



**INDUSTRIAL COURT OF APPEAL OF ESWATINI**

**JUDGMENT**

Case No.19/2020

In the matter between

**INYATSI CONSTRUCTION GROUP  
HOLDINGS LIMITED**

Appellant

**And**

**DAVID ROBERTS  
CONCILIATION, MEDIATION &  
ARBITRATION COMMISSION**

1<sup>st</sup> Respondent

2<sup>nd</sup> Respondent

**Neutral citation:** Inyatsi Construction Group Holdings Limited vs David Roberts  
and Another (19/2020) [2021] SZICA 04 (July 2021)

**Coram:** MAZIBUKO JA, NSIBANDE JP, NKONYANE JA

**Heard:** 25 May 2021

**Delivered:** 10 August 2021

## **Summary:**

### **1. REPORTING A DISPUTE BEFORE THE COMMISSION**

*An aggrieved party, in a contract of employment, is entitled to report his grievance – as a dispute – with the Commission, within 18 months – since the issue giving rise to the dispute arose. A dispute would prescribe if reported out of time. Prescription may be suspended by agreement between the parties. The party reporting the dispute has the onus to prove that the dispute was reported in time, alternatively, the operation of prescription was lawfully suspended.*

### **2. THE RIGHT TO RAISE PRESCRIPTION**

*A party to a dispute who relies on prescription – as a defence – can raise the issue in Court, whether or not the issue had been raised before the Commission. The Commissioner has power to conciliate the parties to the dispute but has no power to adjudicate the dispute. The Court has power to adjudicate inter alia, the issue of prescription as well as the merits of the dispute.*

**JUDGMENT**

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1. The Appellant, namely Inyatsi Construction Group Holdings Limited, has appealed a decision of the Industrial Court dated 8<sup>th</sup> September 2020 which was issued under SZIC case no 29/2020 (B).
  
2. The 1<sup>st</sup> Respondent is Mr David Roberts who is a former employee of the Appellant. It is common cause that the 1<sup>st</sup> Respondent was employed by the Appellant in May 2004 as Production Manager. In October 2009 the 1<sup>st</sup> Respondent was appointed Managing Director of the Appellant.
  
3. The 2<sup>nd</sup> Respondent is Conciliation, Mediation and Arbitration Commission, (hereinafter referred to as the Commission), a statutory body established in terms of the Industrial Relations Act no1/2000 (as amended) (hereinafter referred to as the Act). The 2<sup>nd</sup> Respondent has not opposed the appeal – meaning that it will abide by the decision of the Court.

4. REPORT OF DISPUTE BEFORE THE COMMISSION

About the 30<sup>th</sup> October 2019 the 1<sup>st</sup> Respondent filed a Report of Dispute against the Appellant at the Commission. The 1<sup>st</sup> Respondent claimed the following benefits: bonus payment, 13<sup>th</sup> cheque, severance pay and salary increment.

5. SZIC case no 29/2020 (A).

It is common cause that a Certificate of Unresolved Dispute was issued by the Commission on the 22<sup>nd</sup> November 2019, with the reference SWMZ 516/2019. The issuance of the Certificate of Unresolved Dispute meant that either party could refer the matter to Court for adjudication. Thereafter the 1<sup>st</sup> Respondent (as Applicant) filed a claim at the Industrial Court, under SZIC case no 29/2020 (A), against the Appellant (as Respondent), for adjudication.

6. SZIC case no 29/2020(B).

Thereafter the Appellant filed an application dated 11<sup>th</sup> March 2020, under SZIC case no 29/2020 (B), in which the Appellant (as Applicant) sought an order on the following terms:

“1. *Setting aside Certificate of Unresolved Dispute No: SWMZ 516/2019, which was issued by the Conciliation Mediation and Arbitration Commission on 22<sup>nd</sup> November 2019 on the basis that same was irregularly and impermissibly issued.*

2 *Reviewing, correcting and setting aside the Conciliation Mediation and Arbitration Commission’s decision to accept and conciliate on the first respondent’s report of dispute, notwithstanding that same was time barred in terms of section 76(2) of the Industrial Relation Act.*

3. *Remitting the dispute reported by the first respondent back to the second respondent for consideration on the propriety or efficacy of conciliating the dispute.*

4. *Costs of suit in the event of unsuccessful opposition.*

5. *Further and /or alternative relief.”*

(Record pages 1-2)

7 The Appellant’s application was argued before the Industrial Court and was dismissed by judgment of that Court dated 8<sup>th</sup> September 2020. The Appellant – as Applicant was dissatisfied with the judgment of the Industrial Court and it consequently filed the present appeal.

8 The thrust of the Appellant's argument is that the 1<sup>st</sup> Respondent's claims had prescribed by the time the Report of Dispute was filed with the Commission. The Commission had no jurisdiction therefore to conciliate the dispute since it had been filed out of time.

9 ISSUE GIVING RISE TO A DISPUTE

The 1<sup>st</sup> Respondent has disputed the allegation that his aforementioned claims had prescribed when he reported them as a dispute before the Commission. The 1<sup>st</sup> Respondent submitted further that since the issue regarding prescription was not raised during conciliation (before the Commissioner) - the Appellant is not entitled to raise that issue for the first time before Court.

9.1 An excerpt of the evidence provides as follows:

*“8.3 Furthermore, the Applicant fully participated in the process and did not at all raise issue with the alleged claim that my claim has now prescribed. At the CMAC hearing, I disputed all the correspondence that had passed between the Chairman and myself. At the time, all the Applicant stated was that [I] had been paid in full but no issue at all was raised regarding the alleged prescription of my claim.”*

(Record page 29)

9.2 An excerpt of the Act provides as follows regarding the process of reporting a dispute:

*“76(2) A dispute may not be reported to the Commission if more than eighteen (18) months has elapsed since the issue giving rise to the dispute arose.”*

9.3 An issue giving rise to a dispute would mean; the existence of facts which are necessary for an aggrieved party to prove – in order to be entitled to relief – before the Commissioner.

9.4 In the matter of JAMESON THWALA VS NEOPAC (SWAZILAND) LIMITED SZIC case no 18/98 (unreported) the Court equated the phrase ‘issue giving rise to a dispute’ with the phrase ‘cause of action’. The phrase ‘cause of action’ has been defined as follows:

*“... every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”*

CLASSEN C.J.: DICTIONARY OF LEGAL WORDS AND PHRASES, vol1, Butterworths, (SBN 409 01890 2) page 235.

The Court finds the above-stated authority helpful in explaining the concept.

## 10 THE ROLE OF A COMMISSIONER.

A litigant is entitled to raise the question of prescription – before the Industrial Court, irrespective of whether or not the issue had been raised before the Commissioner. It is therefore imperative at this stage to examine the role as well as the power of a Commissioner, in relation to a dispute that had been referred to him/her for conciliation.

10.1 The Act provides as follows regarding the power and function of a Commissioner.

*64(1) The Commissioner shall –*

*a) ...*

*b) Attempt to resolve, through conciliation, any dispute referred to it in terms of this Act;”*

10.2 In section 2 of the Industrial Relations Act ‘conciliation’ is defined as follows”

*10.2.1 “‘Conciliation’ means the process of settling disputes under Part VIII [of the Act].”*



- 10.2.2 “ ‘*Conciliating officer*’ means an officer or person conciliating between two or more parties in a dispute under this Act whether from the office of the Commissioner of labour or the Commission.”
- 10.3 The power and duty of a Commissioner is to make an effort to settle or resolve a dispute between the parties through conciliation. The Act specifically mentions that the Conciliator or Commissioner will attempt to resolve the dispute. That fact means that there is a possibility that the Commissioner may attempt and yet fail to resolve the dispute.
- 10.4 In the event that the Commissioner fails to resolve the dispute and the time for conciliation has expired, the Commissioner is empowered by the Act to issue a Certificated of Unresolved Dispute – which would confirm the fact that the dispute was not resolved. After a Certificate of Unresolved Dispute is issued, either party may refer the dispute to Court for adjudication.
- 10.5 In addition – the Act has empowered the Commissioner to do the following:
- 10.5.1 “81(5) *At the end of the 21 (twenty one) day period or any further period agreed between the parties –*

a) *The Commissioner shall issue a certificate in the prescribed form stating whether or not the dispute has been resolved;*

...

10.5.2 “85 (1) *For the purposes of this section, an unresolved dispute means a dispute in respect of which a certificate has been issued under section 81 (5)*”.

10.6 The question whether or not a claim has prescribed - is a legal question and it should be decided by the Court. It is a question that the Court has to answer by identifying the correct law that is applicable in the given set of facts. A reading of the Act indicates clearly that the Commissioner has no authority to exercise judicial or quasi-judicial power.

10.6.1 Therefore, even if the question of prescription had been raised during conciliation proceedings, that question would have to be referred to the Court for determination.

10.6.2 By the same token, if the question of prescription had not been raised during conciliation proceedings, it could still be raised before Court and the Court would have to make a determination.

- 10.6.3 In the matter before Court, the Appellant is not prohibited from raising the issue of prescription – even if the Appellant was raising that issue for the first time before the Industrial Court.
- 10.7 The Commission is the appropriate forum to resolve employer – employee disputes through conciliation. The Court is the appropriate forum to adjudicate the disputes – which could not be resolved through conciliation.
- 10.8 The Appellant (as Applicant in the Court a quo), was correct in referring the question of prescription to Court for adjudication. Whatever was discussed or submitted before the Commissioner – during conciliation – could not finalise the question of prescription. As aforementioned, the Commissioner has power to conciliate but not adjudicate. It is the Industrial Court that has power to adjudicate the question of prescription - since prescription is a legal question.
- 10.9 This Court agrees with the Industrial Court in the matter of CYPRIAN MABUZA VS CARITAS SWAZILAND SZIC case no 591/2006 (unreported). In that case the Honourable Court expressed itself as follows, per Nkonyane J.

10.10 *“A Commissioner in the process of conciliation only has a duty to manage the process and is not an arbitrator or judge. During conciliation the Commissioner’s duty is to help the parties to reach an agreement on a particular issue and not to make a ruling. If the parties do not agree, the Commissioner must simply issue a certificate of unresolved dispute.”*

(At pages 3-4)

10.11 This Court also agrees with the Industrial Court in the matter of : NOMSA STEWART VS CONCILIATION, MEDIATION AND ARBITRATION COMMISSION AND ANOTHER, SZIC case no.309/2005 (unreported), where the Court states the following per Nduma J:

*“Conciliation proceedings are about finding an amicable solution. The role of the Conciliator is first and foremost to create an atmosphere that is conducive to settlement of a dispute.”*

(At page 4)

10.12 This Court also agrees with the High Court exercising its review jurisdiction in the matter of: ATTORNEY GENERAL VS THABO MGADLELA DLAMINI AND OTHERS SZHC case no 2007/2010 per Dlamini J. The following extract is apposite:

*“It is common cause as correctly analysed by the Court a quo that from the onset at CMAC, the applicant raised the plea of prescription. The Industrial Court ruled that it ought to have insisted that CMAC make a finding on it. This, I must point out from the outset is incorrect. CMAC’s mandate is not adjudicative over matters. Its jurisdiction is to conciliate or mediate between the parties.”*

## 11 WAIVER OF A RIGHT TO ARGUE PRESCRIPTION

The 1<sup>st</sup> Respondent raised another argument, namely; that the Appellant had waived its right to raise the issue of prescription. According to the 1<sup>st</sup> Respondent the issue of prescription should have been raised, dealt with and finalized – during conciliation. The 1<sup>st</sup> Respondent testified as follows regarding the question of waiver of prescription.

11.1 *“By submission to the jurisdiction of the 2<sup>nd</sup> Respondent, in the full knowledge of all the facts, the Applicant has waived its rights to raise [the] issue at this late stage with the certificate of unresolved dispute.”[sic]*

...

(Record page 30)

11.2 *The reasons being that the dispute arose in the requisite eighteen month period, alternatively, the Applicant waived its right to raise this issue by submitting to the conciliation process whereat all the issues were fully ventilated.”*

(Record pages 30-31)

11.3 The nub of the 1<sup>st</sup> Respondent’s submission is that the Appellant was not entitled to raise the issue of prescription - for the first time – before the Industrial Court. This submission is based on the allegation that the Appellant waived its right to raise the issue of prescription when the dispute was before the Commissioner – for conciliation.

11.4 Legal authorities have explained the principle on ‘waiver’ as follows:

11.4.1 *“The effect of waiver of a right is to extinguish that right and concomitant obligation. Waiver is a question of fact.*

...

*The onus rests upon the party relying on waiver to allege and prove the waiver on a balance of probabilities”*

...

11.4.2 *The defendant must plead and prove that when the alleged waiver took place, the plaintiff had full knowledge of the right which he decided to abandon.”*

HARMS LTC: AMLER’S PRECEDENTS OF PLEADINGS,  
5<sup>th</sup> edition, Butterworths, 1998 (ISBN 0 409 01104 5) page 414

11.4.3 In the matter of HAPPINESS GININDZA VS PEAK TIMBERS LIMITED, the Court, per Dunseith JP (as he then was) expressed itself as follows:

*“There is however a presumption against waiver. The onus is strictly on the Applicant to show that the Respondent, with full knowledge of its right, decided to abandon it ...”*

(At page 6)

11.5 The Appellant was represented at conciliation stage by its Human Resources Manager (Mr Edwin Mbingo). According to Mr Mbingo, the issue of prescription was neither raised nor argued during conciliation. Mr Mbingo denied that he waived the Appellant’s rights to raise that issue. Mr Mbingo testified that he was ignorant of the Appellant’s right to raise the issue of prescription.

11.6 An excerpt of the Appellant’s (Applicant’s) evidence reads thus:

*“There [The] applicant therefore never renounced or agreed to waive its right to enforce the statutory time limit. Waiver of a statutory right, can only be inferred, in circumstances where a party is aware of the statutory provision and consciously waives his reliance on it. In the present matter, during the course of the conciliation, the statutory time limit did not arise and therefore was never considered by parties”*

(Record page 53)

The 1<sup>st</sup> Applicant did not challenge this evidence by Mr Mbingo.

12 The fact that a party submits itself before the Commissioner – for the purpose of conciliation, does not necessarily mean that, that party has waived its right to raise the question of prescription. Ignorance of the law is an acceptable excuse in a case of a party who has failed to raise the question of prescription – during conciliation. When the dispute is referred to Court for adjudication, the Court gains jurisdiction to determine the question of prescription as well as the merits of the dispute –if necessary.

12.1 There is no evidence before Court, to support the notion that Mr Mbingo was aware or had been made aware (at conciliation stage), of the Appellant’s right to raise the issue of prescription. There is no



evidence also to support the 1<sup>st</sup> Respondent's allegation that Mr Mbingo waived the Appellant's right to raise the issue of prescription. Furthermore, there is no evidence to support the allegation that the issue of prescription was subject of discussion - before the Commissioner.

12.2 The onus was on the 1<sup>st</sup> Respondent to prove the alleged waiver. The 1<sup>st</sup> Respondent failed to submit evidence to prove its allegation.

12.3 The Court is satisfied that Mr Mbingo was ignorant of the Appellant's right to raise the issue of prescription – during conciliation. In addition, the Court is satisfied that the Appellant's right to raise the issue of prescription was not waived during conciliation or at all. Therefore the issue of prescription could still be determined before the Industrial Court.

12.4 The Court a quo approached the matter on the basis that the Appellant had not waived its right to raise the question of prescription. The Court a quo proceeded to exercise jurisdiction in order to determine the question of prescription. This Court agrees with the approach of the Industrial Court, that the Appellant did not waive its right to raise the issue of prescription. This Court will

proceed to determine whether or not the decision of the Court a quo was correct regarding the question of prescription.

### 13 CLAIM FOR PAYMENT OF BONUS

In the report of dispute (exhibit EM1) the 1<sup>st</sup> Respondent stated that he had been advised by the Appellant, by letter dated 25<sup>th</sup> November 2016, that he had been awarded bonus for the year 2016 in the sum of E1, 219,987, 00 (One Million Two Hundred and Nineteen Thousand, Nine Hundred and Eighty Seven Emalangi). The letter itself is not before Court, but its contents are not in dispute.

13.1 In paragraph 5.3 of the Report of Dispute the 1<sup>st</sup> Respondent stated the following regarding bonus:

*“I was awarded a bonus in 2016. I received a letter dated 25 November 2016 for E1, 219,987. All other recipients have been paid except me.”*

(Record page 16)

13.2 The Appellant submitted that the 1<sup>st</sup> Respondent’s claim for bonus payment prescribed on the 25<sup>th</sup> May 2018 as calculated from the 25<sup>th</sup> November 2016. Since 1<sup>st</sup> Respondent reported his claim for bonus as a dispute on the 30<sup>th</sup> October 2019, that fact meant that the claim

for bonus had already prescribed when the 1<sup>st</sup> Respondent reported the dispute.

13.3 It appears clearly from the evidence that the 1<sup>st</sup> Respondent became aware as at the 25<sup>th</sup> November 2016 that he was entitled to receive payment from the Appellant of E1, 219,987, 00 for bonus. The Appellant had made a commitment to the 1<sup>st</sup> Respondent to pay (the 1<sup>st</sup> Respondent), the said amount.

13.4 The evidence before Court confirms that the issue giving rise to payment of bonus arose on the 25<sup>th</sup> November 2016. A period of 18 (eighteen) months calculated from the 25<sup>th</sup> November 2016 ended on the 25<sup>th</sup> May 2018.

### 13.5 CLAIM FOR 13<sup>TH</sup> CHEQUE

In the report of dispute the 1<sup>st</sup> Respondent stated that he had been notified in writing, that he was entitled to receive payment for a 13<sup>th</sup> cheque for the year 2017. In his answering affidavit the 1<sup>st</sup> Respondent stated further that his claim for the 13<sup>th</sup> cheque arose in December 2017.

13.6 The Appellant confirmed that the 1<sup>st</sup> Respondent claim for a 13<sup>th</sup> cheque arose in December 2017 but that it prescribed in June 2019.

Since the 1<sup>st</sup> Respondent reported his claim for payment of a 13<sup>th</sup> cheque – as a dispute, on the 30<sup>th</sup> October 2019, that fact meant that the claim for a 13<sup>th</sup> cheque had already prescribed when the 1<sup>st</sup> Respondent reported the dispute.

13.7 The evidence confirms that the issue giving rise to payment of the 13<sup>th</sup> cheque arose in December 2017. A period of 18 months calculated from December 2017 ended in June 2019.

#### 13.8 CLAIM FOR PAYMENT OF SEVERANCE BENEFIT

In the report of dispute the 1<sup>st</sup> Respondent stated that he was notified, in writing, that he would be paid severance benefit (as per contract of employment) in the sum of E3,869,760.00 (Three Million Eight Hundred and Sixty Nine Thousand, Seven Hundred and Sixty Emalangeni). In his answering affidavit the 1<sup>st</sup> Respondent stated that his claim for severance benefit arose in October 2013.

13.9 The Appellant confirmed that the 1<sup>st</sup> Respondent's claim for payment of contractual severance benefit arose in October 2013 and prescribed in April 2015. Since the 1<sup>st</sup> Respondent reported his claim for

payment of severance benefit, as a dispute, on the 30<sup>th</sup> October 2019, that fact meant that the claim for severance pay had already prescribed when the 1<sup>st</sup> Respondent reported the dispute.

13.10 The evidence clearly indicates that the issue giving rise to the claim for payment of severance benefit (as per the employment contract) arose in October 2013. A period of 18 (eighteen) months calculated from October 2013 ended in April 2015.

#### 13.11 CLAIM FOR PAYMENT OF SALARY INCREMENT

In the Report of Dispute, the 1<sup>st</sup> Respondent stated that in his contract of employment, (as Chief Executive Officer of the Appellant), it was agreed that he was entitled to salary increment yearly at a certain agreed rate. The Appellant stated that he did not receive salary increment from 1<sup>st</sup> November 2016 to 1<sup>st</sup> May 2017. The amount owing is E238, 475.00 (Two Hundred and Thirty Eight Thousand Four Hundred and Seventy Five Emalangen). In his answering affidavit the 1<sup>st</sup> Respondent stated that his claim for salary increment arose in May 2017. According to the 1<sup>st</sup> Respondent the issue giving rise to the dispute therefore arose in May 2017.

13.12 The Appellant stated that the alleged increment became due each calendar month with effect from November 2016 and the last of such

amounts was due in May 2017. The Appellant submitted further that even if the issue giving rise to the dispute were to be considered from the 1<sup>st</sup> Respondent's point of view (which was subject to dispute), the claim for salary increment would, in any event, have prescribed in November 2018. Therefore the dispute regarding salary increment had already prescribed by the 30<sup>th</sup> October 2019 when the 1<sup>st</sup> Respondent reported the dispute.

13.13 The evidence indicates that the issue giving rise to salary increment, particularly the last month wherein the increment was to be effected, arose in May 2017. A period of 18 (Eighteen) months calculated from May 2017 ended in November 2018.

#### 14 ARGUMENT ON INTERRUPTION OF PRESCRIPTION

The 1<sup>st</sup> Respondent stated that when the claims arose – the Appellant could not pay them. It was then allegedly agreed that the 1<sup>st</sup> Respondent would be paid when the Appellant was able to.

14.1 In other words the 1<sup>st</sup> Respondent's argument was that prescription was interrupted when the Appellant agreed that it would pay the claims at a future unknown date, subject to availability of funds.

14.2 An excerpt from the affidavit of the 1<sup>st</sup> Respondent reads as follows:

*“6.2.1 in respect of the bonus claim it arose in November 2016;*

6.2.2 *in respect of the thirteenth cheque claim it arose in December 2017;*

6.2.3 *in respect of the severance claim it arose in October 2013;*

6.2.4 *in respect of the salary increment claim it arose in May 2017.”*

14.3 “6.3 *Indeed these claims did arise then but the Respondent was unable to pay them at the time that they arose, and it was agreed that I would be paid as and when the Applicant was able to.”*

(Record page 25)

...

14.4 When the 1<sup>st</sup> Respondent stated in the answering affidavit that: *“Indeed those claims, did arise then ...”*, he meant that his claims arose on the various dates which he had stated in his affidavit, as quoted in paragraph 14.2 above. The dates on which each of the claims arose is therefore common cause. It is not in dispute that the 1<sup>st</sup> Respondent reported his claims at the Commission after 18 (eighteen) months from the date each claim arose. What is disputed is whether or not prescription was interrupted by agreement – as alleged by the 1<sup>st</sup> Respondent.

15 EXHIBIT DR (b) 3

The 1<sup>st</sup> Respondent mentioned also that he had various meetings with the chairman of the Appellant (Mr Michelo Shakantu) wherein Mr Shakantu made requests for extension of time to pay the 1<sup>st</sup> Respondent's claims.

15.1 In order to support his allegation, the 1<sup>st</sup> Respondent referred to exhibit DR (b) 3. This is a letter written by 1<sup>st</sup> Respondent to the Appellant, dated 31<sup>st</sup> May 2019. Exhibit DR (b) 3 reads as follows:

*“Acknowledgement of Debt for monies owed to D. Roberts*

*The following meetings have reference.*

*21<sup>st</sup> February 2018.*

*May 2019 at Malandelas.*

*20<sup>th</sup> February 2019 in the Chairman's office.*

*28<sup>th</sup> May 2019 in the Chairman's office.*

*As per the meeting of 28<sup>th</sup> May 2019 you have agreed to sign an acknowledgement of debt for monies owing to me. I will send through individual emails. These been[sic].*

*1 Outstanding Bonus money owed.*

*2 13<sup>th</sup> cheque*

*3 Cash given to Derek*

*4 Termination of employment benefits.*



5 *Personal loan to M Shakantu.*

*Matters not covered*

1. *Salary increase as per original CEO contract.*

2. *Agreement for 1% of Zambian rewards.*

*These may be used in the settlement.*

*Thanks for your assistance in resolving these matters.”*

(Record page 38)

- 15.2 According to the 1<sup>st</sup> Respondent, exhibit DR (b) 3 confirms that he and the chairman met to discuss his claims on the following dates: 21<sup>st</sup> February 2018, May 2019, 20<sup>th</sup> February 2019 and 28<sup>th</sup> May 2019. The chairman allegedly agreed to sign an acknowledgment of debt for monies owing to him (1<sup>st</sup> Respondent) by the Appellant.
- 15.3 It is a common cause that the Appellant’s chairman (Mr Michelo Shakantu) did not depose to an affidavit in this matter. Mr Shakantu did not deny the allegations made by the 1<sup>st</sup> Respondent as alleged in exhibit DR (b) 3 as read with the answering affidavit.
- 15.4 The 1<sup>st</sup> Respondent argued that; the deponent to both the founding and replying affidavits (Mr Mbingo) is not in a position to deny the existence of the alleged meetings and discussions between the 1<sup>st</sup> Respondent and the chairman (Mr Shakantu). This is because he (Mr

Mbingo) was not part of those meetings. Mr Mbingo has no knowledge of what was discussed and/or agreed to in those meetings. Mr Mbingo's denial of those meetings is either hearsay, speculation or conjecture.

15.5 In the absence of an affidavit from the chairman, the Court was requested to accept the contents of exhibit DR (b) 3 as read with the relevant portion of the answering affidavit – as factually correct.

15.6 This Court has to make the point clear that; it is not hearsay, speculation or conjecture when Mr Mbingo states, under oath, the Appellant's interpretation of the contents of the exhibits that are before Court and to make legal submissions regarding same. The Appellant, being a corporate body, is entitled to authorise any of its senior officers to convey (through an affidavit), its interpretation of the contents of exhibits that are before Court.

16 The Appellant presented a contrary argument to the 1<sup>st</sup> Respondent's submission. According to the Appellant the absence of an opposing affidavit from the chairman does not necessarily mean that prescription (of the 1<sup>st</sup> Respondent's claims) was interrupted. The 1<sup>st</sup> Respondent's claims

had prescribed notwithstanding the absence of an opposing affidavit from the chairman.

16.1 The Appellant argued that there is no evidence of what was allegedly discussed and/or agreed to between the 1<sup>st</sup> Respondent and the chairman on the days mentioned, viz; the 21<sup>st</sup> February 2018, May 2019, 20<sup>th</sup> February 2019 and 28<sup>th</sup> May 2019.

16.2 Secondly, the Appellant argued that in the aforesaid letter (exhibit DR (b) 3), the chairman was advised that he was expected to sign an acknowledgment of debt – whose particulars were yet to be presented to him for consideration. In particular the chairman was expected to acknowledge, in writing, the Appellant’s indebtedness to the 1<sup>st</sup> Respondent – in relation to the claims that are listed in exhibit DR (b) 3.

16.3 In exhibit DR (b) 3, inter alia, the 1<sup>st</sup> Respondent undertook to do the following: *“I will send through individual emails.”*

16.4 The alleged emails are not before Court. There is no allegation in the answering affidavit that the emails were sent to the chairman as per undertaking by the 1<sup>st</sup> Respondent. What is clear from exhibit DR (b) 3 is that the emails were intended to contain terms of the proposed acknowledgement of debt. In the absence of the proposed emails, the

proposed acknowledgement of debt could not exist. There is no acknowledgement of debt before Court.

16.5 Furthermore, in exhibit DR (b) 3, the 1<sup>st</sup> Respondent confirmed that there was neither discussion nor agreement regarding salary increment, as shown below:

*“Matters not covered*

- 1. Salary increase as per original CEO contract.*
- 2. Agreement for 1% of Zambian rewards.”*

17 The Appellant is correct in saying that exhibit DR (b) 3 does not disclose what was discussed or agreed to (if at all) between the 1<sup>st</sup> Respondent and the chairman on the following dates: 21<sup>st</sup> February 2018, May 2019, 20<sup>th</sup> February 2019 and 28<sup>th</sup> May 2019. The letter only confirms that the meetings did take place. However nothing turns on that confirmation especially because that aspect of the evidence is not in dispute. What is in dispute is whether or not there was an agreement between the 1<sup>st</sup> Respondent and the chairman on the claims that are listed in exhibit DR (b) 3. The Court has made a finding that exhibit DR (b) 3 does not disclose an agreement, let alone an agreement that would interrupt prescription date.

18 The 1<sup>st</sup> Respondent further stated in exhibit DR (b) 3 that at the meeting of the 28<sup>th</sup> May 2019, the chairman agreed to sign an acknowledgement of debt for monies owing to the 1<sup>st</sup> Respondent.

18.1 It is common cause that the chairman did not sign an acknowledgement of debt. The absence of the anticipated, acknowledgement of debt, meant that the Appellant did not acknowledge itself to be indebted to the 1<sup>st</sup> Respondent in any of the claims that have been placed before Court.

18.2 As at the 31<sup>st</sup> May 2019, (the date exhibit DR (b) 3 was issued), the 1<sup>st</sup> Respondent knew that the anticipated acknowledgement of debt had not been signed. The 1<sup>st</sup> Respondent knew also that he needed an acknowledgment of debt from the Appellant in order to secure his claims.

18.3 In the absence of an acknowledgement of debt, the 1<sup>st</sup> Respondent bears the onus –

18.3.1 to prove his claims against the Appellant, and also

18.3.2 to prove that his claims against the Appellant had not prescribed at the time he filed a Report of Dispute with the Commission.

19 In the answering affidavit the 1<sup>st</sup> Respondent testified as follows regarding the said meetings.

“6.8 Furthermore, I had various meetings with the Applicant’s Chairman regarding extensions of time for payment of the monies due. In that regard, I attach hereto marked “DR (b) 3” a letter dated 31 May 2019 wherein I address the issue with the Applicant’s Chairman. I made reference to a meeting that was held on the 21<sup>st</sup> of February 2018, at Mandela’s Restaurant in Malkerns, a further meeting held in May 2019 at Mandela’s Restaurant. Again on the 20<sup>th</sup> February 2019 in the Chairman’s Office and again on the 28<sup>th</sup> of May 2019 in the same office we addressed the issue. Additionally I also attach marked “DR (b) 4” a further letter which I sent to the Chairman.

6.9 It was always in contemplation of the parties that I would be paid the various claims of monies due to me when the Applicant was able to. As further illustration of this principle I attach hereto a copy of the Exco Bonus Scheme marked DR (b) 5 from which certain of my claims emanate. It states clearly that “the timing of all payments are dependent on availability of cash.” (my emphasis)”

(Underlining added)

*(Record page 27)*

...

“7.2 *What the Applicant has done is purposely delayed this matter[sic] by stringing me along, not informing me that they never intended to pay me in the first place but always gave me the impression that they would pay when funds are available. It was only on 26<sup>th</sup> September 2019 when it became absolutely clear that they would not pay me that the dispute arose.*”

*(Record page 29)*

19.1 Based on the contents of the answering affidavit, the 1<sup>st</sup> Respondent drew the Court’s attention to the following observation he had made:

19.1.1 That he held various meetings with the Chairman (Mr Shakantu) wherein they discussed the issues of extension of time for payment of monies due to the 1<sup>st</sup> Respondent.

19.1.2 That it was in the contemplation of the parties (viz, Appellant and 1<sup>st</sup> Respondent), that the 1<sup>st</sup> Respondent would be paid the various claims allegedly owing to him when the Appellant is able to pay.

19.2. However, upon a closer examination of the answering affidavit, the following facts appear clearly:

19.2.1 There is no assertion or evidence that the chairman actually agreed that the Appellant was indebted to the 1<sup>st</sup> Respondent on a specific claim or claims or sum of money and that payment of same was due.

19.2.2 There is also no evidence that the Appellant and the 1<sup>st</sup> Respondent agreed that the due date for payment of the said claim or claims or sum of money would be extended.

19.3 The 1<sup>st</sup> Respondent mentioned that it was in the contemplation of the parties that he would be paid the various claims that he had raised against the Appellant. That statement by the 1<sup>st</sup> Respondent has its difficulties – as shown below:

19.3.1 The; *Concise Oxford English Dictionary* has explained word ‘*contemplate*’ as follows:

*“Look at thoughtfully, think about, think profoundly and at length, have as a probable intention.”*

19.3.2 It is a fact that when a person is contemplating a particular issue, it does not mean that, that person has agreed on the terms of that issue. A person may contemplate an issue but still disagree with it either



completely or partially or simply be non-committal. In short, contemplation is not equivalent to agreement.

19.4 Consequently, there is no evidence, in the answering affidavit, that the chairman made a commitment that the Appellant would pay the 1<sup>st</sup> Respondent's claim or claims at a future date, either at all or subject to availability of funds.

19.5 There is also no evidence in the answering affidavit, that confirms the allegation that the chairman agreed to extend the date of prescription of each of the 1<sup>st</sup> Respondent's claims.

## 20 EXHIBIT DR (b) 4

The 1<sup>st</sup> Respondent further referred to exhibit DR (b) 4. This is a letter written by 1<sup>st</sup> Respondent to the chairman. The letter is relevant and is hereby reproduced:

*“Morning Mich,*

*Thanks for the meeting and not rushing it.*

*You explained the cash situation that Inyatsi finds themselves in at the moment.*

*With this in mind we agreed to the following.*

- 1. The EXCO bonus value of E1 219 986,00 will be paid.*
- 2. The 13<sup>th</sup> cheque of E330 000 will be paid.*
- 3. Money that I gave to you and Derek Shiba, E 370 000 will be paid.*

*The salary increase portion will not be paid, but will remain on the table should you not carry out what we agreed.*

*The end of employment benefits are due and will be paid on agreeing to the number of leave days. The salary portion is agreed.*

*You require me to send proof of leave days taken. I am working on that.*

*This money will be paid in full by the 31<sup>st</sup> March 2019. If it is not then interest will apply. I will have this a [sic] agreement drawn up for us to sign once the leave days are agreed, based on these principals.*

*Please respond to this mail indicating that you are in agreement.*

*Keep well and look after your health.*

*Dave”*

*(Underlining added)*

(Record page 39)

- 20.1 Exhibit DR (b) 4 is undated. However it mentions the 31<sup>st</sup> March 2019 as the date on which the 1<sup>st</sup> Respondent proposed that he should receive payment from the Appellant. It is possible that the letter (exhibit DR (b) 4) was written prior to the 31<sup>st</sup> March 2019. The Court does not however make a definite finding regarding the date of the letter. The focus is on contents of the letter.
- 20.2 In exhibit DR (b) 4 the 1<sup>st</sup> Respondent stated that he would draw up an agreement which would be signed by both himself and the chairman. The proposed agreement was meant to be an acknowledgment or confirmation by the Appellant of its indebtedness to the 1<sup>st</sup> Respondent in various sums of money and/or claims, that had allegedly been agreed to between the 2(two) parties.
- 20.3 The tenor of the letter confirms that whatever was discussed at that meeting did not amount to an agreement. The 1<sup>st</sup> Respondent actually issued a directive, in that letter, stating that an agreement between the parties (on the issues that had been discussed at the meeting – aforementioned), would be in writing. The 1<sup>st</sup> Respondent had stated in that directive), that he would draw up and present a written draft -agreement to the chairman. That draft would have been

signed by the 1<sup>st</sup> Respondent and subsequently by the chairman - in order to make it an agreement. In short, the 1<sup>st</sup> Respondent made the point clear in exhibit DR(b)4, that there was no oral agreement between himself and the Appellant regarding payment of his claims as listed in exhibit DR (b) 4.

20.4 There is no written agreement before Court. The 1<sup>st</sup> Respondent has failed to explain (in the answering affidavit), whether or not he signed and issued the proposed draft, and if so what happened to it? The absence, before Court, of a written agreement means that; the parties did not reach agreement on the issues that the 1<sup>st</sup> Respondent had raised in the letter (exhibit DR (b) 4).

20.5 Furthermore, there is no provision in exhibit DR (b)4 in which the Appellant admitted itself to be indebted to the 1<sup>st</sup> Respondent regarding the latter's claims and also that, it would pay those claims when there is money to do so.

20.6 The Court can conclude therefore that exhibit DR (b) 4 was a written communication from 1<sup>st</sup> Respondent, in which he notified the chairman that he (1<sup>st</sup> Respondent) was preparing a draft – agreement which he would sign and then present to the chairman – to sign. It

was the proposed written agreement that was meant to bind the Appellant. The proposed written agreement did not materialize.

21 A second difficulty in exhibit DR(b)4 which the 1<sup>st</sup> Respondent failed to address reads thus:

*“Please respond to this mail indicating you are in agreement.”*

21.1 This clause confirmed that there was no oral agreement between the 1<sup>st</sup> Respondent and the chairman on the issues that had been discussed. Exhibit DR (b) 4 contained a written offer from the 1<sup>st</sup> Respondent, which had been directed to the chairman as a representative of the Appellant. The chairman was directed to communicate acceptance of the offer in writing.

21.2 There is no written acceptance of the offer before Court. The absence of an acceptance, means that there is no agreement between the 1<sup>st</sup> Respondent and the Appellant regarding the terms that 1<sup>st</sup> Respondent had proposed in exhibit DR (b) 4.

21.3 In the matter of: GOODMAN DLAMINI VS FINANCIAL SERVICES REGULATORY AUTHORITY SZIC case no 229/2015, (unreported), the Court restated the principle, of offer and acceptance; as follows:

*“A contract comes into existence when an offer by one party is accepted by the other.”*

(At page 28)

21.4 It follows logically that in the absence of an acceptance of the offer, there is no contract.

## 22 EXHIBIT DR(b) 5

The 1<sup>st</sup> Respondent also referred the Court to exhibit DR (b) 5. The title of this document reads thus: ‘*EXCO Bonus Scheme.*’ It is common cause that the acronym: EXCO (in this context), means the Executive Committee of the Appellant, of which the 1<sup>st</sup> Respondent was a member.

22.1 The 1<sup>st</sup> Respondent presented exhibit DR (b) 5 allegedly as proof that the Appellant had agreed to pay his (1<sup>st</sup> Respondent’s) claims subject to availability of funds.

22.2 Exhibit DR (b) 5 is a 3 (three) page document. At the foot of each page the following words appear:

*“D. Roberts EXCO bonus December 9, 2013”*. The preceding quotation gives an impression that exhibit DR (b) 5 was in existence as at the 9<sup>th</sup> December 2013. However the date is not among the issues that were subject of dispute.

22.3 The attention of the Court was drawn to the following clause in exhibit DR (b) 5:

***“Payment of bonus pool.***

*The timing of all payments are dependent on availability of cash.”*

(Record page 40)

22.4 The 1<sup>st</sup> Respondent has interpreted the statement that is quoted above, to mean that: the Appellant issued a directive in terms of exhibit DR (b) 5 to the effect that; all his claims for payment which he had reported as a dispute before the Commission, would be paid – when the Appellant has money to pay. With respect, the 1<sup>st</sup> Respondent has incorrectly interpreted the contents of exhibit DR (b) 5.

22.5 Exhibit DR (b) 5 mention only 2(two) items viz; payment of bonus to EXCO members and also payment of Long Term Incentive. It is only the payment of bonus to Exco members that is of relevance to the case before Court. This assertion is because in the Report of Dispute there is no claim relating to Long Term Incentive. Therefore, the issue of Long Term Incentive, will not feature in this judgment.

22.6 Other than payment for bonus, there is no mention in exhibit DR (b) 5 of the remainder of the 1<sup>st</sup> Respondent’s claims – especially those

which are contained in the Report of Dispute. In particular there is no mention in exhibit DR (b) 5 of payment for severance benefits, 13<sup>th</sup> cheque and salary increment. The conclusion is inescapable therefore that exhibit DR (b) 5 addressed itself to bonus payment and that, the remainder of the 1<sup>st</sup> Respondent's claims (which are mentioned in the Report of Dispute) are excluded.

22.7 Exhibit DR (b) 5 explains both the arithmetic relating to calculating bonus that is payable to Exco members and the instances or conditions where such bonus is payable. When exhibit DR (b) 5 mentioned that '*The timing of all payments are dependent on availability of cash*'; it only meant payment of bonus to various Exco members according to their entitlement.

22.8 The 1<sup>st</sup> Respondent's mistake is to read into the aforementioned clause something which is not written. Exhibit DR (b) 5, and in particular the clause in question, does not refer to all of the claims which the 1<sup>st</sup> Respondent had listed in the Report of Dispute, but only to payment of bonus. If the author of exhibit DR (b) 5 had intended to regulate the payment of all the claims that the 1<sup>st</sup> Respondent had listed in the Report of Dispute, that author would have clearly stated that as a fact.



22.9 In its replying affidavit the Appellant did not challenge the validity of exhibit DR (b) 5 as well as its contents. The Court can conclude therefore that exhibit DR (b) 5 was a policy document that was applicable at the Appellant's workplace, at the time when the issue giving rise to payment of bonus, arose.

22.10 SUSPENSION OF PRESCRIPTION ON BONUS PAYMENT.

An excerpt from exhibit DR (b) 5 (as quoted in paragraph 22.3 above), indicates clearly that the Appellant committed itself to the principle or rule; that bonus due to Exco members would be paid subject to availability of cash. That statement meant that the date for payment of bonus would be suspended pending availability of funds.

22.11 The suspension of the due date for payment of bonus affected the prescription date. Prescription could not run until that particular condition was met viz; the ability of the Appellant to pay bonus to Exco members. There is no evidence before Court that at some point from 25<sup>th</sup> November 2016 but before the 26<sup>th</sup> September 2019, the Appellant notified the 1<sup>st</sup> Respondent that the condition (which suspended the running of prescription), had been met, and therefore prescription would begin to run. That fact had to be communicated clearly to the 1<sup>st</sup> Respondent so that he could understand the risk he

was taking in failing to report his dispute with the Commission, in time.

22.12 According to the 1<sup>st</sup> Respondent he was notified by the Appellant by letter dated 25<sup>th</sup> November 2016 that he had been awarded bonus in the sum of E1,219,989.00 (One Million Two Hundred and Nineteen Thousand Nine Hundred and Eighty Nine Emalangeni). Even though bonus had been awarded, the 1<sup>st</sup> Respondent could not however demand immediate payment of his share of bonus until the Appellant had declared that it had sufficient funds to pay the Exco members their bonus entitlement. The declaration by the Appellant on the availability of funds to pay bonus to Exco members - would have set aside the suspension of prescription. However that declaration was not made. Therefore, in respect of this claim - prescription remained suspended until 26<sup>th</sup> September 2019.

EXHIBIT DR (b) 7.

23 Exhibit DR (b) 7 is dated 26<sup>th</sup> September 2019. The evidence before Court indicates that exhibit DR (b) 7 was the first statement which the 1<sup>st</sup> Respondent received from the Appellant, (after exhibit DR (b) 5), in which the Appellant denied liability to the 1<sup>st</sup> Respondent for the claims that are contained both in exhibit DR (b) 6 and subsequently in the Report of

Dispute. The Appellant issued exhibit DR (b) 7 through its attorneys (Messrs S.V. Mdladla and Associates).

### 23.1 EXHIBIT DR (b) 6

Exhibit DR (b) 6 is a letter from the 1<sup>st</sup> Respondent's attorneys (Messrs Henwood and Company), dated 3<sup>rd</sup> September 2019, addressed to the Appellant. Exhibit DR (b) 6 contains a demand by the 1<sup>st</sup> Respondent for payment by the Appellant of claims for: bonus, 13<sup>th</sup> cheque, severance benefits and salary increment. The same claims were listed in the Report of Dispute. The Appellant answered this letter by issuing exhibit DR (b) 7.

### 23.2 An excerpt of exhibit DR (b) 7 reads as follows:

*“2 Without going into the details of the issues arising from your aforementioned letter, client instructs us that the issue of your client's terminal benefits was discussed in detail and he was paid in full and final settlement on or about the 24<sup>th</sup> October 2017 and he signed for same.”*

(Underlining added)

(Record page 48)

### 23.3 The allegation that is contained in the Appellant's letter (exhibit DR (b) 7) raises a potential defence which, if pleaded and proved, would

possibly affect the prescription date. However the Appellant's allegation is faced with insurmountable hurdles as shown below.

#### 23.4 PROCEDURE IN APPLICATION PROCEEDINGS

The Appellant has failed to plead in its affidavit certain pertinent allegations which appear in exhibit DR (b) 7 as quoted in paragraph 23.2 above.

23.4.1 The Appellant has alleged in exhibit DR (b) 7 that on the 24<sup>th</sup> October 2017, there was discussion in which terminal benefits claimed by 1<sup>st</sup> Respondent (in exhibit DR (b) 6) were paid in full and final settlement. The Appellant's position is that it discharged its liability toward the 1<sup>st</sup> Respondent regarding the aforementioned claims.

23.4.2 The Appellant further stated that the 1<sup>st</sup> Respondent signed a document as confirmation that he had been paid in full and that, that payment was final settlement of his claims against the Appellant.

23.5 In application proceedings the Applicant is required, by law, to establish its case in the founding affidavit. Likewise, the Respondent is required, by law, to establish its defence in the answering affidavit.

Each of the parties is required to provide, in their respective affidavits, the allegations of fact and also the supporting evidence.

23.5.1 *“The founding and supporting affidavits must cover all the elements of the area of law on which the applicant is relying, and must contain also all the evidence supporting these elements. Relevant documents ... may also be attached to the affidavits as annexures.”*

PETE S et al: CIVIL PROCEDURE, A practical guide, New Africa Books, 2005 (ISBN 1-86928 – 525-5) page 143.

23.5.2 *“Your founding affidavit is the only chance which you will have to place your case before the court, ...”*

MORRIS E et al: TECHNIQUE IN LITIGATION, 6<sup>th</sup> edition, Juta, 2016 (ISBN 978 0 70218 4581) page 311.

23.6 The failure by the Appellant to plead and provide supporting evidence on the alleged events of the 24<sup>th</sup> October 2017, rendered its potential defence as contained in exhibit DR (b) 7, fatally defective. The Appellant could not rely on exhibit DR (b) 7 as a means to prove the alleged event.

23.7 There is no document before Court which was signed by the 1<sup>st</sup> Respondent, in which the 1<sup>st</sup> Respondent acknowledged receipt of

payment of terminal benefits from the Appellant, either on the 24<sup>th</sup> October 2017, or at all. The Appellant's point is without merit and is accordingly dismissed.

23.8 In exhibit DR (b) 5, and also in the affidavits, the Appellant did not deny that it was liable to the Respondent (as an Exco member) for payment of bonus. The Appellant merely suspended the due date for payment of bonus by placing a suspensive condition. The Appellant withdrew that suspensive condition when it wrote exhibit DR (b) 7.

#### 23.9 CLAIM FOR BONUS REPORTED ON TIME

It was in exhibit DR (b) 7 that the Appellant denied that it was liable to the 1<sup>st</sup> Respondent for payment of bonus and other claims. At that moment (26<sup>th</sup> September 2019), a dispute arose regarding the 1<sup>st</sup> Respondent's entitlement to payment of bonus. The 1<sup>st</sup> Respondent was correct in calculating prescription date – for bonus payment, from the 26<sup>th</sup> September 2019.

24 When the 1<sup>st</sup> Respondent filed its Report of Dispute, for instance, on the 30<sup>th</sup> October 2019, its claim for payment of bonus had not prescribed. The Court a quo was correct in arriving at a conclusion that the 1<sup>st</sup> Respondent's claim – for payment of bonus, was filed before the Commission – in time.

Consequently, the Appellant's appeal regarding bonus payment is hereby dismissed.

25 CLAIMS FOR 13<sup>TH</sup> CHEQUE, SEVERANCE BENEFIT AND SALARY INCREMENT

The Court has analysed the legal effect of exhibits DR (b) 3, DR (b) 4, DR (b) 5, DR (b) 6 and DR (b) 7 and has made a finding regarding the 1<sup>st</sup> Respondent's claim for bonus payment. The Court now turns to the remainder of the 1<sup>st</sup> Respondent's claims viz; 13<sup>th</sup> cheque, severance benefit and salary increment. The Appellant's main prayer was that the remainder of the Respondent's claims aforementioned, had prescribed by the time a Report of Dispute was filed with the Commission and the Court should therefore dismiss those claims.

25.1 The 1<sup>st</sup> Respondent submitted that prescription of his claims was interrupted by agreement with the Appellant. In principle, prescription can be interrupted by agreement between employer and employee. In the absence of an admission, there must be proof, on a balance of probabilities, that there was an agreement in which the parties interrupted prescription.

25.2 There is no evidence in the affidavits or exhibits to support the 1<sup>st</sup> Respondent's contention that prescription of its claim, particularly for payment of: a 13<sup>th</sup> cheque, severance benefit and salary increment was interrupted by agreement. Consequently, the Court finds that the 1<sup>st</sup> Respondent's aforementioned claims prescribed on the following dates-

25.2.1 June 2019 for the 13<sup>th</sup> cheque, and

25.2.2 April 2015 for contractual severance benefits, and

25.2.3 November 2018 for salary increment.

25.3 When the 1<sup>st</sup> Respondent filed its Report of Dispute (on the 30<sup>th</sup> October 2019), the remainder of the 1<sup>st</sup> Respondent's claims had prescribed. The 1<sup>st</sup> Respondent's letter of demand (exhibit DR (b) 6), did not revive claims that had already prescribed.

## 26 JUDGMENT FROM THE COURT A QUO

The Court a quo made an error of law in failing to interpret the contents of each of the exhibits before Court namely DR (b) 3, DR (b) 4, DR (b) 5, DR (b) 6, and DR (b) 7. Furthermore, the Court a quo made an error of law in concluding that the aforementioned exhibits, contain an agreement whose



effect was to interrupt prescription on the remainder of the 1<sup>st</sup> Respondent's claims, when infact there is no such agreement.

27 Wherefore the following order is issued.

27.1 The 1<sup>st</sup> Respondent's claims for a 13<sup>th</sup> cheque, severance benefits and salary increment had prescribed prior to being reported before the Commission. The appeal is upheld regarding those claims.

27.2 The 1<sup>st</sup> Respondent's claim for bonus payment was reported in time with the Commission. The appeal is dismissed regarding that claim.

27.3 Each party is to pay its costs.

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D. MAZIBUKO

JUDGE - INDUSTRIAL COURT OF  
APPEAL

I agree

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S. NSIBANDE JP

I agree

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N. NKONYANE JA

**For Appellant:**

Advocate Naidoo

Instructed by Magagula

Attorneys

**For Respondent:**

Advocate P. Flynn

Instructed by Henwood and

Company