IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE **CASE No. 09/17**

In the matter between:-

TQM TEXTILE SWAZILAND (PTY) LTD **Appellant**

and

MOTSA MAVUSO AND ATTORNEYS **1st Respondent**

MUSA SUKATI **2nd Respondent**

THE SHERIFF OF SWAZILAND **3rd Respondent**

THE REGISTRAR OF THE INDUSTRIAL COURT **4th Responent**

THE COMMISSIONER OF POLICE **5th Respondent**

DUMISA JACOB ZONDO AND 303 OTHERS **6th Respondent**

NEUTRAL CITATION: ***TQM Textile Swaziland (Pty) Ltd v Motsa Mavuso Attorneys and Others (09/17) [2017] [SZICA] 05***

CORAM: **C.S MAPHANGA AJA**

J.S MAGAGULA AJA

D. TSHABALALA AJA

HEARD: **12/10/ 17**
DELIVERED: 31/10/17

Summary: *Settlement agreement-status of orders made pursuant to settlement agreement- terms become an enforceable court order- finality of orders*

Joinder of persons as necessary parties-effect of interlocutory application to vary citation and remove certain persons in collective group of applicants- whether reversible by informal application in open court-

Functus officio and res-judicata rule- principles applied

Cross-appeal dismissed and appeal upheld

JUDGMENT

Introduction

[1] This is an appeal fron a judgment of the Industrial Court handed down on the 13th July 2017. The main protatonists in the matter before this court are the Appellant (TQM Textile Swaziland (Pty) Ltd, a textile firm operating a manufacturing plant in the industrial complex in Matsapha) and a section of its workforce comprising of employees of the company who remained after the termination of another section of the firm's employees contingent.

[2] In the judgment the Industrial Court made certain substantive orders which I paraphrase as follows:

> **Interdicting and restraining the 1st, 2nd, 3rd and 5th Respondents from executing a writ issued by the 4th Respondent at the instance of the 1st Respondent dated 27th February, 2017.**
>
> **Declaring and setting aside the said writ dated 27th February, 2017 having determined the same to be irregular and unlawful;**

Declaring the judgment of the Industrial Court delivered on the 23rd July, 2014 to be applicable to all the employees in paragraph 1 of that courts judgment;

[3] By reference to the employees described in paragraph 1 of the Courts judgment of the 23rd July 2014 the court was adverting to the opening statement in that judgment when the court describing the 'applicants' in that case in the following terms:

> **"1. Some of the Applicants are former employees of the Respondent. Three hundred and four of the Applicants are still employed by the Respondent. The Applicant and the fifty others were dismissed by the Respondent on 15th October 2013 for allegedly engaging in an unlawful strike action at the workplace".**

[4] That judgment and in particular the final order *supra* was in determination of the Appellant's application before the court in which, in part, it was seeking the setting aside and interdiction of the execution of the writ of execution sued against the Appellant in favour of the employees therein described as 'the 54 dismissed workers'. That aspect is not in question. It is the final order that the appeal seeks to impugn; which order was made by the court in determination of the ultimate prayer inserted by amendment to the Appellant's application in terms of which the Appellant sought a *declarator* to this effect:

> **"Declaring the judgment of the Court under case No. 119/14 to be inapplicable to the employees who were still in the employ of the Applicant at the date when the Agreement under Case No. 92/14 was made an order of court"**

[5] Effectively in this appeal the Appliants have taken issue with the latter portion of the judgment and it is against that order that it has brought this appeal. On account of the interest of the retained employees in the declarator and by extension in this appeal which stood to be affected and equally stands to be impacted by this appeal, the Appellant's have caused the amend the notice of appeal and the court documents to append and cite the collective of 304 employees as 6th Respondent in the proceedings.

[6] During the application proceedings whose outcome has given rise to this appeal the employees interests in the execution process had at some instances relied on the agency of the 1st Respondent, a firm of attorneys which facilitated such processt. It is common cause that the 1st Respondents were joined in the said proceedings in their own name and having objected to their citation upon contention of misjoinder on a point of law, the court a quo upheld the point. Strictly the said attorneys should not be a party in the proceedings.

[7] It is per pure circumstance that the said attorneys still appear as the 1st Respondents in the matter. Be that as it may the anomaly subsists in that the court a quo in its judgment cites the said firm as the 1st Respondent in regard to a second point in limine which in the context of these proceedings was only nominally raised on behalf of the 1st Respondents but was effectively in favour of the employees who have now been cited collectively as the 6th Respondent. In effect the second point of law contended by the 1st Respondent was that the court a quo's judgment of the 23rd July 2014 was final and therefore it was not competent for the court to entertain and determine the declaration order as to the scope and object of its final order. In a word the court being functus officio could not presume to re-open and review its decision as it lacked jurisdiction to do so. In the event the *court a quo* in its preliminary

ruling delivered on the 16th June 2017 dismissed the point in limine on the functus officio doctrine.

[8] The 6th Respondents have now also brought a cross-appeal against the ruling dismissing the *functus officio* point of law. Consequently serving before this court lies both the appeal and cross-appeal brought by the appellants and the respondents which we deal with in tandem herein.

Factual matrix and the legal events

[9] In order to locate the issues arising in the cross appeal and the appeal before this court it is necessary to give an outline of the critical facts in context the significant legal circumstances culminating before this court at this time.

[10] The appellant has, since the inception of its industrial undertaking in 2007 employed a few hundred employees. From the start of its operations the Appellant had paid the employees at the minimum wage rate prescribed in the wages order pertaining to a category designated as the textile and apparel wages order. At some point the employees were dissatisfied with the level of wages and pressed for and demanded to be remunerated at relatively higher rate in the category of the Manufacturing and Processing Industry regulations. The employer was unyielding.

[11] The differences between the Appellant and its employees over the issue of remuneration rates worsened to a point when a dispute set in and was declared by the latter. The employees were not unionised and as such were not represented by a formal entity. It is unclear when but at a certain stage during the subsistence of the dispute the employees formed a works council which was

constituted and registered as a bargaining agent in terms of Section 82 of the Industrial Relations Act of 2000 to represent their interest in the ongoing dispute.

[12] It is common cause that initially the Appellant initially had a workforce compliment of 355 employees on its factory floor. During October 2013 as the dispute deteriorated some 51 of the workforce downed tools and embarked on an unprotected illegal strike and were consequently dismissed by the Applicant. These employees retained an interest in the dispute on account of its claims for back-pay or claims for past disparities of pay between the demanded rate under the two Wages Orders which they continued to pursue together with the remaining employees. To distinguish the terminated group of employees from the retained workforce I shall henceforth refer to these groups as the 'dismissed' employees and the remaining or retained employees respectively.

[13] On the 27th March 2014 the collective workforce launched an application against the Appellant before the Industrial Court. That application was brought in the name of Sifiso Simelane and 354 others representing the full compliment of the Appellant's 'employees' inclusive of the dismissed employees. The lead applicant Sifiso Simelane being one of the latter.

[14] It transpired that despite the launch of the proceedings before the Court the remaining employees continued to engage the Appellant through its Works Council in ongoing negotiations in a bid to resolve the wages dispute amicably. As a result of these negotiations the parties reached a settlement agreement which the parties recorded and concluded on the 19th February 2014. That collective agreement became binding between the employees in the bargaining unit and the appellant as an employer. It did not

include the former employees within its terms and fold. I shall refer to the agreement as 'The Settlement Agreement' henceforth.

The key points of the agreement were as follows:

1.1. That the wages order that would be applicable for the rate of pay to the employees would be those prescribed from time to time for the Manufacturing and Processing Industry as opposed to the Textile and Apparel Industry.

1.2 In recognition that the parties acknowledged that the Respondent had remunerated the workers in terms of the Wages Order applicable to the textile and apparel industry in good faith the parties agreed that the Appellant would be held indemnified and free from liability for any past claims in that regard;

1.3 That the date for implementing and coming into effect of the new rate of remuneration under the Manufacturing and Processing Industry order would be the 1st January 2014.

[15] On the 14th April 2014 that settlement agreement having been executed and signed by the Works Council on behalf of the employees in the bargaining unit and the appellant was subsequently made an order of the Court. It emerges from the papers in the record before this court that the settlement agreedment was placed before the court and recorded as an order of the court under the Case No. 92/2014.

[16] A significant point also worthy of note in that settlement was an entry under the title, "**WITHDRAWAL OF LEGAL PROCEEDINGS"** which recorded the following terms:

> **"The parties record and agree that the agreement, joined in the case of Masotja Shabangu & 42 Others v TQM Textiles Swaziland Industrial Court Case No. 570/13, shall withdraw the legal proceedings and relief sought herein against the Company"**

[17] As appears from the sequence of events the Settlement agreement was reached after the launch of the joint application by the appellant employees as a collective in March 2014 . In that application the appellation in the citation of the Applicants was recorded as **SIFISO SIMELANE AND 354 OTHERS**. As indicated in their number the Applicants included the remaining members. In the timeline and sequence of events the Settlement Agreement was made an order of the Industrial Court whilst the application under case No. 92/14 was pending

[18] In the *lis* between the Appellant and the employees under case No. 119/14 the applicant sought the following relief:

> **"(That) respondent be ordered to pay the applicant's and handover all outstanding money being for underpayments that was supposed to be paid by respondents to applicants as dictated by the Wages Regulations Order of the Manufacturing and Processing Industry;**
>
> **(That) respondents be ordered to comply with the Wages Regulation Order of Manufacturing and Processing Industry from 1st July, 2007 up to date.; (and)**

(That) respondent be ordered to pay costs at punitive scale"

[19] On the 7th May 2014 the Applicants caused an amendment to the Notice of Application under Case No. 119/14 the purpose of which was to effect a variation of the citation of the applicant by substituting the original designation of the Applicants appearing as 'Sifso Simelane and 354 Others' with 'Sifiso Simelane and 50 Others' as the proper designation of the Applicant; in effect removing the remaining group of employees and leaving the dismissed employees as the applicants to prosecute the application. The remaining employees were thereby withdrawing from the proceedings. It is common cause that that notice to amend the notice of application to effect the variation was duly received and filed by the Registry of the Court. It is common cause also that formally that rectification was effected.

[20] The reasons advanced for the variation of the citation and the withdrawal of the retained employees appears more fully in the accompanying affidavit deposed to by the lead Applicant Sifiso Simelane in these terms:

"REASON FOR AMENDING

The 304 employees who are still employed are having negotiations with the employer about the same issue, therefore hurrying to this….court, when the matter is still being discussed at the company will be acting in bad faith.

DESCRIPTION OF THE PARTIES

The description of the Parties shall be read as follows:

Sifiso Simelane is the applicant in this matter who is also being mandated to depose on behalf of the other applicants, the 50 applicants are those who were dismissed with Sifiso Simelane and deleting the 304 employees who are still employed'

[21] Another significant legal event in the history of the proceedings as appears in the record before us is that on the 3rd June 2017, One Mduduzi Mkhumane and 304 Others cited in the relative notice as Applicants brought on notice of motion under the Case No. 252/14 an application against the Appellant before the Industrial Court for a materially similar or the same relief as in Case No. 119/14. It was conceded by Mr T. Mavuso who appeared for the 6th Respondents that the case under 252/14 was virtually instituted by the retained or remaining employees who had withdrawn as parties from Case No. 119/14. It is common cause that this latter application having not been withdrawn or determined is technically still pending before the Industrial Court.

[22] In the fullness of time the application under Case No. 119/14 was heard before Justice Nkonyane at the Industrial Court. In the outcome the court on the 23rd July 2014 ordered in the following terms (again I paraphrase for the sake of convenience and consistency):

22.1 The Appellant was ordered to pay its employees in terms of the Regulation of Wages applicable to it in terms of the report of the Commissioner of Labour dated 9th December, 2010 with immediate effect;

22.2 The Appellant is ordered to pay the underpayments going back to 9th December 2010 with immediate effect;

22.3 The payement of the underpayments from 9th December 2010 going back to the period when the Respondent started to operate is to be negotiated and agreed upon by the parties with the assistance of the Commissioner of Labour;

22.4 The Appellant was to pay the costs of suit based on the ordinary scale.

Application for Review and Appeal

[23] It is common cause that in the sequence of legal events in the latter part of 2015 the Appellants presently brought an application at the High Court to review and the set aside the judgement of the Court of July 2014 which review application failed when the High Court held that the application lacked essential averments to make out a proper cause for review; that case was registered under case No. 1047/2014

[24] Subsequently the Appellants appealed the judgment of the High Court dismissing the review application. The appeal was also dismissed on technical grounds by the Supreme Court on the 30th June 2016 for want of compliance with the rules of the Supreme Court on appeal.

Application to interdict and set aside writ of execution and for Declaratory Order

[25] The high watermark for purposes presently has been the proceedings referred to earlier in the introductory statements I have made herein; the proceedings before the Court a quo the outcome of which have given rise to the instant appeal and cross appeal.

THE ISSUES

[26] Regard being had to both the written and oral arguments presented before us during the appeal by the counsel for the appellants and the attorney for the respondents, in our view the crisp issues raised in the respondent's cross-appeal are not so far removed from the questions raised by the appellant's appeal. In a sense the issues are so closely associated and interlinked that it is convenient to highlight them at once. They may be crisply stated thus:

[27] Whether the court a quo erred in dismissing the respondent's point in limine premised on the functus officio doctrine- namely; the contention that it was not competent for the court to consider and adjudicate the Appellant's *declarator* aspect of the application before it on the basis that the court was functus officio having pronounced itself on the subject matter in its judgment of July 2014; allied to this point is the question whether the subject matter of the declarator was res iudicata on account of the dismissal of the appellant's review application and appeal before the High and Supreme Courts respectively as relates to the Industrial Court's judgment of July 2014 sought to be impugned thereby;

[28] Whether in adjudicating the matter it was competent for the court to take into account as evidential matter on affidavit certain annexure's pertaining to records of proceedings before the Industrial Court in respect of certain separate proceedings being;

[29] The Order of Court of 14th April 2014 recording and making the Settlement Agreement between the Appellant and the Works Council an order of court under case No. 92/2014;

[30] Court records in the form of a transcript of proceedings together with certain documents pertaining to case No. 252/2014
and whether by so doing the court did not misdirect itself in law by admitting *alliunde* evidence extrinsic to the proceedings before it.

[31] Whether the Court a quo was correct in dismissing the applicants prayer for the sought declaratory order and in so doing regarding the remaining group of employees to be before it as litigants and deeming the judgment of 23rd July as being applicable to them.

Allied to this question are the following issues:

[32] What effect, if any, the Order of the Court under Case No. 92/2014 had to the *lis* as regards the 304 employees; in the same vein

[33] Whether there was any legal nexus as to the employees cited as applicants as an entity under Case No. 252/2014 with the 6th Respondents and what legal effect the subsequent institution by the employees cited as applicants in Case No.119/14 to the lis as regards the 6th Respondents and the Appellant;

[34] What the effect of the application by the remaining employees to amend the citation of the parties and thereby cause a deletion of their names and accordingly recording their withdrawal in case No. 119/2014 was in the said proceedings as regards the lis betweent the 6th Respondents and the Appellant.

THE APPELLANT'S CASE

[35] I now briefly summarise the appellants case in the following paragraphs.

[36] Firstly it is the appellants contention that the court a quo should have taken into account the Order of the Court under case Number

92/2014 and its effect was that by virtue of that order the court a quo had in law disposed of the lis between the appellant and the current employees as existed under case 119/2014.

[37] In advancing this argument it was contended by Ms M. van der Walt on behalf of the appellant in effect that rendering of the agreement between the appellant and the 304 employees on account of its timing had the effect of rendering the *lis* between the parties *res iudicata* in relation to the claims of the remaining employees. Further it was urged on behalf of the appellant in illustrating the point that in light of a specific point in the agreement that the appellants liability for payment claims for past wage disparities would be be calculated from the 1st January 2014 and thus this was not compatible with the order in the judgment of 23rd July 2014 ordering, as per paragraphs 19(b) and (c) thereof, that the applicacnts be paid back pay of the wage differences between 2006-2007. The Appellant's case was the *lis* having been extinguished by virtue of the settlement agreement that settled the matter and thus the appellant's were precluded in law from pursuing the same claims and cause as in case No. 119/14.

THE RESPONDENTS' CASE

[38] The 6th Respondents case can be conveniently summarised as follows:

That the appellants in bringing the review application and the court a quo in hearing and entertaining that prayer in the application cut against the grain of the functus officio. It contends also that the court lacked jurisdiction to deal with the declarator on account of the matter being res judicata in that the question whether its judgment of the 23rd July 2014 applied to the 304 employees had already been decided by the High Court in review case No. 1047/14 and confirmed by the Supreme Court when it dismissed the respondents appeal to the High court ruling.

[39] Further the 6th Respondents contend that in determining the *declarator* the court a quo erroneously allowed the appellant to re-open its case and surreptitiously introduce new evidence which was never a part of the record in the course of the adjudication of Case No. 119/2014 and thereby allowing the appellant to introduce evidential matter pertaining to the settlement agreeement under Case No. 92/2014 and the application by the 6th Respondents for relief under Case No. 252/2014.

[40] In sum the 6th Respondents have persisted in their main contention that the court a quo had erred in dismissing the point of law that it was *functus officio* and that it lacked jurisdiction on account of the lis being *res judicata.*

ANALYSIS

The effect of the settlement agreement

[41] One of the crucial issues before the court concerns the effect of the settlement agreement that was entered into between the appellant and the remaining employees which was subsequently made an order of court by the court a quo; allied to that is the status of the order made pursuant to that settlement agreement the effect of which was to render the said agreement an order of the court by incorporating its terms.

[42] A matter which is common cause is that on the 19th February 2014 the remaining employees, represented by their duly mandated Works Council entered into a settlement agreement in terms of which it was agreed *inter alia* that the said employees would with effect from 1st of January 2014 be paid wages in accordance with the minimum wage rate prescribed by the prevailing wages order or regulations of the Manufacturing and Processing Industry orders. Further it was agreed that the applicant would not be

required to pay or be liable to pay claims for under-payments or payment of the remuneration disparities between the lesser textile and apparrel order and the manucturing and processing industry wages order in recognition that the appellant had used the former rate in good faith. That agreement having been executed and signed by the parties on the 19th February 2014 was subsequently made a consensual order of court on the 11th April 2014.

[43] Ordinarily when the parties to an agreement decide to make that agreement an order of court the desired effect of the settlement order is to vest the terms of the settlement agreement with the status of an order of court.

[44] In the instant case the court a quo did not selectively issue specific orders extracted from the terms of the agreement but adopted the approach that has been commonly used by the courts of making such a settlement, by reference and wholesale incorporation of its terms, an order of the court.

[45] Thus framed the order read:

> **"IT IS ORDERED**
>
> **That the Deed of Settlement signed by the Applicant and the Respondent on the 19th February 2014 is hereby made an order of court"**

[46] The effect of rendering the agreeement an order of court has specific consequences. The law on this subject is well established in that like all orders of court once an agreeement is made an order of court it becomes, like ordinary orders, amenable to enforcement by way of the normal machanisms for the enforcement of judgments.

[47] The rendering of a settlement an order of court also has much broader implications and consequences in regard to the antecedent issues giving rise to the lawsuit or dispute between the parties. It affects the *lis*.

[48] Thus in the Constitutional Court of South Africa case of ***Eke v Parsons [2015] ZACC 30,*** the learned **Justice Madlanga**, after a careful analysis of the principles and the development of the practice of making settlement orders as well as the debate on the matter, summarised the position succinctly in the following concluding remarks:

"Once a settlement agreement has been made an order of court, it is an order like any other. It will be interpreted like all court orders. Here is the well-established test on the interpretation of court orders:

'The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.'

***(C.f. Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) (*Finishing Touch 163*) at para 13. See also *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A))**

This is equally true of court orders following on settlement agreements, of course with a slant that is specific to orders of this nature:

"The Court order in this case records an agreement of settlement and

the basic principles of the interpretation of contracts need therefore be applied to ascertain the meaning of the agreement. . . .

The intention of the parties is ascertained from the language used read in its contextual setting and in the light of admissible evidence. There are three classes of admissible evidence. Evidence of background facts is always admissible. These facts, matters probably present in the mind of the parties when they contracted, are part of the context and explain the 'genesis of the transaction' or its 'factual matrix'. Its aim is to put the Court 'in the armchair of the author(s)' of the document. Evidence of 'surrounding circumstances' is admissible only if a contextual interpretation fails to clear up an ambiguity or uncertainty. Evidence of what passed between the parties during the negotiations that preceded the conclusion of the agreement is admissible only in the case where evidence of the surrounding circumstances does not provide 'sufficient certainty'."

(c.f Engelbrecht and Another v Senwes Ltd* [2006] ZASCA 138; 2007 (3) SA 29 (SCA) at paras 6-7.*)

(Footnotes removed, added parenthesis)

The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the* lis *between the parties; the* lis *becomes* res judicata *(literally, "a matter judged"). It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order. That form may possibly be some litigation the nature of which will be one step removed from seeking committal for contempt; an example being a mandamus."

(See Ex Parte Le Grange and Another In re: Le Grange v Le Grange [2013] ECGHC 75 (Le *Grange)* at para 22. In the South African Law Reports, this is reported as *PL v YL* 2013 (6) SA 28 (ECG)

[49] On the facts and upon a reasoning based on the above sound principles and rules of law, we have no hesitation in arriving at the conclusion that the settlement agreement had the effect of creating a new *lis* and extinguishing the *lis* between the remaining workers under Case No. 119/ 2014 and the appellants. In addition it had the effect of severing that section of the workforce from the proceedings before the court in that matter.

[50] From the circumstances of the settlement agreement and the antecedent dispute or issues in contention there has never been any doubt or ambiguity as to the purpose, the terms or even the intent of the agreement; such being clear and expressly stated in the said agreement. There may have been issues regarding compliance or efficacious execution thereof.

[51] Turning to the the ancillary question concerning the subsequent interlocutory conduct of the respondents in the then ongoing litigation under case No. 119/2014, the issue is what effect did this events impact on the matter between the litigants in the matter?

The Effect of the Variation of the citation of the parties

[52] There is no dispute that the employees who now are constituted as the 6th Respondents in this appeal in one of the twists and during the proceedings under case No 119/14 came before the learned Justice Nkonyane and moved the court for a variation of the citation of the parties the expressly intended effect of which was to delete the remaining employees and thus extricate them from the collective body of applicants. This was in my view a momentous legal event with definite consequences.

[53] Regard being had to the contents of the affidavit deposed to by the

lead applicant Sifiso Simelane, there is no disputing the identity of those employees as being the remaining employees. From these facts it is also inferable that these employees who were a party in respect of whose interests the Settlement Agreement was reached between the Appellants and the Works Council as their bargaining agent.

[54] It is common cause that the said amendment was permitted and effected by the court. That this was done was itself in conformity with the principle that such an amendment to a process will be allowed where the other party will not be occasioned any prejudice[1].

[55] It follows that in much the same way as joinder has the effect of placing a party before the court and within the jurisdiction of the court in a matter, equally the effect of an amendment to remove or withdraw litigants from proceedings where permissible, by virtue of such removal, the parties would likewise, no longer be before the court.

[56] In the affidavit supporting the application for the varying of the parties in the second prayer of the Notice of motion (by altering the citation), Sifiso Simelane, the nominated lead applicant, deposing to the affidavit for the application briefly narrated the reasons for the desired amendment to the appellation of the parties in the following averments:

"REASON OF AMENDING

The reason to amend the citation of the application is that the 304 employees who are still employed are having negotiations with the employer about the same issue, therefore hurrying to this honourable court where the matter is still being discussed at the company level will be acting in

[1] See Herbstein and van Winsen, ibid at 195; see also *Trustees African Explosives Pension Fund v New Hotel Properties (Pty) Ltd and Nestel 1961 (3) SA 245 (W)*

bad faith. Respondent has made it clear that he is not prepared to discuss anything about those who are dismissed.

DESCRIPTION OF THE PARTIES

The description of the parties will be read as follows:

Sifiso Simelane is the applicant in the matter who is also mandated to depose on behalf of the other applicants by the applicants. The 50 applicants are those who were dismissed with Sifiso Simelane and deleting the 304 employees who are still employed'

[57] It is clear from this factual matrix that what these events signified-namely, the application for varying of the citation of the parties and the settlement agreement-was not only the termination of the *lis* between the 304 employees who were still retained in employment but to also formally separate their lot from the dismissed employees and thereby remove the remaining employees from the litigation before the court. There was thus removal of all doubt from a relational point of view between the Appellant and the remaining employees in that these events signified their withdrawal from the proceedings.

[58] It is our view therefore that the confluence of the settlement agreement and the application for the amendment and deletion in the citation or joinder of the remaining emplyees from the proceedings under case 119/2014 had a definite result. At that instance and henceforth the current or remaining employees ceased to be before the court and their *lis* with the apellant was accordingly extinguished.

[59] If the court documents, despite the on-record application for variation of the citation and designation of the respondent to 'Sifiso Simelane and 50 Others' remained unchanged and was not rectified to reflect the true position, then that was a clerical and

patent error which tainted the proceedings. It is an error that was transmitted to the judgment stage. The Court a quo was clearly in error if it regarded the group of employees appearing as the 6th Respondent as being before the Court at that juncture.

[60] Greater clarity on the facts is provided by the transcript record of the proceedings pertaining to the leading of oral evidence which appears at page 134- 207 of the Record of Appeal. It is notable that the covering filing Notice which bears the Registrar's certificate bears the original citation of the parties whilst the transcript in its headings gives the citation of the Applicants as the 50 + 1 dismissed employees. The transcript bears a footer caption **"SIFISO SIMELANE AND 50 OTHERS/TQM TEXTILE SWAZILAND"** throughout from the title page to the the last page of the document.

[61] A further indicator of the status of the matter is that the dismissed employees in execution of the judgment in the writs they sued out (at pages 26 and 37 of the Record) under the court order ostensibly issued in respect of the award by the court as per the judgment of 23rd July 2014 (at page 25), refer to the judgment creditors being the 'dismissed employees'. At no stage did they refer to the current or remaining employees. Even if as the Court appears to accept that this was an error attributable to an instance of 'bad' drafting and set aside the writs on account of that 'irregularity', no attempt was made by the respondents to revoke the writ and or amend it until it was set aside.

[62] It is necessary to deal with an issue that has arisen on account of the Court *a quo's* reasoning for its determination of the appellant's review application. This can be gleaned from the learned court's narration of the circumstances surrounding the withdrawal and 'return to court' of the group of 304 employees during the proceedings under Case No. 119/14. It readily appears in

paragraphs 11 to 13 where the court states as follows:

"11. The main application between the parties was based on affidavits' filed by both parties. During the pleading stage and during the arguments, none of the parties raised any issue about the citation of the parties. The pleadings filed of record show that at some point when the employees were represented by Sipho Manana, there was an applicatiion to amend……..

12. When the negotiations between the employer and the 304 employees failed, the 304 employees returned to Court without going through the formalities of filing an application. Instead their representative applied in open Court. There was no objection by the Employer (the current Applicant). There was why the Court in paragraph 1 of its judgment dated 23rd July 2014 stated clearly that:

> ***"1. Some of the Applicants are former employees of the Respondent. Three hundred and four of the Applicants are still employed by the Respondent. The Applicant and the fifty others were dismissed by the Respondent on the 15th October 2013 for allegedly engaging in an unlawful strike action at the workplace"***

13. At all material times when the application was serving before the Court there was never any question as to who were the Applicants that were before the Court. There can be no question therefore as to whom is the judgment applicable. The judgment is applicable to all the employees mentioned in paragraph 1 of the Court's judgment delivered on 23rd July 2014."

[63] There are several difficulties that arise from the learned court's reasoning in arriving at the above conclusion. The first is presented by the fact which is established from the circumstances of this case and the ancillary proceedings in the conduct by the 6th respondents of their litigation under 252/2014.

[64] Given that the learned Court makes explicit acknowledgment and reference to the course taken by the remaining to eschew the court

proceedings and pursue direct out of court negotiations with the applicant, it is unclear how the court overlooked the facts placed before it that the parties had reached settlement in the matter, and the fact of the settlement having been made into an order of the Court before the very same court. In this regard it can be seen that these facts are a matter of record and were placed before the court as well as canvassed by the parties in contention in the affidavits filed as of record in the application to stay execution and for a declaratory order[2].

[65] For reasons set out elsewhere herein in our view this was a momentous legal event the effect of which was to land finality to the lis between the parties. In that regard it was highly pertinent to the issues before the court a quo. It is trite that once the court had granted the order it prevails and stands until set aside, rescinded or varied by the court. No evidence of such variation of the order of court of the 14th April 2014 was placed before the court.

[66] It was submitted by Ms Van der Walt, on behalf of the appellants, that the court a cquo was aware of the existence of the Order of court of the 14th April 2014 and even alluded to it in passing in the judgment but appeared to have overlooked its significance and thus did not apply its mind to such a crucial element in the cirucmstances of the matter. That perhaps has to, with respect, to the fact that the court approached the matter as one purely of interpretation of its judgment as opposed to a matter where it was being asked to make a declaratory order regard being had, in fullness, to the circumstances and the history of the matter as a whole including all the interrelated proceedings and the conduct of the applicants. These circumstances included the proceedings under case No. 92/2014 and 252/2014 as well as the relative application by the Applicants to withdraw on the critical question as to what the status of the 6th Respondent was at the time of the

[2] See Paragraphs 10.7- 13 of the Appellants (Applicants) founding affidavit at pages 10-11 Record.

courts judgment of the 23rd July 2014; *vis* whether the 6th Respondents were properly before the court and by extension the judgement of the court would extend to them.

[67] It therefore appears to us that the court in overlooking this criticalfactor and its implications to the issues before it fell into error on a fundamental matter of law as regards the core issue before it the status of the 6th Respondents in the proceedings under Case No. 119/2014. As stated earlier this accords with the veiw we take that the *lis* between the 304 group of employees and the Appellant had been severed.

[68] Similarly the learned court also overlooked another fundamental and crucial fact -the effect of the withdrawal and amendment of the notice of motiion deleting and removing from the Case No. 119/14 the citation and joinder of the 304 employees as Appellants- that these persons thereby and thenceforth ceased to be parties before the court.

[69] Added to this point is the further difficulty emanating from the courts allusion to the 'return' of the 6th respondents to the proceedings before it which the court makes in the judgment. It is unclear as to what open court application the court is referring to as there appears to be no evidence of such application *ex facie* the record of proceedings before the court a quo including a transcript of the proceedings on the day the application was moved. One would imagine such an application would in effect be akin to one for the intervention of a person ordinarily not before court as a party in existing proceedings.

[70] In the absence of specific procedural rules providing for any particular proceedings it has become the practice as is sanctioned by the rules of the Industrial Court that in such instances the High Court rules apply. It is our considered opinion that it was not open for the respondents to informally 'return' to the proceedings without following the standard procedural rules for the

intervention of parties to court proceedings. That would have been necessary precisely on account of the peculiar circumstances and status of the 6th Respondents as persons who were no longer ordinarily before the court.

[71] The rule providing for the intervention of a third party as party in application proceedings is catered for in terms of Rule 12 of the High Court rules. In the abscence of a countervailing or applicable Industrial Court rule it is our view that this rule applies with vigour in proceedings before that court. Alternatively a party could approach the court in terms of the common law. Invariably the applicant cannot seek to intervene informally but has to make a substantive application on notice supported by affidavit satisfying the requisite elements to sustain such relief.

[72] In the case ***Ansari and Another v Barakat and Other, In re: Barakat v Copper Sunset Trading 424 (Pty) Ltd and Others (5530/2011) [2012] ZAKZDHC 1 (16 January 2012)*** the court set out the test for intervening as a party which may be summarised as follows:

"A party seeking to intervene in proceedings can either do so in terms of rule 12 of the Rules of Court, or in terms of the common law.

A party seeking leave to intervene must prove that:

> ***(a) he or she has a direct and substantial interest in the subject matter of the litigation which could be prejudiced by the judgment of the court; and***
>
> ***(b) that the application is made seriously and is not frivolous, and that the allegations made by the applicant constitute a prima facie defence to the relief sought in the main application. "***

[73] I must hasten to add the caveat that the learned judges remarks pertain to a South African rule 12 (similar to rule 12 of the High Court of Swaziland Rules) and the common law and were made in the context of joinder of a party as a defendant in summary judgment proceedings and ultimately the underlying action. Having said that in our view they are of equal application in our courts as are the common principles alluded to.

[74] Without such a procedure having been followed it is inconceivable, incompetent and impermissible that the respondents would have 'returned' to the fold of the proceedings as Applicants in the matter under Case No. 119/2014.

THE CROSS APPEAL

[75] I now come to the vexed question concerning the application for declarator and whether the proceedings constituted an impermissible deviation from the functus rule. That is the crux of the cross appeal.

[76] It was the submission of the 6th respondents that, amplified in oral arguments by Mr Mavuso on their behalf at the hearing that the application for a declaratory order as sought by the Appellants a quo was essentially an out-of-time appeal masquearading as a declarator on a matter that was in any event not appealable before this court on account of it being *res iudicata.* To this end Mr Mavuso urged that the issue whether the court a quo was correct to issue a judgment which makes reference to 355 applicants instead to 51 applicants had been fully dealt with and pronounced upon before the High Court and further that on account of the Appellant's having further appealed the decision of the High Court in that regard the court therefore lacked jurisdiction to entertain the declaratory order since the matter had already been determined by the High Court, the only permissible exception

being if it had been remitted by that court to it for such correction. I am not certain I can agree with this proposition in light of the peculiar circumstances of the review and the subsequent appeal in the ensuing evolution of the matter.

[77] The Appellant submits further that the declarator would, if granted not be a mere correction of an error but would in effect alter the substance and true intention of the court as expressed in the judgment.

[78] Mr Mavuso kindly referred this court, albeit as authority buttressing another unrelated point, to the useful test as to the concept of the plea of res iudicata citing the remarks of **Moore J A** in ***Mhlatsi Howard Dlamini v Prince Mabandla Dlamini and Another Appeal Case No. 15/ 2010*** at paragraph 16 when he equates the hallmarks of a plea lis pendens with those of a plea res iudicata by reference to the the elements as being:

a) the two actions
b) must be between the same parties or their successors in title,
c) concernig the same subject matter and founded upon the same complaint

[79] In the quoted remarks abstracted by the learned judge from the commentary by the authors Herbstein and van Winsen the fuller context and meaning becomes clearer as to the scope of the concept that is highlighted especially. The more relevant aspect of the remarks quoted appear further in the dicta where the learned court highlight the following point of elucidation by the editors:

> **" For a plea of res judicata to suceed, howeve, it is not necessary that the 'cause of action' in the narrow sense**

> **in which the term is sometimes used as a term of pleading should be the same in the later case as in the earlier case. <u>If the earlier case necessarily involved a judicial determination of some question of law or issue of fact in a sense that the decision could have been legitimately or rationally pronounced without at the same time determining that question or issue, then that determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it, and will be res iudicata in any subsequent action between the same parties in respect of the same subject matter"</u>**
> (my underlining)

[80] It is clear and it was acknowledged by the court a quo in tracing the tragectory of the matter when dealing with the functus question that when the matter came before the High Court on review the learned Justice Mdladla AJ disposed of the application without traversion either the substantive factual or legal issues in contention. Certainly on the issue as to who constituted the parties before the Industrial Court in the case No. 119/2014 neither the High Court nor the Supreme Court could be said to have definitively dealt with a question of law or fact rationally connected to the substance of the facts or issues surfaced by the litigation. I cannot see how the courts could be said to have pronounced themselves definitively and resolutely on the issues. I am inclined towards the argument by the appellant that neither court dealt with the merits nor touched on the issues or matters related thereto as pertains the complaint by the appellant regarding the judgment in the main application.

[81] Mr Mavuso earnestly sought to impress upon us his argument that element or requirement of the lis being between the same parties

is neatly illustrated by reference to a clause in the Settlemet Agreement which appears as clause 4 where it was recorded as follows by the parties:

> **"4. Withdrawal of Legal Proceedings**
>
> **The parties record and agree that the agreement joined in the case of Masotja Shabangu & 42 Others v TQM Textitles Swaziland Industrial Court Case No. 570/13 shall witdraw the proceedings and relief sought therein against the Company"**

[82] I am afraid this excerpt from the agreement does not resolve the privity of the appellants in the sense of distinguishing the 6th respondents from the persons referred to in the aforesaid clause. On the contrary the said Masotja Shabangu is specifically mentioned in the application for rectification involving the 304 employees in the affidavit deposed to by SifIso Simelane. That statement appears at page 115 of the record of appeal where in his affidavit for the variation of citation of the Applicants to exclude and delete the remaining employees this is what Simelane says about the said Masotja Shabangu:

> **"CONFIRMATORY AFFIDAVIT"**
>
> **The confirmatory affidavit of Thembie Dlamini and Bhekie Mhlongo which is in paragraph [3] three where it appears Masotja Shabangu instead of Sifiso Simelane is amended and it shall be read as follows Sifiso Simelane not Masotja Shabangu.**

[83] Without doubt reference to the said Masotja Shabangu exists linking him in some respect to the application in relation to the

matter in Case No. 119/14 although it is not clear in what capacity he is being associated with the proceedings. Thus some connection between the Settlement Agreement and the main application appears to exist ex facie the record.

Functus Officio, Jurisdiction and Res Iudicata

[84] I now deal with the point that is substantially the case for the respondent in the cross-appeal the objection to the ruling of the *court a quo* dismissing the point on functus officio rule and thus interpreting its judgment. I take it the cross-appeal was argued as an alternative argument to the contention advanced by Mr Mavuso in the heads of argument contesting the main appeal.

[85] I say this as there the appellant has contended an argument which is not in my view with the Respondents stance that as the court was functus officio it could therefore not re-open the matter under the guise of interpretation as it did. At paragrap 6.2 and 6.3 of the Appellants heads it has been contended that the Court a quo did not decide the matter *de novo* but merely interpreted its 2014 decision in that the learned court merely explained or clarified what its intentiion was when it rendered the judgment in 2014 without making a new judgment altogether.

[86] I cannot, with respect, follow the nuanced distinction the respondents seem to make in trying to reconcile their point in limine as persisted in the cross- appeal that the applicatin for interpretation (as the proceedings on the declarator have been described) does not constitute one of the permissible instances where a court may be called upon to clarify or correct, it was not competent for the court to clarify, correct, alter or supplement its judgment or order.

[87] The principles informing the notion of functus officio have been revisited time and again by our courts recalling the celebrated insightful remarks by Justice Trollip J. A a case now regarded locus classicus on the subject. There the learned judge in elucidating the concept stated:

> **"The general principle, now well established in our law is that once a Court has fuly pronounced a full judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased…..There are, however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this Court, provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of he following cases……"**

[88] The circumscribed field of exceptional circumstances where the court may rectify its own judgment have been explored in the region and before our courts. We are grateful for the references as to judicial authorities provided by Mr Mavuso in this regard. One of these is the ***Monnanyana v The State [2002] 1 BLR 72 (C.A.)*** where the Court of Appeal of Botswana in the words of **Tebbutt AJP** gave practical guide of the permissible exceptions to the functus rule when he said:

> **"In the Firestone case, supra, the court held that there were four exceptions to the general principle and that the court may correct, alter or supplement its judgement or order (i) in respect of accessory or consequential matters e.g. costs or interest on a judgment debt which the court overlooked or**

inadvertently omitted to grant; (ii) in order to clarify if its meaning is obscure, ambigous or uncertain provided it does not alter the sense or substance of the judgment or order; (iii) to correct a clerical, arithmetic or other error in expressing the judgment or order but not altering the sense or substance; (iv) making an appropriate order for costs which had not been argued, the question of costs depending on the courts decision on the merits of the case."

[89] The stance taken by the Respondents in the cross appeal, that in bringing the application for a declaratory order or if you incline to regarding that application as one for interpretation or even clarification, the appellants are asking the court to review its own decision appears extreme and artificial in light of the unique circumstances of the matter. The clear position is that in the context of execution of an order under obscure circumstances by parties that appear equally obscure the Appellants were justified in seeking the courts remedial intervention in the form of the interdict and order setting aside the execution of the writ. In that context the application for a declarator to settle that lingering question as to whom the benefit of the judgement accrued and as to ascertaining the correct identity of the appellant in light of the facts which are either common cause or evident from the record was itself a legitimate process.

[90] The 6th Respondent have come to concede in their own submissions that the court was correct in interpreting or clarifying its own judgment in so far as there may have been an ambiguity or uncertainty. Whether there was any uncertainty on the aspect raised is a matter that turns on the facts.

[91] The principles stated in the ***Monnayana*** case supra were, in my respectful view not proffered as a numerus classus or a closed catalogue but guiding considerations. The Supreme Court in ***The Swaziland Motor Vehicle Accident Fund v Gondwe, Civil Appeal No. 66/ 2010 [2010] SZSC 22*** has taken a more robust interpretation of the rule in Firestone. The court quoting the case ***S v Wells 1990 (1) SA 816 (A)*** taken from the judgment of the learned **Joubert JA** in that case at pages 819-820: -

'According to the strict approach a judicial official is *functus officio* upon having pronounced his judgment which is *sententia stricti iuris* and as such incapable of alteration, correction, amendment or addition by him in any manner at all. *(See D. 42.1.55 (Ulpianus), D 42.1.62, Gail (1526-1587) Practicarum Observationum ;on 1 ond 116 nrs 1 et 3, Huber (1936)[and other Roman Dutch authorities cited] In the case of In re: Appeal : S v Stofile and Others 1989 (2) SA 629 (Ck) at 6301 Pickard CJ would seem to prefer this strict approach. A variant to this strict approach permits a judicial officer to effect linguistic or other minor corrections to his pronounced judgement without changing the substance thereof. See Damhouder Practycke in Civile Saecken CAP 220 NR 1, Merula (15558-1607) Manier van Procederen titel 90 vsp 1 nr 2, Wassenaar (1589-1664) Practcyk Judicieel cap 21 nr 21.)*

The more enlightened approach, however, permits a judicial officer to change, amend or supplement his pronounced judgment, provided that the sense or substance of his judgment is not affected thereby *(tenore substantiae perseverante).*

I am mainly attracted by the more enlightened approach which permits a judicial officer to change, amend or

supplement his pronounced judgement or order provided he does not change its sense or substance. I consider that this approach should guide this Court as to enable it to do justice according to the circumstances of each case. This is such a case"

[92] If the court could clarify or interpret its own judgment to resolve the question concerning the scope of application of the orders it issued in its July 2914 judgment, this was a necessary exercise incidental to the purpose of making a declaratory order on a matter of status. The status and true identity of the parties in my view is an **'accessory or consequential matter'** relative to the judgment, to respectifully borrow the words of his **Lordship Justice Trollip** in the ***Monnanyana*** case. It also qualifies as a matter requiring clarification on a matter that the court may have required to go into; to bring clarity in the haze of the convoluted process of the proceedings and the ancillary matters or cases filed as the matter progressed. It became an opportunity to align its decision on a matter overlooked as a result of the confusion arising from multiplicity of proceedings brought by the parties or various factions of the Applicants. To properly reset the citation of the parties before the court.

[93] In my view the court was correct in dismissing the *functus* point of law and in enquiring into the matter and in so doing in considering the evidence placed before it on the matters of record connected to the legal events affecting the parties germane to the enquiry at hand in determining the *declarator.* That said, the learned court however was led into error when it overlooked critical considerations and evidence which clearly pointed to a critical change in the status of a section of the body of Applicants as an entity (comprising of various persons cited only by their numbers). The error and oversight the court fell into is

understandable in light of the confusion and multiplicity of proceedings which we have referred to above.

[94] It is our considered view that the decision which accords with the facts, the circumstances and the totality of the evidence placed before the *Court a quo* was such that the Court having been alerted to the grave oversight and patent errors ought to have in clarifying the judgment corrected and or supplemented it without affecting the outcome as to the substance and effect of the findings on the questions of liability and quantum of the claims as to redirect the application of the judgement to reflect the true parties before it.

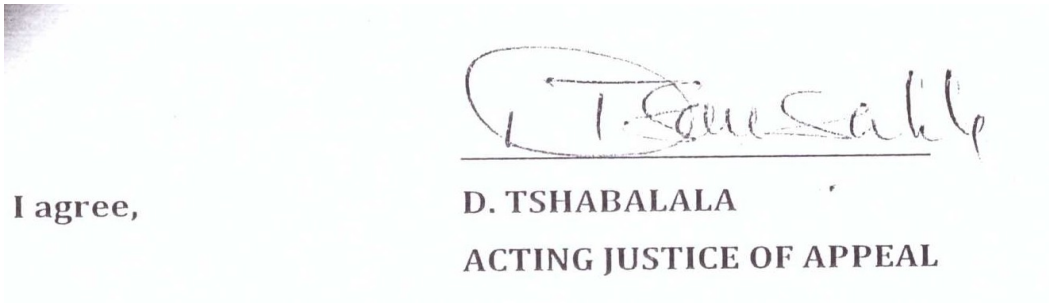
[95] In the event the appeal succeeds and the cross-appeal is dismissed. I make no order as to costs. It is therefore appropriate that we make an order fitting the result and order that the order of the court a quo be and is hereby substituted with the following:

It is declared that the judgment of the Industrial Court dated the 23rd July 2014 under Case Number 119/2014 is inapplicable to the current employees for the reasons aforestated.

C.S MAPHANGA
ACTING JUSTICE OF APPEAL

I agree,

J.S MAGAGULA
ACTING JUSTICE OF APPEAL



I agree,

D. TSHABALALA

ACTING JUSTICE OF APPEAL

Appearances:

For the Appellant: **Ms. M. van der Walt**

Instructed by: **L. R Mamba and Associates**

For the 6th Respondent: **Mr T Mavuso**

Instructed by: Mr A. Fakudze.