IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

APPEAL CASE NO. 01/2009

In the matter between:

SWAZILAND BUILDING SOCIETY **APPELLANT**

VERSUS

SWAZILAND UNION OF FINANCIAL INSTITUTIONS AND ALLIED WORKERS **1st RESPONDENT**

AND

EMPLOYEES OF THE APPLICANT FALLING WITHIN THE SCOPE OF RECOGNITION OF THE FIRST RESPONDENT **2nd RESPONDENT**

CORAM: RAMODIBEDI - JP
ANNANDALE -AJA
MCB MAPHALALA – AJA

FOR THE APPELLANT: MR. M.M. SIBANDZE OF CURRIE AND SIBANDZE ATTORNEYS, MBABANE

FOR THE RESPONDENTS: MR. A.M. LUKHELE OF P.R. DUNSEITH ATTORNEYS MBABANE

Summary

Employee benefits—removal of—Relief against applicant without counter application.

The question as to whether an employer can unilaterally and without agreement, consultations or negotiations remove an existing benefit of a 5% annual merit increment from qualifying employees was considered in the Industrial Court— The main issue to decide was an application to interdict an intended strike—It was ordered that the strike be interdicted—The employer/applicant was ordered to pay the qualifying employees their merit increment—Confirmed on appeal.

JUDGMENT 17™
SEPTEMBER 2010

ANNANDALE-AJA

[1] Under threat of imminent industrial action wherein the two Respondents threatened the Swaziland Building Society with a crippling strike, the Appellant approached the Industrial Court for relief on an urgent basis.

[2] The intended strike action was interdicted but the Court *a quo* further ordered that qualifying employees of the Applicant be paid a merit increment of 5%. It is against this second order of the Industrial Court that an appeal was noted.

PRELIMINARY

[3] The original Rules of the Industrial Court of Appeal were gazetted under Legal Notice No. 11 of 1997, well over a decade ago and the subsequent amendments of the Act and the Rules did not change the present shortcoming. Rule 22 requires of an appellant to file its heads of argument, together with a list of authorities to be quoted in support of each head, not later than fourteen (14) days before the hearing of the appeal. Copies of same are to be served on the respondent, which in turn has no more than four days before the hearing of the appeal to similarly file its heads and list of authorities with the Registrar.

[4] The aim and purpose of this Rule is singularly aimed at assisting the appellant and the respondent in being properly heard during the course of arguing the appeal and the resistance thereto, if any. It is not the intention to create obstacles and difficulties for the parties on appeal, and especially not in order to create an opportunity to generate additional costs. The exigencies of hearing argument in a final decision on appeal by a court of final instance indeed carry the burden of serious responsibility and preparedness.

[5] Before appeals are argued and heard, the initial legal process has to run the gauntlet of either a trial or hearing of argument and applicable oral evidence where needed. Significant resources are channelled into the legal process of the Industrial Court, in order to obtain closure on the matters which are brought before it. In the event that a challenge is laid against the outcome of litigation in the Industrial Court, it requires even more of counsel in order to have the matter yet again adjudicated on appeal.

[6] With this court being the final port of call in the determination of labour or industrial disputes, the attitude of a *diligens paterfamilias et consultus* requires strict adherence to the formal rules of procedure such as timeous filing of heads of argument.

[7] In the present matter, the Court was deprived of considering the heads of argument and the authorities in support of each head relative

of the Appellant before the actual hearing of the appeal in open court. In fact, no heads were filed at all, nor was a motion placed before the court in order to seek justified condonation for late filing of heads and authorities. Magnanimously and in apparent sincere honesty, counsel for the Appellant sought a last minute reprieve at the time when the matter was called by the Registrar. Mr. Sibandze apologised for failing to carry out his responsibilities, citing a number of reasons. We are accepted the apology.

[8] In the end, the court decided to condone the absence of an application for condonation of late filing of heads of argument and authorities, at the same time indulging the Appellant to argue its case without any written heads or authorities at all, instead of striking the matter off the roll, as proposed by the Respondents' counsel. Heads were only filed after the hearing of the appeal.

[9] This unacceptable practice has manifested itself a number of times during the present session. It is not acceptable. Respondents are disadvantaged when they do not timeously receive heads and cannot properly respond to contentions by appellants. The Court which is to decide the appeal is also handicapped in its preparations by not being able to consider and research arguments for and against legal issues, difficult enough under normal circumstances but exacerbated when first ventilated in open court.

[10] It unfortunately requires to be reiterated that indulgences by the Court, such as to let matters be argued on appeal but without affording the opposition and the bench the opportunity to timeously read the heads and apply their minds to the argument and relevant authorities, remains unacceptable. It flies in the face of a fair hearing, good jurisprudence and plain common decency. It is an undesired practice which must not be tolerated at all.

[11] Were it not for the already unduly long delay in enrolling the appeal and the potential of adversely adding to an already hostile environment in the workplace, as is presently evidenced in especially our two neighbouring jurisdictions, the appeal could well have been deemed to be abandoned or withdrawn. Understandably, an application for postponement was outrightly refused.

[12] Accordingly, it is yet again emphasised that litigants who wish to prosecute appeals which originate in the Industrial Court of Swaziland should familiarise themselves with the Rules of the Industrial Court of Appeal. It is necessary to comply with the Rules and it is not an optional extra. In future, as it has been in the not too distant past, uncondoned failure to file heads of argument within the prescribed time limits may well result in a refusal to hear the matter as well as adverse costs orders.

[13] Before I revert to the merits of the appeal itself, having heard the

matter without the benefit of having read the Appellant's heads beforehand, there is yet another issue to be dealt with.

[14] The judgment against which the appeal lies is dated the 29th January 2009. The Notice of Appeal is dated the 16th February 2009 and it was filed with the Registrar of the Industrial Court the following day.

[15] Rule 6 of the Industrial Court of Appeal Rules holds that every appeal shall be instituted by the filing and service of a Notice of Appeal as far as possible in accordance with Form 1, signed by the appellant, and that it shall be done within the period prescribed in Rule 8.

[16]Rule 8 holds that the prescribed period shall be seven days of the date of the judgment appealed against and if it be a written judgment, that the *dies* shall run from date of delivery thereof.

[17] By whatever method of reckoning *dies* as from the 29 January 2009, being the date of the written judgment, it cannot result in the 17th February to still be within the stipulated time limits.

[18] In such an event, the Registrar is enjoined to refuse acceptance of any notice of appeal which is presented after the expiry of the period referred to above.

[19] Also, both Rules 6 and 9 refer to specific forms which have to be used for the respective purposes, as far as is possible.

[20] It is noteworthy that the present Notice of Appeal does not sufficiently follow the prescribed Form in order to properly qualify for the requirement of being as far as possible in accordance with Form I. Counsel must adhere to the stated requirement.

[21] Due to the salient and tried legal principle that an Act of Parliament takes precedence over subservient Rules promulgated under the Act, the Appellant cannot now be blamed. Although the Rules require that Notice of Appeal be filed within seven days (Rule 8 (1)), Section 19 (3) of the Act provides for a period of three months to lodge an appeal. See for example Manzini City Council vs. Workers Representative Council Industrial Court of Appeal Case No, 2/1999 at page 4. The Appellant cannot now be penalised or accused of filing its appeal out of time. We can only trust that this defect shall be attended to within a reasonable time.

The combined effect of the above recorded instances which each could be indicative of a lackadaisical attitude, might well have resulted in a refusal to hear the appeal and an order to pay the respondent's wasted costs. However, the members of the bench are in agreement that instead of setting an overdue and well deserved example, a final warning should rather be sounded to all concerned that the Rules of

this Court must indeed be complied with. We are well aware of the salient principles which apply in the exercise of our discretion, for instance, the prejudice occasioned to adversaries.

Presently, the Respondents did not raise prejudice and disadvantage as serious issues, which otherwise might well have adversely impacted on them. In fact, Mr. Lukhele demonstrated admirable tolerance and adaptability which ultimately resulted in the matter being heard on the allocated date. The Court decided that form should not prevail over substance.

THE MERITS

Because the Notice of Appeal so widely encompasses the issues to decide on appeal, with reference to the applicable portions of the judgment of the Industrial Court, it is quoted in full, *verbatim.* I deliberately refrain from passing any comment on the use of the English Language, which is alien to most of us in any event.

> "1. The Court a *quo* erred in law in finding that notwithstanding that the matter before it, brought under a certificate of urgency and substantiating why the matter should be heard as one of urgency, as opposed to one following the

normal rules of the Industrial Court, was an application by the Appellant for an interdict against the strike that which the Respondent was to institute and which the further Respondents were to participate in;

1.1The Court a *quo* in on the one hand interdicted the strike and on the other, entertained a prayer made by the Respondent in the Answering Affidavit to the effect that:

> *"The Applicant is to pay the qualifying employees the merit increment of 5%; If the Applicant wants to reduce the percentage due to market forces and affordability it must first negotiate with the 1st Respondent,"* when there was no counter application filed of record against the Application brought by the Applicant.

2. The Honourable Court *a quo* erred in law in that in making its Order the Honourable Court made findings of fact when such findings were based on facts in dispute and could not be resolved without resorting to oral evidence, in particular the Court came to incorrect finding of fact that *"indeed the evidence revealed that the applicant had since 2003 been paying the merit increment to qualifying members of the Respondent, although the figure is not specifically mentioned in the Agreement, it was common cause between the parties that it was fixed at 5%. The Applicant therefore*

had no right to unilaterally alter the terms of the agreement between the parties. The affected workers therefore had the right to approach the court to seek redress".

3. The Court a quo erred in that it was not common cause that merit increment had been *fixed* at 5% between the parties indeed this was clearly in dispute on the papers. This was a dispute which could not be resolved on the papers without resorting to oral evidence even in the event, it was a matter for decision before the Honourable Court, which it was not.

4. The Court *a quo* erred in making the Order appealed against in that the Court entertained a matter which was not before it for decision, in particular whether or not the Respondents were entitled to receive a merit increment of up to 5% in that there was only an Application by the Appellant before it and no counter Application by the Respondent" (sic).

[25] Although the first paragraph does not raise any specific dispute, it sets out some of the background to the matter. As a matter of urgency, the Building Society which is now the Appellant, sought relief in the Industrial Court, set out as follows:- (again, *verbatim)*

"1. Dispensing with the usual forms and procedures and time limits relating to the Institution of proceedings and allowing this matter to be heard as a matter of urgency.

2. That a *rule nisi* be issued with immediate and interim effect calling upon the Further Respondents' to show cause on a date to be appointed by the Honourable Court why an Order in the following terms should not be made final:

4 That the demand of the 1st Respondent for a further 2.5% merit increment falls outside of the 1st Respondents scope of Recognition.

5 That the 1st Respondent is not entitled to negotiate a **further** salary increment in the form of the merit increment whilst the Memorandum of Agreement for 2008/2009 on salary increments subsists.

6 The strike action intended to commend (sic) on the 21st November 2008 instituted by the 1st Respondent be and is hereby interdicted.

7 The Memorandum of Agreement signed on the 3rd March 2008 between the Applicant and 1st Respondent is made an Order of Court.

8 That service of this Application upon the 1 Respondent suffices as service upon the Further Respondents.

9 That only employees who were members of the Trade Union *(i.e. the 1st Respondent)* as at the date of the Strike ballot are entitled to take part in the strike action in the event such strike action is lawful.

3 Directing that prayers 2.3. and 2.5. operate with immediate and interim effect returnable on a date to be set by this Honourable Court.

10 Granting costs of this Application in the event that any of the Respondents oppose the Application.

11 Further and/or alternative relief" (sic).

From a mere reading of the prayers for relief, it is immediately apparent that a serious dispute existed between the Building Society and its employees. The Trade Union intended to embark on strike action and the Industrial Court was asked to deal with a demand of "a further 2.5% merit increment" on two different grounds. It also wanted a memorandum of agreement to be declared an order of the court and to

prevent non unionised members to participate in the strike in the event that a lawful strike commenced. The main thrust of the application was to interdict the strike action which was to commence two days after the Court was approached.

The intended strike action was interdicted but in its written judgment which is dated the 29th January 2009, some two months after the interdicted strike, no orders pertaining to the remainder of prayers for relief are made. The reason why the ancillary orders were not made remains unknown.

It follows that it cannot be gleaned from the reserved judgment whether the other aspects of the application fell by the wayside or not. All that can be taken for granted is that the court did order interim relief, which it eventually made final insofar as the strike action is concerned, and that costs of the application were not ordered against the respondents but that each party had to pay its own costs.

[29] The absence of orders with regard to the other prayers of the Applicant did not conclude the matter. To the chagrin of the Applicant, now Appellant, the Industrial Court ordered it to pay a merit increment of 5% to qualifying employees and added that if it wanted to reduce this due to market forces and afford ability, it would first have to negotiate this with the Union.

[30] The thrust of the appeal lies against the 5% merit increment. No issue is taken with the apparent absence of orders with regard to the other prayers or with the qualifying order pertaining to the merit increment.

[31] Cut to the bone, the order relating to a 5% merit increment is appealed against ostensibly because as claimed by the appellant, it was not brought before the court below for decision and in any event, that it never was so that it had been fixed and agreed upon by the parties, giving it some permanence and that before such a finding could be made, oral evidence had to be heard, according to the Appellant.

In its founding affidavit, the Building Society says that historically, in addition to the annual salary increment negotiations, a merit increment of up to 5% had been awarded to qualifying employees based upon individual performance and the overall performance of the institution, as a means of incentivising and rewarding industrious employees and encouraging lesser performers for the following year. However, that since it was instituted in the year 2003, it never was the subject of negotiation, being a management tool to reward and motivate its employees.

The Applicant placed much reliance upon a collective agreement dated the 28th March 2008 between itself and the first Respondent which is mainly to the effect that an across the

> board salary increase of 9.5% shall be awarded to all employees.

[34] The Respondents in turn stated that the 5% merit increment is an established part and parcel of their remuneration package. It is an established right and not a privilege, dependant upon the whims of the employer and that it is also not dependant upon the overall performance of the employer. The Respondents further stated that this is entrenched in their collective agreements.

[35] It is common cause that the Building Society commissioned a remuneration analysis to be done by a consultancy firm which culminated in a report dated June 2002.

[36] The report and its recommendations resulted in its mutual acceptance by the litigants in March 2003. It signifies acceptance of the recommended salary structure (not the total package) as being acceptable to all. Growth from notch to notch in the scales of eight notches would be limited to 5%.

[37] The Union interprets this to be a 5% percent incremental salary

increase based on the basic scales with 8 notches per scale, to be paid to deserving members of the Union, namely those that have reached a particular threshold of their performance rating.

[38] This is in distinct contrast to the view of the Appellant, which regards the 5% increment as a management tool by way of which only certain identified individuals would benefit from a 5% increment while it would also serve to motivate non-deserving individuals to aspire to the increment the following year.

[39] The replying affidavit of the Applicant lucidly sets out its views of the 5% issue. With reference to clause 3.5 of the report on the remuneration analysis, referred to above, and coupled with the memorandum of agreement dated the 14th March 2003, it says that the 5% referred to therein is a *notch* increment which has nothing to do with a *merit* increment or any other type of increment. A further manifestation of the misapprehension under which the applicant labours is found in prayer 2.2 of its

Notice of Motion. There, the Applicant clearly indicates that it views the merit increment as a *further salary increment,* something not yet again open for negotiation.

[40] The heart of the determinative issue lies in this — is the 5% increment an established right of the workers, as was held by the Industrial Court, or is it entirely within the discretion of the

employer, as is contended by the Appellant.

[41] During the course of hearing argument, the question of whether the 5% increment could be subject to a legitimate expectation arose. Mr. Sibandze ably dealt with the issue and argued that in our law, as it currently stands, the doctrine of "Legitimate Expectation" does not have a footing since our jurisdiction does not have an "unfair labour practise" dispensation.

[42] Mr. Sibandze *inter alia* relies on the unreported Appeal Case between Ubombo Ranches vs. Pan Attendants, No. 6 of 1990, where the High Court, then sitting as Industrial Court of Appeal, held that the concept of "unfair labour practise" was ousted from the jurisdiction of the Industrial Court (pages 3 to 5). Since the concept of legitimate expectation goes hand in hand with that of unfair labour practise (Grogan: Workplace Law, Chapter 6 quoted at page 1472 of the Industrial Law Journal, 2009) he argues that this doctrine cannot be implemented to determine whether indeed the employees of the Appellant became entitled to a 5% increment.

It bears well to recall that the Appellant argues from the position that the 5% is a mere bonus, a management tool entirely within its own discretion, never contractually founded nor subject of an agreement. I am in respectful agreement with the contention by the Respondents

that clause 3.5 of the consultant's report, as adopted by both parties in the agreement signed on the 14th March 2003, does not form the basis on which the matter could have been decided.

There, the only overlapping aspect is the referral to "five percent". That this refers to a salary notch increment instead of a performance or incentive bonus is quite clear. The two issues are distinct and separate, the application and reason for its existence quite apart, save for the incidental fact that each refers to "5%".

The Appellant incorrectly argues that the court a *quo* erred in that it mistakenly relied upon clause 3.5 of the consultant's report, as accepted in a memorandum of agreement dated the 14th March 2003, as being the basis for the existence of the 5% merit increment.

The learned Judge stated in his reasons for judgment that in its own papers, the Applicant stated that the merit increment was instituted in 2003 and has never been the subject of negotiation. He then held that it was thus clear that the issue of a merit increment was a standing agreement since 2003 and that relative to the dispute which gave rise to the intended strike and the matter before the court, the signed agreement between the parties of the 28th March 2008 related to salaries only, without reference to the merit increment.

[47] Also, concerning the agreement of the 17 April 2002, the Court held that an agreement was in place between the parties relating to the merit increment. This was based on "SUFIAW 2" (the agreement of 17th April 2002) and not on "SUFIAW 1" (the agreement of 14th March 2003), which is founded upon "SUFIAW 3" (the Report on a Remuneration Analysis and Structuring Assignment of June 2002). The Industrial Court correctly held that in fact, there indeed was an existing and ongoing agreement with regard to a 5% increment.

[48] In order to have held otherwise, namely to have accepted that there was an unresolved and serious dispute between the parties as to the existence or absence of such an agreement and established practice, as the Appellant contends, only then would it have required the hearing of oral evidence to decide the dispute. That this was neither necessary nor a mistake requires the mere consideration of one important factor.

In the agreement between the parties of the 17th April 2002, "SUFIAW 2", the following point is recorded under paragraph (iii) thereof. It reads:

"That the merit increase shall not be paid this year only"

In a short five paragraph memorandum of agreement, fully encompassed in one single page, such a matter cannot be glanced over as insignificant. What it does do is to prominently and inescapably draw attention to the following fact— after the Building Society and the

Union engaged in salary and merit increment negotiations for the year 2002/2003, they agreed that an across the board increase of 10.5% will be paid to all but that in that year only, the merit increase shall not be paid.

From this it cannot be concluded otherwise than that in April 2002 already, the parties mutually accepted the existence of a merit increase and that it was entrenched to the extent that it formed a significant part of negotiations relating to the merit increment and salary. For that particular year, they agreed that it shall not be paid. This did not render the 5% merit increment subject to the exclusive consideration of the applicant, to be used as a discretionary tool to reward and entice.

Indeed, we find and hold that the 5% merit increment went beyond the level of merely a legitimate expectation — it is clothed in the garment of permanence, an established part and parcel of the remuneration package which can only be legitimately withheld after negotiations between the parties and if so agreed.

The Industrial Court held that the issue of the merit increment has been a standing agreement between the parties since 2003. It also rejected the argument advanced on behalf of the Applicant that by demanding the 5% merit increment the respondents would re-open salary negotiations, also that it was wrong for the applicant to unilaterally alter the terms of agreement but equally wrong for the respondents to

decide to engage on a strike as the dispute was clearly one of right. Hence the costs order of each to pay its own costs, together with the orders to interdict the intended strike but also that the qualifying employees were to be paid their 5% merit increment.

[53] In our considered view, the Industrial Court correctly came to the conclusions it did and made appropriate orders, contrary to the contentions of Appellants counsel. That these are issues of law bear no dispute.

[54] It is only with regard to issues of law and not of fact that an appeal may be noted against a decision of the Industrial Court. See unreported Industrial Appeal Case No. 104/2004 — VIP Protection Services vs. Simon Nhlabatsi at paragraph 8 *et seq.* Also, see Section 19 (1) of the Industrial Relations Act of 2000 (Act 1 of 2000).

[55] Mr. Lukhele further convincingly argued that in deciding the matter before it, the Industrial Court was not bound and limited by the prayers for relief which came before it. Indeed, Section 8 (4) of the Act enjoins it, when deciding a matter, to make any other order which it deems reasonable to promote the purpose and objects of the Act. In Moses Dlamini vs. The Teaching Service Commission and Another, unreported Industrial Court of Appeal Case Number 17 of 2005, this principle was clearly enunciated. In its quest to be a court of equity and fairness, a holistic approach requires a broad perspective of the issues

before it. The Industrial Court cannot properly fulfil its functions if it needs to be unduly tethered to form and procedure rather than to deal with the substance of the matter.

[56] Accordingly, it properly had to consider all of the issues before it, not only with a myoptic perspective of the Applicants prayers. Thus, it did not err to also include the order appealed against, namely an order to pay the qualifying employees what was due to them, even though the Applicant did not specifically seek to be excused from doing so. Non payment of the 5% merit increment was an issue most central to the intended strike action and as such it required to be dealt with. The Appellant argues otherwise, as is evidenced most clearly in its final ground of appeal. It attacks the order on the basis that the court entertained a matter which was not before it for decision, in particular whether or not the Respondents were entitled to receive a merit increment of up to 5%, in that there was only an application by the Appellant before it and no counter application by the Respondent. The contention is wrong. The Respondents made a counter application in their answering affidavit in the following terms: vide p52,

> "Wherefore, the 1st Respondents prays that the application be dismissed with costs at attorney client scale and order in the following terms:

1. That the agreement on the merit increment entered between the 1st

Respondent contained in the annexures "SUFIAW 1 read together with SUFIAW 2" is valid and binding and enforceable between the parties.

2. That the Applicant should pay to the qualifying further Respondents a merit increment of 5%."

[57] Part of the misplaced anxiety which is held by the Appellant comes across in argument presented by its learned counsel. There, it is conceded that the Industrial Court *"misunderstood the contentions between the parties to the extent that it appears to have now ordered that an increment of 5% across the board be awarded to all employees. However, even though the Order itself is subject to interpretation, the court could not have come to the conclusion it reached in respect of the 5% merit increment...".*

[58] It is incorrect to say or think or to interpret that the Appellant was to award an increment of 5% across the board in accordance with the conclusion which the Industrial Court had reached. On the contrary, no such order was made and no such conclusion was reached.

[59] Instead, it is quite obvious clear that the court below limited the ambit of its contentious order to only those employees who actually qualify for the merit increment of 5%. It does not at all endeavour to bring about a general and across the board increase of 5% in the salaries and wages of all employees.

[60] Mr. Sibandze relies upon a South African Labour Court decision by Musi AJ to bolster the Appellant's Case. It does not. In Department of Justice and Constitutional Development v Van der Merwe N.O. and Others, (2010) 31 ILJ 1184 (LC), a challenge against an arbitration was founded upon the question of whether or not a performance bonus and pay progression related to the provision of a benefit and thus be arbitrable, impacting on the distinction between disputes of right and of interest. There, the Union wanted to enhance an existing right, thereby creating fresh rights. Arbitration was incorrectly resorted to in order to increase the performance bonus and pay progression, a classical "interest" issue, and moreover the bonuses and awards are not "benefits" as such.

[61] The case relied upon, as well as the South African principles of unfair labour practice and the collective agreement between the parties in that matter is clearly distinguishable from the appeal at hand. Most importantly, the Union in the present dispute did not endeavour to change, amend, increase or otherwise alter anything which relates to the 5% merit increment, save to have it paid to the specifically qualifying respondents or employees. Withholding of the merit increment to a great extent ignited the intended industrial action, which is what the employer sought to prevent. It would have been folly for the Industrial Court to have ignored the cause of the problem.

Mr. Lukhele finally referred to unreported Industrial Court of Appeal

Case No. 20/2005, the matter between Swazi Bank vs Samuel P Simango, where the appellant relied on Titus Nzima v SPTC, Industrial Case No. 139/2005 at paragraph 6, as authority to say that an employee can only enforce, as of right, a term which constitutes part of his terms and conditions of employment. It was held that if it is a term, the respondent is not entitled without the sanction of the applicant to alter it.

[63] In the Simango Case at paragraph 11 (8), the court stated on appeal that "Nzima's case was distinguishable from (that) case in that in Nzima's case the applicant sought to rely on the payment of the housing allowance as a term of the contract. The Respondent in (that) case did not rely on the use of the motor vehicle as a term of his contract of employment but rather as a benefit which was granted to him as Senior Manager".

[64] Applied to the present issue, the position remains that the Union did not try to create a new benefit, or to amend an existing one, or to bring about any amendment in an existing benefit or term of employment. What they did ask for was to order the Appellant to pay qualifying employees their already existing right of a five percent merit increment. By so asking, no new dispute was created, one which might have occasioned the hearing of oral evidence.

[65] By ordering the Appellant to pay the merit increment in the manner which it did, and with full and careful consideration of the affidavits

before it, coupled with diverse undisputed memoranda of agreements, the court a *quo* cannot be faulted on appeal as contended by the Appellant. It is thus ordered that the appeal be dismissed, with costs.

JACOBUS P. ANNANDALE
ACTING JUSTICE OF APPEAL

I agree

M.M. RAMODIBEDI
JUDGE PRESIDENT

I also agree

M.C.B. MAPHALALA
ACTING JUSTICE OF APPEAL