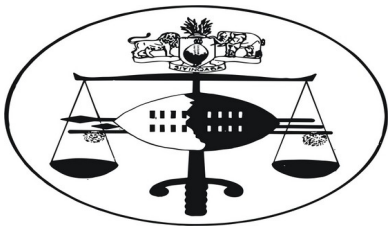

IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case No.64/2003

In the matter between:-

MECCO MASEKO **1ST APPLICANT**

SIPHO J. MAMBA **2ND APPLICANT**

And

INYATSI CONSTRUCTION LIMITED **RESPONDENT**

Neutral Citation: Mecco Maseko & Sipho J. Mamba V Inyatsi Construction Ltd (64/2003) [2003] SZIC12 (30th May 2012)

CORAM: **D. MAZIBUKO J**

(Sitting, with A. Nkambule & M. Mtetwa (members of the Court)

Heard : **8th December 2011**

Delivered : **30th May 2012**

Summary: ***Labour Law: Retrenchment-Applicants retrenched and they challenged the retrenchment. In order to justify retrenchment the employer must show that***

the decision to retrench was reasonable, bona fide and must apply a fair selection process.
Pleadings-Defence of compromise raised orally. Respondent must present its defence in writing in accordance with the rules. Failure to follow the rules regarding pleadings will result in Court not accepting the defence.

1. The first Applicant is Mr. Mecco Maseko an adult male resident in Matsapha town. The Second Applicant is Mr. Sipho Jabulani Mamba an adult male resident in Manzini town.

2. The Respondent is Inyatsi Construction Limited, a public limited liability company incorporated and carrying on business in Swaziland under the style Inyatsi Superfos.

3. In the year 1993 the first Applicant was employed by the Respondent in the security department as a guard. As from the year 1994, the first Applicant was promoted to various positions within the security department. By the year 1999 he worked as a shift supervisor and instructor. In the latter positions the first Applicant was required inter alia, to train new guards, allocate them work and supervise them in the execution of their duties.

4. The second Applicant was employed by the Respondent on the 11th November 1994 in the security department. The second Applicant initially worked as a guard and a radio operator. He was subsequently promoted to various positions within the security

department. By the year 1999 he occupied the positions of shift supervisor and instructor. That means that in the year 1999 the first and second Applicants occupied similar positions namely as instructor and supervisor.

5. The duties of the second Applicant included training the Respondent's employees in the use of a two-way radio and in maintaining and repairing the radio equipment. The second Applicant also trained the guards and supervised their work. In the process of supervising the guards the instructors also regulated their working shifts.

6. The levels of authority in the security department in the Respondent's workplace at the material time listed from the most senior to the most junior employee are as follows; security manager, chief security officer, assistant chief security officer, captain, instructors, sergeants and guards.

7. The Respondent's main business is to construct public roads throughout the kingdom of Swaziland. The Respondent relies heavily on the Swaziland Government as its main client in the road construction business. The Government would put out to tender its interest in having a particular public road constructed with specifications and details embodied in the tender document.

Interested construction companies including the Respondent would then respond by presenting their offers to construct the proposed road.

8. About the year 1994 the Respondent succeeded in getting a Swaziland Government tender to construct a public road that connects two (2) towns namely Mbabane and Matsapha. This road is officially known as MR3. During this trial the parties referred to this road as Mbabane–Matsapha road. In the preparation to commence the aforementioned roadworks, the Respondent recruited some employees including security guards. The Respondent's instructors were inter alia, tasked to train and supervise the new guards. During that time the Respondent had three (3) instructors namely the first and second Applicants as well as a certain Mr. Paul Ndwandwe.

9. About the year 1998 the Respondent completed the aforementioned roadworks. The Respondent thereafter took a decision to retrench some of its workers. During the Applicants' term of office there was no trade union that was active at the Respondent's workplace.

10. According to the Respondent a list of names of employees who had been earmarked for retrenchment was sent to the Labour Commissioner and to all parties concerned. This exercise was in compliance with section 40 (2) of the Employment Act No.5 of 1980 as amended (hereinafter referred to as The Employment Act).

    About three hundred (300) employees were earmarked for retrenchment. This list included a number of security guards.

11. The retrenchment exercise went ahead as scheduled. In the year 1998 the concerned employees were terminated by the Respondent. The instructors (first and second Applicants and a Mr Paul Ndwandwe) continued to work for the Respondent in their capacities aforementioned.

12. About 20th March 1998, a meeting of security guards took place at the Respondent's workplace. The guards tabled a list of grievances at that meeting. Those grievances implicated the instructors and the chief security officer in certain misconduct. The instructors and the chief security officer were referred to collectively as supervisors in the grievance discussion.

13. Some of the complaints that were raised by the guards can be paraphrased in this manner:

(i) The supervisors refused to entertain requests from the guards to take some time off work in order to attend to family problems and to enrol at school.

(ii) The guards perceived the instructions which were regularly issued by the supervisors as oppressive.

(iii) Supervisors often take disciplinary action against the guards for misconduct committed at work, yet the supervisors commit the same infraction with impunity.

(iv) The supervisors undermine the authority of the security manager Mr Armando Ferreira in that they defy his orders. Instead they impose their decisions regarding the operation of the security division of the Respondent.

(v) The supervisors are plotting to remove the security manager from his position.

14. As a result of these grievances the guards took a resolution to orchestrate the demotion of the supervisors from their positions. A memorandum was prepared in which the guards recorded their grievances and the resolution they had taken. The memorandum was sent to the management of the Respondent.

This memorandum was produced in Court and marked exhibit **C.** The memorandum was endorsed by signatures of ninety six (96) security guards.

Exhibit **C** reads as follows;

"MEMORANDUM

FROM: SECURITY DEPARTMENT TO:INYATSI MANAGEMENT

DATE: 20 March 19980

RE: PROBLEMS FACED BY THE DEPARTMENT

We as a security department of the company wish to come out with the problems we are facing as a department.

The problems are caused by the Department's Supervisors that is our Chief Security Officer together with Instructors and excluding the Sergeants. The problem[s] that we are really facing are that;

They refuse to take requests from the guards, that is to attend family problems and family ceremonies, and even if you are enrolling at school, they just refuse. If you request from the manager to do something they just tell the person to go to the Manager every time he/she is facing a problem.

They use oppressive instruction to the guards. Guards gets [get] charged for cases while a supervisor is not charged if he has a case.

Supervisors are always trying to be senior than Mr Ferreira, and always against [the] decision of the Manager. They want things to be operated on their way not the way that the Manager wants.

THEY ARE ALL STRUGGLING FOR THE POST OF SECURITY MANAGER.

They have private techniques of removing the Security Manager for [from] the post so that they can be free.

These problems are pushing the department to a dark future and it can end up being close[closed] because of the Chief Security Officer and Instructors. We as workers of the department decided to raise the point of demoting the Chief himself and the Instructors.

The demotion can solve all the above which we have mentioned since they are taking advantage of being superiors yet they were not going to be Supervisors without us."

15. On the 18th May 1998, the security guards had another meeting. The grievances which had been raised in the meeting of the 20th March 1998 were further discussed at this meeting. A committee was established and was mandated to forward the grievances of the guards to management. The committee members are listed as follows: Patrick Mtsetfwa, Abednego Ncongwane, Elliot Dlamini, Johanes Nkhambule and Clement Dlamini. One of the Committee members Mr Patrick Mtsetfwa will receive further attention later in this judgment.

16. The minutes of this meeting were introduced in Court marked exhibit **D**. It is apposite at this stage to reproduce exhibit **D.**

MINUTES OF A MEETING FOR THE SECURITY DEPARTMENT HELD AT MATSAPHA HEAD QUARTERS ON THE 18TH MAY 1998)

Present *:*

Patrick Mtsetfwa - Chairman

Elliot Dlamini - Guard Captain

Abednego Ncongwane - Secretary

Drivers

All Security Personnel

1. Opening of the meeting.

The meeting was opened with prayer by Guard Sikelela Dlamini.

2. Minutes of the last meeting

There no minutes from the last meeting read.

3. General Increment

The Chairman firstly addressed the gathering about the 10% increment which was a general increment.

4. Transport

Guards passed out one vote that they will as from the 18th May 1998 walk from camps to satellite station and mobile workshop to wait for a transport to save time.

5. Fire Woods

All guards requested to have firewood in their posts as it is cold and new overcoats.

6. Matters arising from the minutes

Most of the guards raised a motion that they are being ill-treated by their supervisors excluding their Sergeants. They complained of being forced to sign warning letters that are uncalled for. The supervisors are always not prepared to listen to their requests e.g if they want to change shifts to another, the Supervisors will resist to allow them as guards.

The Supervisors are always against them as guards like some Supervisors call them Edwin's people.

Some of the guards reported that they were beaten by the Supervisors but the case was not properly handled. Supervisors should be exemplory [exemplary] so that we as guards can copy what is done by them.

7. Setting up of a Committee

The guards set up a committee which will forward their grivances [grievances] up until the end. The guards pointed out that they no longer need all the supervisors excluding the two sergeants. The guards told them that they have heard [had] enough because the downfall of the department is caused by them as Supervisors. The demotion of them will be very fair.

The Committee was made of the following:

(1) Patrick Mtsetfwa
(2) Abednego Ncongwane
(3) Elliot Dlamini
(4) Johaness Nkhambule
(5) Clement Dlamini

The above committee was requested after the closure of the meeting to be together

Chairman
P. Mtsetfwa"

17. About the 25th June 1998 the administration manager of the Respondent a Mr Len Hudson called a meeting to hear the grievances which had been filed by the guards. Each of the supervisors was called to answer the charges.

18. The supervisors were called into the grievance hearing individually. According to the first Applicant he appeared at the hearing and denied all the charges that are contained in exhibits **C** and **D**.

The first Applicant further stated that there was no one at the hearing who implicated him in any form of misconduct. The first Applicant was thereafter excused from the hearing.

19. The first Applicant was however not told what the outcome of the grievance hearing was. Instead he was told to go back to work. The second Applicant gave a version similar to that of the first Applicant. After the grievance hearing the Applicants carried on with their work.

20. Meanwhile one of the instructors, Mr Paul Ndwandwe was implicated in certain misconduct which the guards had raised in the grievance hearing.

He was called to a disciplinary hearing and subsequently dismissed from work in the year 1998. The details of his dismissal are not relevant to this case.

21. On the 30th June 1999 the first and second Applicants were individually served with letters terminating their employment with the Respondent. The letters were served by Mr Edwin Mbingo who then was the Respondent's human resources manager. Mr Mbingo was also called as the first witness for the Respondent at the trial.

22. The letter terminating the first Applicant's contract of employment is dated 30th June 1999. It was introduced in Court as exhibit **A.** The letter terminating the second Applicant's contract of employment as also dated 30th June 1999 and was introduced in Court as exhibit **E.** Exhibit **E** is worded in a manner similar to exhibit **A** save for the identity of the addressee.

23. Exhibit **A** reads as follows;

"Inyatsi Construction Ltd T/A
Inyatsi Superfos Roads
Bethany Area, Matsapha

P.O.Box 147, Kwaluseni, M201

Swaziland

Telephone:(+268)5184583, 4347518

Telefax (+268) 5185520, 5185436

Telex: 2397 WD

30th June 1999

Mr Mecco Maseko CO293,

C/O Inyatsi Superfos,

P.O.Box 147,

KWALUSENI

M201

Dear Mecco,

The Management of Inyatsi Superfos regret to inform you that you are retrenched from 30th June 1999 although notice to pay to which you are entitled will be paid as per the Labour Law. Despite our strategy of tendering for the Mbabane-Ngwenya contract at a very competitive price, the Government has chosen a foreign competitor

at a price E7 M higher, and we have no choice but to accept this decision.

What we should like you to know is that this negative attitude to our company by Government has nothing to do with the high quality of work that you, as employees, have given us over the years.

You should know, too, that we are not asking to be spoonfed by the Government. Our expectation is to be treated fairly, as we believe that we can compete with any company on even terms.

We remain uncertain of our future and have to scale down in the absence of work.

We intent to continue tendering, in the hope that sense will prevail ultimately, and, should we be awarded another contract, please contact us immediately, if you require employment, and we shall endeavor to employ you again , if possible.

We thank you for your dedicated service and assistance over the years, and deeply regret having to terminate your employment in the current difficult economic climate.

Yours sincerely

E.J. MBINGO

PERSONNEL MANAGER"

24. According to the contents of the exhibits **A** and **E** the Applicants were retrenched for economic reasons. The Respondent alleged that it did not have work for the Applicants. The work shortage was allegedly due to the Respondent's failure to secure a government tender for a proposed new road known as Ngwenya-Mbabane. The Respondent had planned to work on a new road upon completing the Mbabane–Matsapha road. This issue will be discussed further in paragraph 34 below.

25. The Applicants argued that they were unfairly dismissed from work and not retrenched. The dismissal was unfair because the Respondents had no valid reason to retrench them. The Applicants averred that the reason given in exhibits **A** and **E** for the retrenchment is a ruse designed by the Respondent to justify the dismissal.

26. The Applicants argued further that the reason for the dismissal was the resolution which had been taken by the guards at their meetings dated 20th March and 18th May 1998. The minutes of those meetings are marked exhibits **C** and **D** and have been reproduced in paragraphs 14 and 16 above.

According to the Applicants, the security guards applied pressure on the management as a result of which the Respondent dismissed the Applicants.

27. In exhibit **C** the guards resolved inter alia that the Applicants should be demoted from their positions. A relevant portion in exhibit **C** reads as follows;

"These problems are pushing the department to [into] a dark future and it can end up being close [closed] because of the Chief Security Officer and Instructors. We as workers of [in] the department [have] decided to raise the point of **demoting the Chief himself and the Instructors. The demotion can solve all the above…."**

(emphasis added)

28. It is common cause that at the time of the resolution which had been taken by the guards, there were three (3) instructors at the Respondent's workplace namely the first and second Applicants and Mr Paul Ndwandwe.

29. The Applicants further referred to a phrase in exhibit **D** in which the guards repeated their demand to management to demote the supervisors. According to the Applicants the pressure from the guards mounted and resulted in the Respondent dismissing the Applicants under the guise of retrenchment.

30. In exhibit **D** the guards established a committee which was mandated to pursue their grievances *up until the end.* The Applicants interpreted this phrase to mean that the guards will not rest until the Applicants are removed from office. The Applicants argued that, the wish of the guards has been fulfilled. The "*end"* which the guards wished for as stated in exhibit **D** has been achieved in the dismissal of the Applicants and Mr Paul Ndwandwe.

31. The Applicants further challenged their retrenchment on the basis that it was contrary to The Employment Act. The Applicants argued that the retrenchment was not based on some demonstrable economic rationale. It was unreasonable and therefore in breach of section 42 (2) of The Employment Act. This section provides as follows:

"42. The services of an employee shall not be considered as having been fairly terminated unless the employer proves –

(a) that the reason for the termination was one permitted by section 36 ; and

(b) that, taking into account all the circumstances of the case, it was reasonable to terminate the service of the employee".

32. The Respondent has denied that the retrenchment was unreasonable or unfair. The Respondents argued that the decision to retrench the Applicants was based solely on economic difficulties which the Respondent was facing. The retrenchment had no bearing on the grievances which had been raised by the guards.

33. According to the Respondent, the guards' grievances were dealt with and finalized at the hearing of the 25th June 1998. At that hearing only one instructor was implicated in certain misconduct. Mr Paul Ndwandwe was accused of having assaulted certain security guards. He was subsequently called to a disciplinary

hearing. He was found guilty of misconduct and dismissed. The first and second Applicants returned to work. The guards were admonished to maintain peace among themselves and the instructors (Applicants). That (according to the Respondent) brought the grievance matter to an end.

34. About 1998 the Swaziland Government had put out to tender a proposal to construct a public road that would connect two (2) towns namely Ngwenya and Mbabane (also part of the MR3 route). The road has been referred to by the parties as Ngwenya–Mbabane road. The Respondent did put in an offer to construct that road.

35. According to the Respondent, when they retrenched about three hundred (300) employees in 1998, they had high hopes that their offer for the Ngwenya-Mbabane road would succeed. The Respondent anticipated a need to hire more security guards at the commencement of the proposed roadworks. The Respondent decided to retain the services of the instructors (Applicants) so that they could train the expected security guards.

36. In 1999 the Respondent learned that its offer to construct the Ngwenya- Mbabane road did not succeed. The Respondent

concluded that it had no further work for the Applicants. A decision to retrench the Applicants was then taken.

37. The Respondents stated further that after the retrenchment of the Applicants, the Respondents did not hire any new instructors. The existing security guards had been trained already. There was no need for further training. The Respondents therefore had no further need of instructors (Applicants).

38. The Applicants argued further that they were retrenched in a manner that is procedurally irregular and unfair. Both Applicants alleged that they were not consulted before a decision to retrench them was taken.

Accordingly they argue that they were denied a chance to make a contribution in order to avert the retrenchment.

39. The first Applicant testified that a letter of retrenchment, exhibit **A**, was served on him on the 30th June 1999 while he was on duty. He was ordered to leave work immediately, which he did. Exhibit **A** has been reproduced in paragraph 23 above. The retrenchment was with immediate effect.

40. The second Applicants' s testimony is materially similar to that of the first Applicant on this issue. He was on duty on the 30th June 1999 when a letter of retrenchment, exhibit **E**, was served on him**.** He was told that he had been retrenched and that he must leave work immediately. He complied.

41. Mr Mbingo confirmed that he delivered the letters of retrenchment exhibits **A** and **E,** the same day the Applicants were retrenched. His evidence reads as follows;

> "AC But you confirm that the letters [exhibits **A** and **E**] were given on the date on which they [Applicants] were told that they were being retrenched.
>
> EJM I confirm".

(Record Page 184)

42. The first paragraph of both exhibits **A** and **E** reads as follows;

> "The Management of Inyatsi Superfos regret to inform you that you are retrenched from 30th June 1999 although notice to pay to which you are entitled will be paid as per the Labour Law"

It is clear from these statements that the Respondent communicated its decision to retrench the Applicants the same day and time the decision was implemented. These statements further meant that the termination was without notice.

43. The Respondent has denied that it failed to consult the Applicants regarding the possibility of a retrenchment. The Respondent's first witness Mr Edwin Mbingo testified that the retrenchment exercise was under his supervision as human resources manager. Mr Mbingo stated that all employees of the Respondent were notified in time and consulted regarding the pending retrenchments. The notification and consultation regarding the retrenchments was done through the Workers Council and not with the Applicants themselves.

44. About June 1999 the managing director allegedly instructed Mr Mbingo together with other officials of the Respondent to assemble the Respondent's employees in a meeting. At that meeting the managing director allegedly informed the employees that the Respondent had failed to secure a tender for the Ngwenya –Mbabane road.

45. According to Mr Mbingo there were two (2) categories of employees at the Respondent's workplace. One such category was the salaried staff. The other was the hourly-paid employees. He stated that all hourly-paid employees were represented by the Workers Council in meetings with management. The agreement that the Respondent reached with the Workers Council benefited all the hourly-paid employees including the Applicants.

46. Mr Mbingo added that the first and second Applicants belonged in the hourly-paid category. He then introduced to the Court exhibits **R2** and **R7**. These are salary advise slips of the second and the first Applicants respectively. These exhibits indicate that each of the Applicants was paid his salary calculated at the rate of Six Emalangeni Twenty One cents (E6.21) per hour. Mr Mbingo tendered these exhibits as proof that the Applicants were hourly-paid employees.

47. The Applicants have not disputed the allegation that their monthly payment was calculated based on the number of hours worked but subject to an agreed rate as aforestated. Furthermore, the Applicants have not challenged the contents of exhibits **R2** and **R7**. What the Applicants deny though is that

they were represented by the Workers Council at management meetings.

48. Both Applicants testified that they had not been notified concerning the managing director's meeting. As a result they did not attend that meeting. The Respondent has conceded this allegation.

49. In his evidence Mr Mbingo did not give any further detail regarding the managing director's address to the employees. As a result there is no evidence before Court to support the Respondent's contention that the retrenchment of the Applicants was discussed at that meeting. The issue was whether consultation took place before a decision to retrench the Applicants was taken.

50. What compounds the problem is the fact that the Respondent did not produce the minutes of the managing director's meeting with the employees.

As a result the Court has no evidence as to what was discussed at the retrenchment meeting with management and what resolution was taken if any, and based on which facts?.

51. The missing evidence is crucial to the Respondent in support of its assertion that consultation did take place. The Court must get to the detail of that consultation in order to make its own assessment whether or not there was a valid reason to retrench. Thereafter the Court must further make its assessment whether the procedure that was applied to retrench these two (2) Applicants was fair or not. That assessment is not possible without evidence.

52. The Applicants distanced themselves from the establishment and function of the Workers Council. The Applicants argued that they were neither invited nor participated in the appointment of the office bearers of the Workers Council.

53. The Applicants denied that the Workers Council had an automatic right to represent all the employees who were hourly-paid. In particular the Applicants denied that they were represented by the Workers Council in the alleged retrenchment discussion or any meeting whatsoever.

The Applicants argued further that they never gave the Workers Council any mandate to represent them in the retrenchment meeting or at all. The Applicants accordingly maintained their

position that the retrenchment was implemented without notice, bona fide reason or consultation.

54. Thereafter the Respondent introduced a document which is headed "*Collective Agreement".* The preamble to this document reads as follows;

"**COLLECTIVE AGREEMENT"**

Between

INYATSI CONSTRUCTION LIMITED

t/a Inyatsi Superfos

And

INYATSI WORKERS COUNCIL …".

This document has been introduced as exhibit **R12**.

55. According to the Respondent, exhibit **R12** is a collective agreement that was applicable at the workplace during the Applicants' term of office. This document was allegedly used to regulate relations between the Respondents and its employees who were in the hourly-paid category.

56. Exhibit **R12** was introduced to prove that the Inyatsi Workers Council had the general authority to represent the hourly-paid employees in negotiation with management. Furthermore, exhibit **R12** was meant to prove that the said Workers Council was the legitimate representative of the Applicants particularly at the retrenchment meeting. The Respondent argued that despite the absence of a specific mandate from the Applicants, the Works Council was empowered by exhibit **R12** to represent the Applicants in the retrenchment meeting.

57. According to the Respondent they were justified in terms of exhibit **R12** to give notice to and to conduct a consultation with the Workers Council regarding the retrenchment of the Applicants. There was therefore no need to consult the Applicants in person on the matter.

58. The Reference to exhibit **R12** created a need for the Court to examine its legality. This exhibit is in a form of a typed document that was presented in three (3) pages and contains eight (8) paragraphs. This document has no signature at all. In addition, it has no execution clause. The absence of an execution clause makes it difficult for the Court to determine whether this exhibit is a complete document as it stands, or it

is a portion of a document whose remainder is not before Court.

59. It is common practice in our jurisdiction for formal documents, especially written agreements that are brought before Court to have an execution clause. An execution clause provides an orderly ending in a written agreement. It further makes provision for the execution date of the agreement to be inserted and space for the signatures of the contracting parties to be appended. However the absence of an execution clause does not necessarily affect the validity of a lawfully executed written agreement. It is however advisable to provide an execution clause in written agreements.

60. Exhibit **R12** has been introduced as a binding agreement between the Respondent and the Inyatsi Workers Council. This document however fails to meet the legal requirements of a written agreement.

61. The absence of signatures on exhibit **R12** deny the document the legitimacy and authority of a written agreement or contract. The learned author explains the importance of a signature in a written contract as follows;

"…a written contract comes into existence when it is signed by all parties…"

RH CHRISTIE: The Law of Contracts in South Africa 4th edition 2001(butterworths) ISBN 0 409 01836 8 at page 122.

62. Another helpful definition of a written contract or agreement provides as follows;

> "A written contract is one which is recorded in writing and which bears the signatures of the parties".

> **J.T.R. GIBSON: WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW 1970 (Juta & co) 6th edition page 315.**

63 A signature of each of the contracting parties is an essential element in a written agreement. The absence of a signature renders the purported agreement nothing more than a documented discussion. Exhibit **R12** is accordingly fatally defective by reason of the absence of signatures of the intended parties. At common law exhibit **R12** is not an agreement . The

contents therein are not binding and therefore not applicable to this matter.

64. Exhibit **R12** purports to be a collective agreement. This agreement however, fails to meet the requirements of a collective agreement. Collective agreements are regulated under The Industrial Relations Act No. 1 of 2000 (as amended). This Act states as follows in section 55;

"55 (1) A collective agreement shall –

(a) be in writing and signed by the parties to the agreement;

(b) .....

(c) be for a specific period of not less than twelve months and not more than twenty four months, unless modified by the parties by mutual consent;

(d) ....

(2) After a collective agreement has been signed by the parties, it shall be submitted to the Court with a copy to the Commissioner of Labour together with a

request by the parties for the registration of the agreement by the Court.

(3) A collective agreement shall take effect on any date agreed upon by the parties in writing and may contain retrospective provisions.

(4) …"

65. Section 55 is couched in a mandatory language. In order for a collective agreement to be valid it must be **in writing and signed** by the parties to it. Exhibit **R12** has not been signed by any of the intended parties. The absence of a signature renders the document (exhibit **R12)** fatally defective. It is not a collective agreement within the meaning of section 55 of the Industrial Relations Act. At best exhibit **R12** appears to be an incomplete draft. In that case it is not binding at all on the parties before Court.

66. Furthermore, section 55 (3) of the Act requires that the date on which the collective agreement shall take effect should be agreed upon by the parties **in writing.** Exhibit **R12** is further defective in that it has no commencement date. That means that even if the document had been properly signed by the parties, the commencement date would still be relevant to the

Respondent. The Respondent has to show that the agreement was applicable and binding on the parties at the material time. This requirement can be satisfied by the Respondent by referring to the commencement date which should also be **in writing**. That means exhibit **R12** is also in breach of section 55 (3) of the Industrial Relations Act. It is noted by Court that a collective agreement has an expiry date.

67. The Court therefore finds that exhibit **R12** is a defective document for reasons aforementioned. No reliance therefore will be placed on this document. These flaws were brought to the attention of the Respondent's counsel during the trial. Nothing was done to address that irregularity.

68. Since the Court has dismissed exhibit **R12** as a defective document it is not necessary therefore to examine its contents regarding the alleged authority of the Workers Council. The Respondent cannot use exhibit **R12** to prove its case.

69. The Court has noted that there is no allegation from the Respondent that the Applicants are a party to exhibit **R12**. Even if exhibit **R12** was binding on the Respondent and Inyatsi Workers Council, it is difficult to imagine how it could be binding

on the Applicants who are not party to it and have never associated themselves with its contents.

70. The Court finds that whatever was discussed and/or agreed to at the retrenchment meeting between management and the Workers Council is not binding on the Applicants. The Workers Council had no mandate to represent the Applicants. As a result there was no consultation between the Applicants and the Respondent preceding the retrenchment.

71. Even if the Court had found exhibit **R12** to have been signed and properly executed, and further found that the Workers Council had authority to represent the Applicants at the retrenchment meeting with management, that was not the end of the matter. The Respondent had a further duty to demonstrate with evidence that though consultation took place the parties failed to avert the retrenchment. The Respondent failed to adduce the necessary evidence in support of its defence especially regarding representation and consultation.

72. The evidence of Mr Mbingo indicates that when the Respondent issued the retrenchment letters exhibits **A** and **E** they were

relying on two (2) separate consultations. There was a consultation which the Respondent alleges took place at a meeting with management. At that meeting it has been alleged that the Applicants were represented by the Workers Council. Then there was another consultation which allegedly took place at a meeting which had been called by the Workers Council. At the latter meeting the Respondent alleged that the Applicants were represented by the Workers Committee. The latter meeting is dealt with later in this judgment.

73. The establishment and operation of the Workers Council is governed by section 52 of The Industrial Relations Act. The Respondent as employer was authorized by this Act to establish a Works Council at its workplace. The Respondent had the requisite number of employees demanded by the Act to establish a Works Council, for instance a minimum of twenty five (25). The parties have referred to a Workers Council in the trial when they actually meant a Works Council.

74. This Act requires a written constitution in order for a Works Council to operate. Section 52 (2) of the Act provides as follows;

> "A Works Council **shall** be established and conducted in accordance with a **written constitution** submitted to the Commissioner of Labour."

(emphasis added)

It is clear from the reading of section 52 (2) that the requirement of a written constitution is mandatory.

75. The Respondent has failed to adduce evidence to show that the Works Council it relied on was established under a written constitution. There was no constitution that was mentioned or produced before Court. The Respondent has accordingly failed to satisfy the Court that the Works Council was lawfully constituted. In the circumstances the Court finds that the Works Council operated contrary to the peremptory provisions of section 52 (2) of the Industrial Relations Act. Even if a written constitution had been produced that would not be the end of the enquiry. The Respondent had an additional duty to demonstrate with evidence that the business of the Works Council was conducted in accordance with the provision of the constitution.

76. In the absence of the a written constitution, it follows that the operation of the Works Council was unlawful.

The Applicants are entitled to refuse to be associated with an illegal entity as its representative in a meeting. There was no Works Council within the meaning of the Act established at the Respondent's workplace, at the time the Applicants were retrenched.

77. The resolution to retrench the Applicants, which allegedly was taken at the meeting involving the Works Council is therefore a nullity. The Court will not place reliance on that resolution.

78. The second meeting that was mentioned by Mr Mbingo, was called by the Works Council. The Works Council allegedly met about June 1999 to discuss the retrenchment of the Applicants. Mr Mbingo attended that meeting as well.

79. The Works Council allegedly resolved that the Applicants should be retrenched. An important factor that was considered was the nature of the work that the Applicants did. They were instructors. Their duty inter alia was to train the guards.

80. According to the Respondent there was no further need to train new guards. The existing guards were trained already. The Respondent concluded that it had no further work for the Applicants.

Thereupon the Respondent assigned to the sergeants the remaining work which the Applicants were entitled do.

81. The Applicants testified that they had not been invited to attend the meeting of the Works Council aforementioned, and as a result they did not attend same. This statement was conceded by the Respondent. As a result, the Applicants dissociated themselves from whatever discussion and resolution that resulted from that meeting.

82. Mr Mbingo insisted however that the Applicants were represented in all the Works Council meetings by the Workers Committee including this retrenchment meeting. The Respondent consulted with the Workers Committee at the retrenchment meeting. The resolution that was taken at that meeting is therefore binding on the Applicants. According to Mr Mbingo all hourly-paid employees at the Respondent's undertaking were invariably represented by the Workers Committee in meetings with the Workers Council.

83. The evidence of Mr Mbingo reads as follows in response to a question from the Applicants Counsel;

> "AC Mr Mbingo you informed this Court that both Applicants were members of the workers' council and my instructions are that both applicants were never members of the workers' council, what would you say to that ?
>
> "EJM They were not members of the workers' council but **they were represented by the workers' committee** which formed part of the workers' council".
>
> (emphasis added)
>
> (Record page 181)

84. The Court has noted that the Works Council meeting in which Mr Mbingo has alleged that the Applicants were represented by the Workers Committee, was defective for another reason.

85. According to Mr Mbingo, the security department had a representative at the Works Council meetings named Mr. Patrick Mtsetfwa. The Applicants were therefore represented by Mr

Mtsetfwa at the retrenchment meeting which had been called by the Works Council.

86. The evidence of Mr Mbingo reads as follows on this point;

> "AC Can you mention three members of the workers' council which were there during 1998-1999 just before the Applicants were retrenched.
>
> EJM There was **Patrick Mtsetfwa who was representing the Security Department**, there was Boy Dlamini who was representing the Sites, and Albert Mbhambane [sic] representing the Workshop".
>
> (Emphasis added)
>
> (Record page 182)

87. The Applicants argued that they did not appoint Mr Mtsetfwa as their representative at the retrenchment meeting or at all. The Applicants were not even aware that there was a retrenchment meeting in progress in which their contracts of employment

were being discussed, (and the same applies to the retrenchment meeting which had been called by the managing director). As far as the Applicants are concerned Mr Mtsetfwa imposed himself as a representative since he had no mandate from the Applicants.

88. In terms of annexure **D**, Mr Patrick Mtsetfwa was appointed chairman of the committee which the security guards had established to convey their grievances to management. The Respondent argued that the same Mr Patrick Mtsetfwa appeared before the retrenchment meeting and allegedly claimed to represent the Applicants.

By so doing Mr Mtsetfwa placed himself in an invidious position. He voluntarily subjected himself to a duty to serve two (2) competing and conflicting interests.

89. Mr Mtsetfwa was not just a mere representative of the guards, he was one of them. He was also chairman of the committee that was elected to pursue the interests of the guards until fulfilment. The interests of the guards were also his personal interests. In as far as Mr Mtsetfwa and the guards were concerned the Applicants were the adversaries who deserved to be demoted.

90. Mr Mtsetfwa approached the retrenchment meeting deliberately carrying two (2) competing and contradictory assignments. As a guard and a representative of the guard's committee, Mr Mtsetfwa's duty was to denigrate and vilify the Applicants in order to jeopardize their chances of retaining their jobs. Yet as an alleged representative of the Applicants he had a duty to defend and compliment the Applicants to the point of protecting them against the retrenchment.

91. No matter how honest, diligent and principled a man is, he cannot serve two (2) competing masters with matching excellence. He will invariably love the one and compromise the other. Likewise Mr Mtsetfwa could not discharge these two (2) competing assignments with absolute commitment and dedication. The end result was that Mr Mtsetfwa pursued his own interest at the retrenchment meeting and sacrificed justice and fairness in the process, to the prejudice and detriment of the Applicants.

92. Although Mr Mtsetfwa appeared at the retrenchment meeting, he had no genuine intention to represent the Applicants. He was incapable anyway of representing the Applicants in this or any other meeting in light of the conflicting interest he was facing. A disingenuous representative, is not a representative in the eyes of the Court.

93. The Court accordingly finds that the Applicants were not represented at this retrenchment meeting either. The Applicants were accordingly deprived of an opportunity to make representation before a decision to retrench them was taken. The Applicants' right to a fair retrenchment was accordingly denied. This is another reason the Court finds that the retrenchment of the Applicants was unfair.

94. Even if the Works Council was lawfully constituted and its meetings were legally compliant, this particular retrenchment meeting would still be set aside on account of the irregularity involving Mr Mtsetfwa. The conduct of Mr Mtsetfwa denied the Applicants the right to an honest and fair representation in a retrenchment consultation.

95. The Respondent was aware of the hostile attitude of the guards toward the Applicants. Exhibits **C** and **D** are written grievances which the guards forwarded to the Respondent demanding immediate disciplinary action to be taken against the Applicants and their colleague Mr Paul Ndwandwe. The guards even suggested that the Applicants be demoted.

96. The Respondent's administration manager Mr Len Hudson convened a meeting to hear the grievances. The Respondent was therefore aware that Mr Patrick Mtsetfwa harboured hostile feelings toward the Applicants.

As a result Mr Mtsetfwa could not sincerely and fairly represent the Applicants at the retrenchment meeting. The Respondent took no steps to protect the Applicants against an obviously hostile and self imposed representative. The Respondent's conduct indicates a lack of interest in conducting a fair and lawful retrenchment. What mattered to the Respondent was the removal of the Applicants from work.

97. The Respondent issued the letters of retrenchment exhibits **A** and **E** knowing that it is implementing a decision of the Works Council which had been obtained irregularly and unfairly. The Respondent's conduct lacked the bona fides required of an

employer in a retrenchment exercise. This is another reason the Court finds that the retrenchment of the Applicants was substantially irregular and unfair.

98. The Respondent has failed to advance cogent reasons before Court to justify her decision to retrench the Applicants. The reason given by Mr Mbingo which appears in paragraphs 79-80 above falls short of the required - bona fide reason to retrench.

99. According to Mr Mbingo the Respondent had no further need for the services of the Applicants as trainers. The Applicants inter alia, worked as trainers of the guards. The existing guards were trained already. The Respondent decided that it had no further work for the Applicants and thereupon proceeded to retrench them.

100. It is apposite at this stage to reproduce the evidence of Mr Mbingo on this issue;

"RC And How was it decided that the Applicants would be the ones to be retrenched?

EJM Looking at the nature of their work that they were responsible for training the guards and at that time we did not have the function of training guards it was interceptive [imperative] that they can be retrenched"

(Record page 172)

101. It is clear from the evidence of Mr Mbingo that the Respondent focused its whole attention on the fact that the Applicants worked as trainers (instructors) of the guards. As a result, the Respondent failed to take into consideration the other work which the Applicants did. The second Applicant for instance, did additional work of operating a two-way radio communication system and further repaired the gadgets on which the radio operated. He was qualified in doing this work. He had been trained in the Republic of South Africa.

102. In addition to training guards, the Applicants further supervised and allocated work to the guards on a daily basis. Mr Mbingo acknowledged this fact in his evidence.

103. The Respondent failed to investigate the nature of the work and the personal circumstances of the Applicants before retrenching them. It has been noted by Court that no consultation took place between the Applicants and the Respondent before the latter took a decision to retrench the former. The Respondent's conduct denied the Applicants a chance to make their contribution in order to prevent the retrenchment from taking place.

104. A retrenchment means a dismissal because the employee is redundant.

"M Brassey (et al): The New Labour Law, Juta and Co (1987) ISBN 0 7021 1828 1 at page 279 foot note 1".

105. The employer carries the burden to prove that the retrenched employee was redundant, and that the retrenchment exercise was legally compliant.

The Employment Act section 42 (2)

106. The Respondent's second witness Mr Abednego Ncongwane, testified that there was once a meeting of the hourly-paid employees of the Respondent which took place at Ezulwini town

near the satellite television station. The Respondent had a temporary office in that area. The meeting had been called by the Works Council.

107. Mr Ncongwane together with certain of his colleagues were notified about this meeting by their representative at Works Council namely Mr Mtsetfwa. This witness did not remember the date or period of this meeting.

108. Mr Ncongwane together with his colleagues who attended the Ezulwini meeting, were allegedly informed by the Works Council that there was a retrenchment pending at the Respondent's workplace. This witness did not state when was this retrenchment scheduled to take place, which employees were likely to be affected and what was the rationale for same. Mr Ncongwane did not clarify whether or not the proposed retrenchment was ever implemented and if so when and who was affected?. It is unfortunate that the Respondent did not call Mr Patrick Mtsetfwa as a witness in this trial. His evidence was crucial to the Respondent's defence.

109. Mr Ncongwane was not aware whether or not the Applicants were present at that meeting. He confirmed that he did not invite the Applicants to attend the Ezulwini meeting. He quickly

added that it was not his duty to do so. He was not aware whether any person had invited the Applicants to that meeting. The Applicants stated that they had not been invited to attend that meeting and that they did not attend same. This evidence by the Applicant remains uncontroverted.

110. Mr Ncongwane's evidence does not assist the Court. It is not clear what the relevance of this meeting is to the matter before Court. There is no connection between the Ezulwini meeting referred to by Mr Ncongwane and the retrenchment of the Applicants. Also the Court has not been told what resolution if any, was taken at the Ezulwni meeting and how it affects the Applicants, if at all.

111. It is clear though that the Works Council did not consult the Applicants on the alleged pending retrenchments. The absence of consultation with the Applicants, and the absence of evidence regarding the resolution taken (if any) renders the Ezulwini meeting irrelevant to the matter before Court.

112. The Court has already pointed out that Mr Patrick Mtsetfwa could not represent the Applicants in any meeting or forum for reasons stated above. That means that the Ezulwini meeting is also defective for lack of representation. The evidence of Mr

Ncongwane is not helpful to the Court. The Court is unable to benefit from that information.

113. In terms of section 36 (j) of The Employment Act No. 5/1980 as amended, an employer is entitled to retrench a redundant employee. The employer must provide a bona fide reason to retrench. The retrenchment must not be used as a guise to remove an unwanted employee from the workplace.

114. Section 35 (2) of the Employment Act provides as follows;

"No employer shall terminate the services of an employee unfairly"

That means that the reason for the retrenchment as well as the procedure used to implement that retrenchment must be fair.

115. Every employer who is faced with a necessity to retrench must consult the employee concerned or the employee representative. Consultation is beneficial to both the employer and the employee in many ways.

116. Consultation gives the employer an opportunity to explain the reasons for the proposed retrenchment. This is the point where the employer will demonstrate with supporting evidence that the suggested retrenchment is bona fide and necessary for the survival of the undertaking.

117. The employee may require access to the financial and other records of the employer in order to verify the reasons advanced for the retrenchment. The employee may suggest an alternative to the retrenchment.

The employer must engage in a meaningful discussion with the employee to find ways to avoid the retrenchment. Access to records will enable the employee to make an informed decision on the matter.

118. In order for consultation to be meaningful, the employer must give the employee sufficient notice of the proposed retrenchment. A delayed notice may in some cases result in a denied consultation. Such delay may jeopardize any chance of a meaningful consultation and/or implementation of suggested alternatives. The point is to avoid a retrenchment which is avoidable.

119. In the consultation, the personal circumstances of the employees concerned will have to be considered. Some employees may wish to make sacrifices in order to avoid the retrenchment and save their jobs. Such sacrifices may include lawful salary reduction, temporary lay-off, extended unpaid leave, demotion, transfer to another job or department and any other cost saving measure.

RYCROFT AND JORDAN: A GUIDE TO SOUTH AFRICAN LABOUR LAW 2nd edition (Juta & co) 1992 ISBN 0 7021 2806 6 at pages 233-234.

120. In this case the absence of consultation denied the Applicants a chance to exercise options that were available to them to avert the retrenchment. The Applicants could have opted to continue with their work which was assigned the sergeants for a lawful reduction in salary. They also could have agreed to be demoted to work as guards or any other junior post for less pay. The Applicants had worked as guards before they were promoted to be instructors. They were therefore skilled in that kind of work

121. There was therefore a possibility that the Applicants could have agreed to the alternatives if they were given a chance. No evidence has been led to indicate that there were no vacancies in the security and the other departments in which the Applicants could fit. The Respondent failed to explore these options.

122. Consultation is an indispensable process in a fair retrenchment. In the absence of a consultation it is inconceivable how else an employer can prove fairness in that retrenchment. A genuine consultation will minimize if not eliminate industrial disputes that often follow a retrenchment. Consultation in a retrenchment exercise is a duty which the employer cannot abdicate.

PHYILLIS PHUMZILE NTSHALINTSHALI VS SMALL ENTERPRISE DEVELOPMENT COMPANY Case No. 88/2004 (I/C) page 13

123. As a matter of fact, the Respondent does not know what would have been the result - had the Respondent consulted the Applicant on the retrenchment. It is however clear to the Court that consultation with the Applicants had a potential to avert

the retrenchment. The Respondent cannot therefore argue that the retrenchment was unavoidable. That conclusion was only possible after a genuine and thorough consultation.

124. The Respondent failed to conduct the necessary consultation with the Applicants. As a result the Respondent failed to give the Applicants a bona fide reason for retrenching them. At the trial the Respondent further failed to give the Court a bona fide reason for retrenching the Applicants.

125. The evidence before Court shows that the Applicants were not redundant. Mr Mbingo testified that some of the work that the Applicants used to do was assigned the sergeants during or immediately after the retrenchment. That clearly indicates that there was still work which the Applicants could do at the time of the retrenchment.

126. The Respondent took work that was ordinarily done by the Applicants and assigned it to the sergeants. Thereafter the Respondent declared the Applicants redundant. It is the Respondent therefore who created a redundancy which otherwise did not exist. The Respondent's motive was to get rid of the Applicants from the workplace.

127. The second Applicant is skilled in operating a two-way radio communication system and in repairing that equipment. He testified that it was part of his duties to teach the Respondent's employees how to use the radio equipment.

128. That communication facility is still in need of maintenance. There is neither allegation nor evidence that the maintenance of the radio gadgets has been phased out. It is not clear therefore why was the second Applicant denied an opportunity to continue with that work.

129. Mr Abednego Ncongwane worked as a security guard at the time the Applicants were retrenched. He was therefore junior to the Applicants. He was promoted to chief security officer after the retrenchment of the Applicants. That means a vacancy was created in the security department to which Mr Ncongwane was promoted. The Applicants were not given a chance to be considered for that position.

This was despite Mr Mbingo's promise to the Applicants at the time of the retrenchment that should a vacancy arise in the security department the Applicants will be considered. Mr

Mbingo did not deny that he made that promise to each of the Applicants.

130. The conclusion is inescapable that the Applicants were not redundant. The Court finds that the Applicants were unfairly and unprocedurally dismissed under the guise of retrenchment. There was no bona fide reason to retrench them.

131. The first Applicant testified that since the date of retrenchment he has not been able to find employment. He is married with three (3) minor children, two of these children attend school. The youngest child is not school-going yet. He has a further dependant namely his mother who is sickly. After the retrenchment the first Applicant has approached the Respondent for work but was told that there are no vacancies.

132. The second Applicant also testified that he has not been able to find employment since the date he was retrenched. He has two (2) minor children who attend school. He has another dependant namely his father who is elderly. The second Applicant has also approached the Respondent for work but was also turned down.

133. The Applicants have pleaded in their application that they were earning a monthly salary of E2, 260-44 (Two Thousand Two

Hundred and Sixty Emalangeni Forty Four cents) each. This allegation was admitted by the Respondent.

134. It is common cause that at the time of the retrenchment the Respondent paid certain sums of money to the Applicants to which they were entitled.

A sum of E6, 828-00 (Six Thousand Eight Hundred and Twenty Eight Emalangeni) was paid to the second Applicant.

135. The second Applicant was made to sign a document upon receipt of this payment namely exhibit **R1**. This payment was for the following items; salary, leave pay, notice pay, severance allowance and additional notice.

136. The first Applicant was paid a total sum of E 6,902-00 (Six Thousand Nine Hundred and Two Emalangeni only) at the time of the retrenchment. This payment was for the following items: salary, leave pay, notice pay, severance allowance and additional notice. The first Applicant was also made to sign a document upon receipt of this payment marked exhibit **R5**. These two exhibits **R1** and **R5** will be dealt with later in this judgment.

137. The Applicants have not asked for re-instatement. Instead they have asked for maximum compensation for unfair dismissal. The Court has a discretion in the award of compensation which admittedly must be judiciously exercised.

138. The Court has taken into consideration the circumstances under which the Applicants were retrenched. In the eyes of the Court the Respondent acted in a manner that shows a callous disregard for the rights and interests of the Applicants at the time of the retrenchment.. This is an appropriate case where the Applicants should be awarded maximum compensation.

139. At the close of the evidence both parties filed heads of argument. In their heads the Applicants have asked for an order for costs of suit. There is however no prayer for costs in their pleadings. The Applicants' pleadings have not been amended.

140. The claim for costs has been made very late in the proceedings and must have taken the Respondent by surprise. It is a procedurally correct principle that litigants should confine their arguments and prayers within the limits of their pleadings. Where the pleadings and heads of arguments are at variance, the Court prefers to look at the pleadings.

In the circumstances the Court is unable to accede to the Applicants' claim for costs.

141. There is one more issue that needs to be mentioned. During the trial, and in the process of cross examining the Applicants, the Respondent's counsel introduced a new defence namely compromise. According to the Respondent, each of the Applicants entered into a compromise at the time when the Applicants signed for and accepted payments from the Respondent of certain sums of money referred to in paragraphs 134 and 136 above.

142. The Respondent referred the Court to a clause that appears in both exhibits **R1** and **R5** on which the defence of compromise is based. That clause reads as follows;

> "I confirm this [payment] represents a full and final settlement of all or any claims, including that of compensation if any, arising from my employment and its termination, and I confirm that there are no other claims outstanding."

143. According to the Respondent this clause constitute the compromise that was entered into in writing by the Respondent and each of the Applicants.

The Respondent argued that as a result of the compromise the Applicants are precluded from prosecuting their claims in Court arising from the retrenchment. The relationship between the parties is no longer regulated by the law relating to employment and retrenchment. Instead it is now regulated by the terms and conditions of the compromise with effect from the date the compromise was concluded.

144. It is noted that the Respondent did not plead the compromise as a defence in its papers before Court. In the Reply which the Respondent filed, dated 28th March 2003, the Respondent confined itself to a defence based solely on the merits of the claim. The crux of the Respondent's defence was that the retrenchment was fair.

145. The Respondent through its council (Mr Dlamini), referred to the compromise as part of the Respondent's defence for the first time during cross examination of each of the Applicants. This approach took the Applicants by surprise.

146. The Court procedure and the rules of Court do not permit one party in a matter before Court to take the other by surprise.

A litigant is required to present his claim or defence in his pleadings with sufficient detail and particularity in order to enable his adversary to know what case he has to meet.

147. The Applicants came to Court expecting to meet the Respondent's defence as pleaded in the Reply. The Reply does not mention the compromise.

148. The Respondent's approach is irregular for two (2) reasons. The defence of compromise was introduced orally during the trial. The reply was not amended. The Respondent breached rule 8 of The Industrial Court Rules, 2007 (Legal Notice No. 165 of 2007).

149. The filing of a Reply is regulated by Rule 8 (1) and (2) which reads as follows;

> "8 (1) A party who is served with an application may attend court on the date stated in the application and deliver **a reply to the application and five copies** of the reply in open court.

(2)The reply **shall be signed** by or on behalf of the respondent and shall contain-…".

(emphasis added)

150. It is clear from a reading of Rule 8 (1) and (2) that the Respondent is directed to file a Reply (defence) which must be signed and it should be delivered together with copies thereof in Court. This requirement clearly indicates that **the reply must be in writing**. An oral Reply (defence) is not acceptable. Since the compromise was introduced orally, it follows that it is in breach of the rule. Consequently the compromise is not before Court for adjudication. The Respondent's attempt to introduce an oral item of defence is accordingly dismissed.

151. The common law confirms the provision of Rule 8 (1) and (2) regarding the filing of a reply as follows;

> "Every pleading must contain a clear and concise statement of the material facts upon which the pleader relies for his claim, **defence or answer** to any pleading, as the case may be, **with sufficient particularity** to enable the opposite party to reply to it".

(emphasis added)

HERBSTEIN AND VAN WINSEN: The Civil Practice of the Supreme Court of South Africa, 4th addition (1997), Juta & Co ISBN 0 7021 2990 9 at page 450.

152. A litigant (Respondent) who relies on a defence which has not been pleaded acts in breach of this requirement as well. The Court cannot consider a defence which has been introduced contrary to law.

153. Secondly this defence was introduced very late in the proceedings particularly and at the stage of cross examination of each of the Applicants. This approach denied the Applicants an opportunity to challenge this defence in their pleadings especially the replication. In addition, the Applicants were denied an opportunity to address this issue in their evidence in chief.

154. A compromise can be challenged on several grounds including fraud and *justus error*. The principle is well stated by the learned author as follows;

"A compromise, even if made an order of court, may be set aside on the ground of fraud or *justis error …"*

GIBSON J.T.R.: supra at page 367

155. If the defence of compromise were to stand, it would prejudice the Applicants to the extent that a miscarriage of justice would inevitably occur. This irregularity was brought to the attention of the Respondent's counsel during the trial. The Reply was not amended.

156. The Court does not condone the manner the Respondent attempted to introduce this defence. The compromise is not before Court, the Court will not apply its mind to it.

157. The Applicants have claimed maximum compensation for unfair dismissal in the sum of E 27,125-28 (Twenty Seven Thousand One Hundred and Twenty Five Emalangeni Twenty Eight cents)

each. The Applicants have made out a case for maximum compensation. Judgment is hereby granted in favor of the Applicants as follows;

(1) The first Applicant - payment of E27,125-28

(2) The second Applicant - payment of E27,125-28

(3) Each party is to pay its costs.

The Members agree.

_____

D. MAZIBUKO

INDUSTRIAL COURT- JUDGE.

For 1st Applicant : L. Vilakati
2nd Applicant : L. Vilakati -
Vilakati and Company.

For Respondents : S. Dlamini
Robinson Bertram