IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 187/2006**

In the matter between:

DEREK CHARLES McMILLAN	**1st Applicant**
PIETER JACOBUS VAN DER MERWE	**2nd Applicant**

and

USUTHU PULP COMPANY t/a SAPPI USUTHU	**Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**M. SIBANDZE**

FOR RESPONDENT: **ADV. P. FLYNN (instructed by Robinson Bertram Attorneys)**

J U D G E M E N T - 12/09/2008

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1. The Applicants have applied to the Industrial Court for determination of their unresolved dispute against the Respondent. The Applicants allege that they were employed by the Respondent, and that the subsequent termination of their services on the ground of localization was unfair and unreasonable in all the circumstances. The Applicants are claiming maximum compensation for unfair dismissal. They allege that the termination

of their services was automatically unfair in that the Respondent unfairly discriminated when it localized their positions, and that in the circumstances the court is entitled to award them up to 24 months remuneration as compensation. The Applicants abandoned a further claim for the balance of severance allowance.

2. The Respondent denies that the Applicants were its employees and avers that they were employees of Sappi Management Services (Pty) Ltd ("SMS"), another company within the Sappi Group of Companies. The Respondent alleges that the Applicants were seconded to it by SMS, and that the secondment contracts were later terminated for localization purposes. The Applicants then reverted to SMS, where-after they were retrenched for reasons based on operational requirements and paid an exit package. The Respondent denies that it terminated the services of the Applicants, and denies that it is liable to pay compensation for unfair dismissal. The Respondent also denies that localization amounts to unfair discrimination and denies that the termination of the Applicants' employment was automatically unfair.

3. The Applicants bear the onus of proving on a preponderance of probabilities that they were employees of the Respondent, such that they are entitled to the protection afforded by section 35 (2) and (3) of the Employment Act 1980 .

4. Both of the Applicants testified as to the individual circumstances of their employment and the termination of their employment. The Respondent called one witness, Mr. Chris Jonker who is the Divisional Human Resources Manager employed by SMS. The facts testified to by both sides are largely common cause. The main issues for decision in the case concern the inferences and conclusions to be drawn from the objective facts.

EVIDENCE OF THE 2ND APPLICANT

5. The 2nd Applicant testified first, and it is convenient to commence by setting out his evidence. His association with the Sappi Group began in 1989 when he was employed by Sappi Forests (Pty) Limited for an indefinite period as Forestry Manager - Melmoth. He was subsequently promoted by the same company to be Area Manager - North based at Sabie, Mpumalanga as from 1st February 1994. A further promotion followed when he was appointed Regional Manager with effect from 1st April 1998.

6. At the end of 2003 at a meeting of Sappi Forests Senior Managers, attended also by Chris Jonker, the 2nd Applicant was offered the position of Project Manager at Pietermaritzburg. He declined this offer and said he preferred the position of Forest Manager at Sappi Usuthu in Swaziland, which position had recently fallen vacant. He was advised to apply, and warned that the Respondent (Sappi Usuthu) would offer him a 3 year contract and there was no guarantee of another position with Sappi Forests thereafter. He telephoned the Human Resources Manager at Sappi Usuthu, and an interview was arranged. On December 2003 he was interviewed by the Respondent's General Manager and Human Resources Manager at Bhunya, and employed on the same day. He commenced working on 2nd January 2004, but the formal written employment agreement was only signed on 21 January 2004.

7. The Agreement in question is headed "*EMPLOYMENT AGREEMENT by and between USUTHU PULP COMPANY LIMITED ('the Company") and A.J. van der Merwe ("the Employee")".* In terms of this Agreement the 2nd Applicant was employed by the Respondent on a full-time basis as Forest Manager for a 3 year period from 1st January 2004 to 31 December 2006. The agreement provides for the remuneration and benefits to

be enjoyed by the 2nd Applicant, and otherwise contains the usual terms and conditions which one would expect to find in the contract of employment of a large corporation. The agreement was signed in Swaziland at Bhunya by the 2nd Applicant and the Respondent's General Manager.

8. The 2nd Applicant testified that as from 2nd January 2004 he reported for duty at Sappi Usuthu every day. He reported to the General Manager of the Respondent until the latter was made redundant, whereafter he reported to the Sappi Divisional Forestry Manager, who was based at Sappi Forests. He was paid his remuneration by the Respondent, and he paid his income tax in Swaziland. He was required by the Employment Agreement at all times to obey all lawful orders given to him by the Respondent and by persons placed by the Respondent in authority over him, and he was subject to the Respondent's Disciplinary Code and Procedures.

9. The Employment Agreement provides that the 2nd Applicant shall be a member of and contribute to a provident fund arranged by the Respondent. The 2nd Applicant testified that when he joined the Respondent he was told that his membership of the pension fund operated by the Sappi Group would continue and that the Respondent would pay the employer's contribution into the fund.

10. The 2nd Applicant gave evidence that in 2004 he discussed with Dinga Mncube, the Managing Director of Sappi Forests, that a certain Mandla Dlamini should be groomed to take over his position as Forest Manager at the end of his contract period. He says he was given the express assurance by Mncube that his full contract period would be honoured. A subsequent email from Sappi Divisional Forestry Manager dated 14 October 2004 confirms the intention that Mandla Dlamini would only take over only on expiry of the 2nd

Applicant's contract.

11. On or about 2nd June 2005 the 2nd Applicant received a letter from the Divisional Forestry Manager. The letter is on the Respondent's letterhead , and states as follows:

"Termination of Secondment to Usuthu Pulp Company Ltd

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

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

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

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

12. On 16th June 2005 the 2nd Applicant received another letter from the Divisional Forestry Manager, again on Respondent's letterhead. The letter states :

"*Retrenchment*

The letter dated 2nd June 2005 refers.

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

13. The 2nd Applicant was duly provided with a summary of the exit package due to him. The package is headed SAPPI Usuthu. Under employment details, his date of engagement is shown as 1st March 1989, and his period of employment is shown as 16 completed years. The summary records two alternate packages, an *exit package on transfer back to SMS* and an *exit package in the event of retrenchment.* The latter package, which was paid to 2nd Applicant, includes severance pay of R408,874-49.

14. It was put to the 2nd Applicant in cross-examination that his employer was Sappi Management Services ("SMS"), that he had been seconded to the Respondent, and that the Employment Agreement he entered into with the Respondent was a secondment agreement. The 2nd Applicant denied these allegations. He testified that he never entered into any contract with SMS, nor was he aware of any arrangement to second him to the Respondent. The first time any reference was made to secondment was in the letter terminating his services, and he understood this to be a reference to his employment by the Respondent. He said that he had been employed by Sappi Forests (Pty) Ltd until 31st December 2003, and thereafter he was employed by the Respondent. He said his membership of the Sappi Pension Fund continued throughout because it is a Group Pension Fund separate from the individual Sappi Companies. He said he also retained his years of service with the Sappi

Group, for purpose of calculating his benefits on termination of service.

15. Asked about the reference to “reverting to SMS” in the letter dated 2nd June 2005, the 2nd Applicant said that he understood this to mean that the Sappi Group would try and find him another position.

16. The 2nd Applicant agreed that the severance allowance was paid by SMS in terms of South African law, in addition to the benefits to which he was entitled under his agreement with the Respondent. He said he considered this allowance to be payable because of his cumulative years of employment under the Sappi Group at Sappi Forests and Sappi Usuthu. He had not been paid any severance allowance when his employment with Sappi Forests came to an end.

17. The 2nd Applicant denied knowledge of any policy governing employees on international assignment within the Sappi Group. He said he was never told that he was required to become an employee of SMS when he applied for the position in Swaziland.

18. In re-examination, the 2nd Applicant said an employment arrangement with SMS was never discussed with him and the first time he received any indication that he was considered an SMS employee was when he received the letter of 16th June 2005 after the Respondent had terminated his services. It was never brought to his attention that the off-shore secondment policies on the Group intranet might apply to him.

EVIDENCE OF 1ST APPLICANT

19. The 1st Applicant testified that he applied for a post of Procurement

Manager at Sappi Ngodwana. He had never previously worked for the Sappi Group. The post was filled internally, but he was offered the post of Commercial Manager at Sappi Usuthu in Swaziland instead. He was interviewed by the General Manager and the Human Resources Manager of the Respondent, who told him that his appointment was subject to Sappi head office approving his profile. He met with some head office personnel, and the Respondent's Human Resources Manager then telephoned to say he had the job. He duly received a letter dated 21st November 2003 on the letterhead of SMS. The letter was signed by the Managing Director of Sappi Kraft (Pty) Ltd, and stated:

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

20. This letter sets out various terms and conditions of appointment including inter alia that :

- the 1st Applicant's "SA notional remuneration package" will be R29,000 per month, reviewed annually at Usuthu.

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

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

- he would be eligible for an annual bonus under the Management Incentive Scheme operated by SMS.

- income tax would be payable in Swaziland.

21. The letter contained a clause which stated :

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

The Applicant says he queried this clause with A. Carr, the signatory of the letter, who said the clause would be changed and a revised contract would be sent to him. The Applicant deleted the clause and signed the letter on 3 December 2008, agreeing to be bound by the rules and regulations of SMS. He never did receive a revised contract.

22. Shortly thereafter the 1st Applicant received an Employment Agreement between himself and the Respondent, similar in terms to the Employment Agreement between 2nd Applicant and the Respondent. In terms of this agreement, the 1st Applicant was employed by the Respondent on a full-time basis as Commercial Manager for a fixed period of three years from 1st January 2004 to 31st December 2006. This agreement was signed by the 1st Applicant and the General Manager of the Respondent on 12th December 2003.

23. The 1st Applicant was stationed at the Respondent's Mill at Bhunya. He reported to the Respondent's Financial Manager who reported to the Respondent's General Manager. He was paid his remuneration by the Respondent. He said that he regarded the Respondent as his employer because his work performance was governed by the contract he signed with the

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

24. On 2nd June 2005 the 1st Applicant received a letter from the Respondent informing him it had decided to localize his position. The letter gave him three months notice of termination of his secondment to the Respondent, and informed him that he would revert to SMS, which would try and find an alternative position for him. This letter is identical `in terms to the letter received by 2nd Applicant terminating the latter's contract with the Respondent.

25. On or about 20th June 2005 the 1st Applicant received a further letter from the Respondent giving him three months notice of termination of his employment with SMS. The terms of this letter are the same as those contained in the Respondent's letter to the 2nd Applicant dated 16th June 2005.

26. Under cross-examination, the 1st Applicant could not recall but did not deny receiving a letter dated 3rd August 2005 from SMS which terminated his services with SMS "for reasons based on operational requirements" on one months notice. He agreed that he had received a summary of his exit package, and that he was paid the retrenchment package. This package included severance pay based on South African law.

27. The 1st Applicant said he was not aware of Sappi's policy on secondment and international assignments.

EVIDENCE OF CHRIS JONKER

28. Chris Jonker is the Sappi Divisional Human Resources Manager

responsible for the Human Resources function of the Respondent. He is employed by SMI.

29. Jonker testified that Sappi employees sent on international assignment are employed by SMS to protect their security of tenure and to ensure equality of treatment within the Sappi Group, and then seconded to a particular Sappi Company in the foreign country of assignment. These international assignments are governed by a policy document posted on the Sappi website and intranet. The policy applies to all SMS employees who are seconded off shore.

30. Jonker explained that an SMS employee on international assignment enters into an employment agreement with the local company to accommodate local conditions and legal requirements.

31. Jonker insisted that the 2nd Applicant was employed by SMS and seconded to the Respondent. He conceded that the Respondent could not produce any employment contract between SMS and the 2nd Applicant nor any notification to the 2nd Applicant that he was being seconded to the respondent by SMS, but he said in terms of Sappi policy the 2nd Applicant should have been employed by SMS and seconded to the Respondent.

32. Jonker said that the 2nd Applicant was retrenched by SMS as per the letters of the 2nd and 16th June 2005, and paid severance allowance according to South African law. Asked why these letters were written on the Respondent's letterhead, he speculated that the Divisional Forestry Manager might have been in Swaziland and simply made use of the local letterhead for convenience sake.

33. In cross-examination, Jonker said that SMS employs all senior

Sappi management employees. He was however never party to any discussion whereby 2nd Applicant was employed by SMS, nor could he say that any document evidencing such employment had ever existed.

34. Jonker agreed that both Applicants received their entire remuneration from the Respondent. He further agreed that the Applicants were fully under the control and discipline of the Respondent's management in the performance of their work in Swaziland, but he said such management was employed by SMS.

35. The witness said that the 2nd Applicant was paid a bonus under the Management Incentive Scheme. He said this indicated that he was an SMS employee, since this bonus was not a term of his contract with the Respondent. The witness later conceded that all Sappi managers from grade 7 upwards were eligible for the bonus, whether or not they were employed by SMS.

36. In relation to disciplinary control, Jonker agreed that the Applicants were in the same position as a Dr. Lemmer, who worked for the Respondent as Health Services Manager. When it was put to him that Lemmer had been subjected to a disciplinary enquiry by the Respondent, Jonker denied this and said the enquiry was instituted and conducted by SMS. The Applicant's counsel then produced notices and minutes pertaining to Dr. Lemmer's enquiry. The notices were on the Respondent's letterhead and were signed by the Respondent's Mill Manager. The minutes recorded that it was a "SAPPI USUTHU DISCIPLINARY ENQUIRY" between Dr. Lemmer as employee and Sappi Usuthu as employer. Jonker denied that these documents showed that Dr. Lemmer, and by extension the Applicants, were subject to the Respondents disciplinary control.

37. On the question of localization of the Applicants' post, Jonker

doubted but could not deny that the 2nd Applicant was assured he would be able to serve out his contract. He said that a decision was taken to restructure the Respondent, which included a decision to advance the localization process. He agreed that the Applicants were localized because of their nationality i.e. because they were not Swazi nationals.

ANALYSIS

38. Dealing first with the evidence relating to the employment of the 2nd Applicant Van De Merwe, a strong prima facie case was established that he was employed by the Respondent, on the basis of:

38.1 the written contract between himself and the Respondent, which purports to be an Employment Agreement and contains all the essentials of a contract of employment;

38.2 his evidence that he rendered his services to the Respondent at the Respondent's place of business, that he was subject to the direct authority, control and discipline of the Respondent, its officers and managers, and that he was paid his remuneration by the Respondent.

39. The Respondent was unable to lead any direct evidence to substantiate its claim that the 2nd Applicant was ever employed by SMS. There is no evidence of any written contract or letter of appointment between the 2nd Applicant and SMS, nor of any oral negotiations held or oral agreement reached.

40. The Respondent's sole witness Chris Jonker asked the court to imply an employment contract between 2nd Applicant and SMS from the following facts, namely that:

40.1 Respondent's senior managers, to whom the 2nd Applicant reported, are employees of SMS; and

40.2 the policy of Sappi is that managers on international assignment are employed by SMS and seconded to the local company; and

40.3 the 2nd Applicant did not query the letters terminating his "secondment" to the Respondent and reverting him to SMS, and he accepted a severance allowance based on South African law without protest.

41. The managers to whom the 2nd Applicant reported were placed in authority over him by the Respondent, and the control they exercised over him was exercised on behalf of the Respondent, not their employer SMS. No inference of employment of the 2nd Applicant by SMS arises in the circumstances.

42. Chris Jonker stated unequivocally that the policy governing international assignments applies to employees of SMS. If SMS failed to employ the 2nd Applicant, then the policy never applied to him. Using the policy to prove employment by SMS simply begs the question.

43. The letters of the 2nd and 16th June 2005 were clearly written by the Respondent under the misapprehension that the 2nd Applicant had been employed by SMS and seconded to the Respondent. The 2nd Applicant said he understood the reference to "secondment" and "secondment contract' to refer to his employment by the Respondent within the Sappi Group. Neither counsel for the parties was prepared to venture a definition of secondment, so it would

be unreasonable to expect a forester to attach a precise legal meaning to the term. The 2nd Applicant said he understood that he reverted to SMS so that an attempt could be made to find him another position in the Sappi Group. There is nothing unreasonable or improbable in this misunderstanding either, since as far as the 2nd Applicant was concerned, and as far as the objective facts are concerned, the 2nd Applicant was employed by the Respondent and he had never been employed by SMS.

44. We find that there are no grounds for implying an employment contract between the 2nd Applicant and SMS, nor for implying that the 2nd Applicant ever considered himself to be employed by SMS. He had no direct dealings with SMS, and none of the *indicia* of a relationship of employer/employee existed.

45. "*Employee*" is defined in the Employment Act 1980 to mean "*any person to whom wages are paid or are payable under a contract of employment*". Not only is there no proof of any employment contract between the 2nd Applicant and SMS, but the 1st Applicant's 'wages' were paid by the Respondent, not SMS, and those 'wages' were payable in terms of his Employment Agreement with the Respondent. The pension benefits, management incentive scheme bonus and severance allowance paid to the Applicant on the basis of his total of 16 years service may be attributed to his relationship with the Sappi Group as a whole rather than to any direct relationship he had with SMS.

46. There is substantial and compelling evidence that the 2nd Applicant was employed by the Respondent, and a significant lack of evidence proving any employment relationship with SMS. We have no hesitation in finding as a

matter of fact that the 2nd Applicant has proved on a balance of probabilities that he was employed by the Respondent, and that he was an employee to whom section 35 of the Employment Act 1980 applied.

47. The 2nd Applicant's services were terminated by the Respondent as a result of the localization of his post. The Respondent decided to give the post to a Swazi national, and since the 2nd Applicant was not a Swazi national, the Respondent terminated his services. In other words, the services of the 2nd Applicant were terminated for reason of his national origin.

48. Section 35 (3) (d) of the Employment Act 1980 provides that the termination of an employee's services shall be deemed to be unfair if it takes place for reason of the national origin of the employee. It follows that the termination of the 2nd Applicant's services is deemed to be unfair.

49. Where the court finds that the dismissal of an employee is "automatically unfair" the court may award just and equitable compensation not exceeding the equivalent of 24 months remuneration. If the dismissal is not "automatically unfair", then the maximum compensation that may be awarded is the equivalent of 12 months remuneration.

See section 16 (6) and (7) of the Industrial Relations Act 2000 (as amended).

50. "Automatically unfair dismissal" includes a dismissal where the reason for the dismissal is –

"*that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, age, disability, religion, conscience, language,*

marital status or family responsibility."

See subparagraph (f) of the definition of "automatically unfair dismissal" in section 2 of the Industrial Relations Act.

51. The above definition does not expressly refer to unfair discrimination on grounds of national origin. "*Ethnic origin*" denotes origin by birth or descent rather than nationality - **see The Concise Oxford English Dictionary (9th Ed)**

Nevertheless the inclusion of the phrase "*on any arbitrary ground, including*" is a clear indication that the list of prohibited grounds is not intended to be exhaustive.

52. In our opinion, an 'arbitrary ground' for discrimination in the context of a workplace dismissal is one which has no *bona fide* rationale based on work performance or operational requirements.

53. The Respondent has not led any evidence which suggests that Swazi nationality is an inherent requirement for the job of Forest Manager. There is no legislation in place in Swaziland which authorizes an employer to prematurely terminate the services of an employee in order to localize his position. On the contrary, section 35 (3) (d) of the Employment Act deems such discrimination to be unfair. We also note that provision for localization in a contract of employment is expressly prohibited by section 29 of the Employment Act, which declares contractual discrimination on grounds of national origin to be unlawful.

54. In our view, the termination of an employee's services on grounds of his national origin is regarded by our employment law as arbitrary

discrimination. It follows that the termination of the 2nd Applicant's services for reason of his national origin was an automatically unfair dismissal.

55. The contractual position of the 1st Applicant differs from that of the 2nd Applicant. He entered into an employment contract with SMS, in terms of which he was seconded to the Respondent. He then entered into an employment contract with the Respondent. These contracts are conclusive as to the terms and conditions of the transactions which they were intended to record, and the 1st Applicant's evidence regarding his understanding - or rather misunderstanding - of the transactions is irrelevant. He is bound by the contracts which he signed.

Union Government v Vianini Ferro Concrete Pipes (Pty) Ltd 1941 AD 43.

56. There can be no doubt that the 1st Applicant was employed by SMS with the specific intention of seconding him to the Respondent. A secondment takes place when an employee is temporarily assigned to work for a different division of the same employer or a different organization altogether, the idea being that the employee will return to his original position following the termination of the secondment. If the secondment is to another part of the same employer, the substantive employment relationship is not affected, although there may be a need for small changes in the terms of employment to cater for new duties, new reporting structures etc. Where however the secondment is to a separate legal entity, for example to an associated company within the same group of companies as the employer, as in the present case, the question arises as to who will be the employer during the period of the secondment.

57. Whether or not an employment relationship comes into existence

between the seconded employee ("the secondee") and the company to which he is seconded ("the host") will depend entirely on the contractual terms - express or implied - governing the secondment. Such terms may provide for the original employer ("the seconder") to exclusively retain all the rights, duties and obligations of an employer; alternatively the terms of the secondment may provide for a temporary assignment of all such rights, duties and obligations to the host so that the employment relationship between the seconder and the secondee is subordinated to the employment relationship between the secondee and the host and held in abeyance during the secondment; or the terms of secondment may provide for some other hybrid arrangement. Whether or not the host company becomes the employer of the secondee is a matter of fact to be determined from the contractual terms and the circumstances of the relationships between the parties.

58. On the evidence it is clear that SMS was not only aware of the Employment Agreement between the 1st Applicant and the Respondent but that this agreement was intended to set out the terms and conditions governing the secondment envisaged in 1st Applicant's letter of appointment from SMS.

59. The 1st Applicant alleges that he was employed by the Respondent and not by SMS, whilst the Respondent alleges that the 1st Applicant was employed by SMS and not itself. The dispute arises because the 1st Applicant entered into two contracts which both purport to be contracts of employment. The issue to be determined in this case, however, is whether the 1st Applicant was an employee to whom section 35 of the Employment Act 1980 applied. This raises the question whether the 1st Applicant was an employee of the Respondent, and whether the Employment Agreement between the 1st Applicant and the Respondent is subject to the provisions of the Employment

Act 1980.

60. As stated earlier in relation to the 2nd Applicant, "*employee*" is defined in the Employment Act 1980 to mean "*any person to whom wages are paid or are payable under a contract of employment*".

2. A contract of employment is defined in the Act as *"…a contract of service, apprenticeship or traineeship whether it is express or implied."*

3. The essential elements of a contract of service are:

- an agreement by the employee to make his personal services available;

an obligation on the employer to remunerate him for his services; and
subordination of the employee to the control of the employer

See **Rycroft and Jordaan: A Guide to South African Labour Law (2nd Ed) at p35.**

4. The 1st Applicant agreed to make his personal services available to the Respondent at the Respondent's place of business in Swaziland. The Employment Agreement expressly provided that the 1st Applicant would not, without the Respondent's prior written consent, undertake any other work for financial gain, so the 1st Applicant was precluded (without the written consent of the Respondent) from making his services available to SMS or any other person or entity or to obtain remuneration for his services from any other source.

5. The SMS letter of appointment expressly provided that whilst on secondment to the Respondent the 1st Applicant would be paid his salary and receive benefits in accordance with the Respondent's remuneration policies and practices. The

Respondent was obliged to pay the 1st Applicant the remuneration package set out in the Employment Agreement for his services. The review of the 1st Applicant's salary was entirely within the discretion of the Respondent. During the subsistence of the 1st Applicant's secondment, his remuneration was in fact paid by the Respondent, and he paid income tax to the Swaziland Commissioner of Taxes on the basis that his remuneration was derived from a source within Swaziland ie. from the Respondent.

6. Clause 3 of the Employment Agreement makes it clear that the 1st Applicant was contractually subject to the direct control of the Respondent in the performance of his duties, not only in the end to be achieved but in the detailed manner in which the duties were to be performed. He was under the supervision of Richard Wells, the Respondent's Financial Manager, who reported to Alex Todd, the Respondent's General Manager. It is irrelevant whether Wells and Todd were employees of SMS, since they supervised the 1st Applicant in their capacity as managers of the Respondent.

7. The 1st Applicant was also subject to the disciplinary control and authority of the Respondent in accordance with its Disciplinary Code. This is expressly provided in the Employment Agreement. The disciplinary hearing of Dr. Lemmer, whom it is common cause held a similar employment status to that of the 1st Applicant, was undoubtedly prosecuted by the Respondent. The argument of Chris Jonker to the contrary is unsustainable on the evidence.

8. The 1st Applicant's letter of appointment from SMS provides for his secondment to the Respondent but does not make any provision for the termination of such secondment. The terms governing the termination of the 1st Applicant's

contractual relationship with the Respondent are to be found in the Employment Agreement between the 1st Applicant and the Respondent. Indeed the Respondent terminated the relationship in terms of the localization clause contained in the Employment Agreement.

9. The clause which was deleted by the 1st Applicant from the SMS letter of appointment provided:

"Should your employment with Usuthu be terminated for whatever reason this employment contract will also be terminated ipso facto."

The inclusion of this clause by SMS confirms that SMS never intended any employment relationship with the 1st Applicant other than a technical one. What is perhaps more significant is that SMS intended the Respondent to have the right and the authority to determine the 1st Applicant's employment, both with the Respondent and with SMS.

The deletion of the clause does not alter the position that the termination of the 1st Respondent's secondment was governed by the terms of his Employment Agreement with the Respondent, and the power to dismiss the 1st Applicant from the service of the Respondent lay with the Respondent.

61. The court finds that the 1st Applicant was subordinate to the control of the Respondent, and that the Employment Agreement contains all the essential elements of a contract of service.

62. Having regard to the Employment Agreement and the relationship between the 1st Applicant and the Respondent in general, the court finds that the 1st Applicant was an employee of the Respondent (i.e. "a person to whom wages are paid or payable under a contract of employment") during the subsistence of his secondment – see the definitions of "employee" and "wages" under the Employment Act.

63. It is not necessary to decide whether the 1st Applicant was also an employee of SMS whilst he was seconded to the Respondent, since the question at issue in this case is whether the 1st Applicant was an employee of the Respondent. There is no reason in principle why an employee cannot have more than one employer, and the definition of employer in the Employment Act 1980 does not preclude an employee having more than one employer at any particular time.

See **Burmat Ltd V Vaughan (1992) 13 ILJ 934 (LAC) AT 939 G-I**

Camdon's Realty (Pty) Ltd & Another v Hart (1993) 14 ILJ 1008 (LAC) at 1016

Board of Executors Ltd v McCafferty (1997) 18 ILJ 949 (LAC)
at 969

64. Nevertheless it is our view that there was no relationship of employer-employer between SMS and the 1st Applicant during the period of the latter's secondment to the Respondent. During this period, none of the essential elements of a contract of service applied to the 1st Applicant's relationship with SMS. He did not render any services to SMS, nor did he receive any remuneration from SMS. It is also clear that SMS ceased during the period of secondment to exercise any right of control and supervision over the Applicant's work.

65. **Halsbury's Laws of England (4th Ed) Vol. 16 at paragraph 601** states the following in relation to the temporary employment of another person's employee:

"*If the general employer has parted for the time being with his*

rights of control as employer and those rights have been assumed by the temporary employer, the latter has all the responsibilities attaching to the relationship of employer towards the employee."

66. The 1st Applicant's employment relationship with SMS resumed when his secondment to the Respondent terminated. Upon his retrenchment by SMS he then became entitled to the retrenchment benefits payable in terms of his contract with SMS and the requirements of South African law. His acceptance of these benefits is not in any way inconsistent with his being an employee of the Respondent during the period of the secondment.

67. Part V of the Employment Act, 1980, which deals with termination of contracts of employment, applies to "*every contract of employment made within Swaziland and to be performed wholly in Swaziland*". It is our finding that the contract of employment between the 1st Applicant and the Respondent was subject to Part V of the Act, and in particular to the provisions of section 35 of the Act. We find that the 1st Applicant was, at the time his employment with the Respondent was terminated, an employee to whom section 35 applied.

68. The 1st Applicant is entitled to the protection of section 35 (3), which deems the termination of his services by the Respondent to be unfair because it took place for reason of his national origin (see *supra* in relation to the 2nd Applicant).

69. We also find that the termination of the 1st Applicant's services was an automatically unfair dismissal for the same reasons given *supra* in relation to the 2nd Applicant. There is no evidence that being a Swazi national was an inherent requirement for the job of Commercial Manager.

COMPENSATION

70. The Industrial Court has a discretion in determining the amount of the compensation to be awarded to the Applicants for their automatically unfair dismissal, but such amount may not exceed 24 months remuneration. The compensation awarded is in addition to any severance allowance or other payment payable under any law – see section 16(9) of the Industrial Relations Act 2000. The award must be just and equitable to both the Applicants and the Respondent, and seeks not only to compensate the Applicants for their patrimonial loss but also to act as a *solatium* for any non-patrimonial hardship suffered by them. The award may also contain a punitive element, to reflect the disapproval of the court with regard to discriminatory conduct that has been expressly prohibited by our employment law.

See **Chemical Energy Paper Printing Wood & Allied Workers** Union & another v Glass & Aluminium 2000 CC (2002) 23 ILJ 695 (LAC)

71. The employment contracts of the Applicants were terminated 15 months prematurely. There is no evidence that the localization of their jobs had any element of malice or victimization. Rather, the Respondent appears to have used localization as a handy excuse for cost-cutting by giving the Applicants' jobs to Swazi nationals at a reduced remuneration. No consideration appears to have been given to the hardship this would occasion to the Applicants, and the absence of malice does not derogate from the prohibited discrimination implicit in the dismissal.

72. The 1st Applicant took a job at Sappi Ngodwana at the end of 2005, but resigned soon after because the work was menial. He then obtained employment with Eskom at a salary of E37,000-00 per month. This salary was increased to E44,000-00 per month in 2007. He has been obliged to live apart from his family because the Eskom job is at Kriel whilst the family resides in Nelspruit. The premature termination of the 1st Applicant's employment

undoubtedly caused him great inconvenience and worry, and resulted in the disruption of his family life.

73. The 1st Applicant furnished a full breakdown of his remuneration package with the Respondent, including all benefits, allowances and bonuses. For the purpose of making an award, we shall only take into account his monthly salary (inclusive of vehicle allowance), the taxable value of his accommodation, his canteen allowance, the education fees paid by the Respondent for his two children, and the medical aid contribution paid by the Respondent. The monthly remuneration on this basis amounts to E39,326-39.

74. In our estimation, the 1st Applicant suffered patrimonial loss as a result of the unfair termination of his services in a sum of E155,565-56. We award him a further 4 months remuneration in the sum of E157,305-56 as a *solatium* for the loss of other unquantifiable employments benefits and for the hardship and inconvenience caused to him. As a penalty to the Respondent, we award a further 2 months remuneration in the sum of E78,652-78. The total compensation award amounts to E391,523-90.

75. The 2nd Applicant was unemployed from October 2005 to March 2006. Thereafter he worked as a consultant earning between E15,000-00 and E26,000-00 per month. In March 2007 he obtained permanent employment at E26,000-00 per month. Using the same basis for calculating the 2nd Applicant's remuneration with the Respondent as that applied for the 1st Applicant, we calculate his monthly remuneration at E48,748-39. In our estimation, the 2nd Applicant suffered patrimonial loss in a sum of E497,225-85 as a result of the unfair termination of his services. We award him a further 4 months remuneration in the sum of E194,993-56 as a *solatium* for the loss of other unquantifiable employments benefits and for the hardship and inconvenience

caused to him. As a penalty to the Respondent, we award a further 2 months remuneration in the sum of E97,496-78. The total compensation award amounts to E789,716-19.

76. **Judgement is entered against the Respondent for payment to the Applicants as follows:**

1st Applicant: Payment of the sum of E391,523-90

2nd Applicant: Payment of the sum of E789,716-19

The Respondent is to pay the costs of the suit.

The members agree.

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PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT