that the 2nd Applicant was employed purely for the purposes of serving as Ms Motsa’s housekeeper whilst she was abroad on foreign mission, and not whilst she was in Swaziland.

It was also a material term of the contract that her appointment “could be terminated by either party, on giving one calendar month’s notice or one month’s salary in lieu of notice for which no reason need be given” (see clause (d) of the contract).

Whilst it is true that Ms Matsebula did no wrong in requesting that she be given leave to go home to spend Christmas with her children, as is clearly seen from the letter she wrote to the High Commissioner on the 19th of December, 2003 requesting that she be afforded assistance also in taking the 1st Applicant’s child with her. The fact that there was nothing intrinsically wrong with her requesting leave, make it quite puzzling why the 2nd Applicant felt that she had to be cagey, and initially deny that she had ever asked for the assistance of Mr. Malinga, or of the employer.

It was Ms Matsebula’s testimony that the employer had provided her with transport to her house in Mbekelweni, and had not returned to collect her. According to Ms Matsebula, the employer had

effectively dismissed her from employment, and had also stopped her salary in December, 2003.

Nowhere, in Ms Matsebula's evidence does it appear that she tried to return to her workstation in Johannesburg, because even though the employer had been benevolent in transporting her to her home, this appears to have been sheer courtesy in the employers' part. Ms Matsebula did not in her evidence, produce proof that the employer was under a legal obligation to transport her anywhere during the course of her employment, whether it be to her home on leave, or to collect her from her home after the leave had expired.

Had Ms Matsebula tried to return to her work station, and been turned away by the employer, then a different light would be shed on the whole matter. As the matter stands at this point, Ms Matsebula went home on leave, and never returned to her workstation to resume her duties, as such, she effectively deserted her employment and could be summarily dismissed in terms of Section 36 of the Employment Act, 1980.

The employer, just as it does in the case of the 1st Applicant, has a legal remedy at its disposal, in that it can dismiss any employee who in material respects breaches his employment contract (the duty of the employee being to render services to the employer). Both Ms Motsa and Ms Matsebula failed to render their services to the employer and yet they had been bound by their contracts of employment to do this. However, in Ms Matsebula's case, because she was not suspended indefinitely by the employer, as in the case of 1st Applicant, she just stayed at home and did not go back to Johannesburg to perform her services. As a result, the employer in her case does not owe her any unpaid salary as she has not rendered any

services to the employer in line with her contract since December, 2003 and as such the employer does not have a reciprocal duty to remunerate her. The employer in Ms Matsebula's case, is yet to hold a disciplinary hearing, where she can answer to the charge of abscondment, or any other charge that the employer may have in mind, and finally dismiss her if she is found guilty. (See Van Jaarsveld & Van Eck, "Principles of Labour Law (supra), page 55, see also page 123).

AWARD

Having heard the evidence and arguments by all the parties, it is my finding that the dispute is prematurely before me for arbitration, as neither of the Applicants was ever formally charged with any act of misconduct, subjected to a disciplinary hearing, and ultimately dismissed on the basis of the findings of such hearing.

With regard to the 1st Applicant, the employer is hereby ordered to hold a disciplinary hearing within a reasonable time charging her with abscondment and/or other charge the employer may deem appropriate, and dismiss her, should she be found guilty of the charge. Since Ms Motsa has been on suspension on half pay since the 2nd of March, 2004, the employer is ordered to comply with Section 39 (2) of the Employment Act and pay her half salary for the one month suspension period allowed by the Act, and restore her to full pay up until the decision of the disciplinary hearing. The disciplinary hearing should be held within a reasonable time.

The employer is thereby ordered to pay her her full salary from the day the one month suspension period ends, up until her fate is determined by a disciplinary hearing.

In regard to the 2nd Applicant, the employer is ordered to hold a disciplinary hearing, within a reasonable time, charging her with breaching her contract, and deserting her workstation. There is no award made as regards the monies that were claimed by the 2nd Applicant, as it is my finding that none were due to her in the first place.

**DATED AT MBABANE ON THIS DAY OF
DECEMBER 2006.**

KHONTAPHI MANZINI
ARBITRATOR