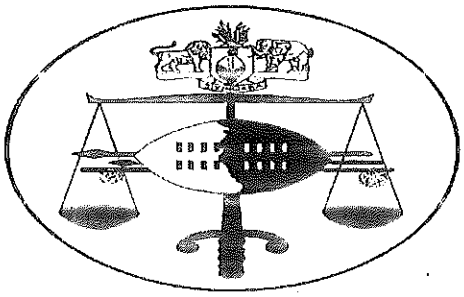

IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

HELD AT MBABANE **CASE NO. 18/2023**

In the matter between:

JONATHON C. WILLIAMS	1st Appellant
KJOTT-OG FJORFEBRANSJENS LANDSFORBUND	2nd Appellant
BEN GILBERT DLAMINI	3rd Appellant
VINCENT SABELO LUKHELE	4th Appellant
SIPHO JOHANE SHONGWE	5th Appellant
RICHARD DUMA DLAMINI	6th Appellant
MGUNTU AARON DLAMINI	7th Appellant
HOWE INVESTMENTS (PTY) LIMITED	8th Appellant
TWK AGRICULTURE LIMITED	9th Appellant

and

DERRICK MDUDUZI SHONGWE AND 199 OTHERS	**Respondents**
ESWATINI MEAT INDUSTRIES LIMITED	**200th Respondent**

NEUTRAL CITATION: *Jonathon C. Williams &Others v Derrick Mduduzi Shongwe & 199 Others (18/2023 [2023] SZICA 08 (22nd March, 2024)*

CORAM: S. NSIBANDE JP, N. NKONYANE AND A.M. LUKHELE JJA

HEARD : 30/11/2023

DELIVERED : 22/03/2024

SUMMARY---Labour Law---The Appellants were shareholders of the entire issued share capital of Eswatini Meat Industries Limited---All shares were sold to and purchased by Inyatsi Group Holdings---Employees seeking to be paid accrued benefits as they reasoned that the transaction amounted to a sale and/or takeover of the business by another person as envisaged by Section 33 bis of the Employment Act---Industrial Court making a finding in favour of the employees---Appellants dissatisfied with the judgement and filing an appeal to the Industrial Court of Appeal.

On Appeal:

Held---The takeover envisaged by the Employment Act is one that indeed and in reality, is capable of transferring the ownership, control and management of the company's business to another person. In casu, the sale agreement effectively transferred the ownership, control and management of the company to the purchaser, Inyatsi Group Holdings.

Held further--- the principle that a registered company is a legal person distinct from the members who compose it as propounded in the locus classicus of Salomon V Salomon & Company Ltd (1897) AC 22 (HL) is part our jurisprudence and is applicable to the current matter---in casu, the Appellants as the erstwhile shareholders cannot be held personally liable unless an order to pierce the corporate veil is granted upon application by the interested party---the Appellants having made an undertaking in terms of clause 12 (b) of the Agreement to ensure that the company shall pay the benefits accruing to the employees in terms of Section 33 bis, as long as the employees remain unpaid it cannot be said that the Appellants have discharged that obligation---the Appellants' appeal is accordingly dismissed---Each party to pay its own costs.

JUDGEMENT

N. NKONYANE, JA

INTRODUCTION

[1] This is an Appeal that was brought by the Appellants in terms of Section 19(1) of the Industrial Relations Act No.1 of 2000 as amended.

[2] The appeal was noted by the Appellants on the 04th October 2023 against the final decision of the Industrial Court delivered on the 18th September 2023.

BACKGROUND FACTS

[3] The Appellants are all erstwhile shareholders of the entire issued share capital in the 200th Respondent, ESwatini Meat Industries Limited. The Appellants decided to sell their entire shareholding in ESwatini Meat Industries Limited to Inyatsi Group Holdings (Pty) Ltd (hereinafter referred to as Inyatsi Group Holdings). The parties duly executed a written agreement which they called a Share Purchase Agreement. The original agreement was not produced in Court. The Appellants only filed a copy of a redacted document which was annexed to the answering affidavit marked "JW1".

[4] According to clause 12 (b) of the agreement, the parties agreed that they will abide by the relevant section of the Employment Act set out in clause 4 (9) (vi) of the agreement. The parties also agreed that the sellers shall ensure that the employer company (ESwatini Meat Industries Limited) shall pay all eligible employees the benefits payable in terms of Section 33 *bis* of the Employment Act 5 of 1980 as amended (hereinafter referred to as the Employment Act), being the difference between the provident fund benefit and the amount due in terms of Section 33 bis.

[5] On the 21st July 2023, ESwatini Meat Industries Limited wrote a letter to the Staff Association (annexture "MIE 3") informing the employees that as a result of the sale, all contracts of employment shall be terminated effective 31st July 2023 in accordance with Section 33 *bis* of the Employment Act.

[6] The employees viewed the transaction as a sale and/or takeover of the business by the purchaser, who acquired the entire shareholding that was formerly held by the Appellants in ESwatini Meat Industries Limited. The employees accordingly approached the Industrial Court on an urgent basis seeking relief, *inter alia*, to be paid all the benefits accruing and/or due to them as envisaged by Section 33 *bis* of the Employment Act.

[7] The Industrial Court in its judgment concluded that there was a sale and takeover of all the shares and assets of the 200th Respondent (ESwatini Meat Industries Limited) by the Inyatsi Group Holdings (Pty) Ltd, which triggered the operation of Section 33 *bis* of the Employment Act. The Industrial Court also found that the Appellants were liable to pay as per the terms of the agreement of sale and it accordingly made an order that the Appellants should pay all the employees of ESwatini Meat Industries Limited their terminal benefits in compliance with Section 33 *bis* of the Employment Act within thirty days of the delivery of the judgment. The Appellants were also ordered to pay the costs of suit based on the attorney and own client scale.

[8] The Appellants did not accept the judgment of the Industrial Court and they filed the current appeal.

GROUNDS OF APPEAL

[9] The Appellants' grounds of appeal are voluminous. They can, however, be summarized as follows;

9.1 The Industrial Court erred in making the finding that the sale of the entire shares in ESwatini Meat Industries Limited by the Appellants allowed the takeover of the business as envisaged by Section 33 *bis*.

9.2 The Industrial Court erred in fact and in law in failing to follow the judgments in **Swazi Spa Holdings Limited V Swaziland Hotel Catering and Allied Workers Union and Another, Industrial Court case number 254/2011 (IC)** and that of **Swaziland Hotel Catering and Allied Workers Union and Another V Swazi Spa Holdings, case number 06/2012 (ICA)** where the Courts held, *inter alia*, that the purchase of the majority of shares in a company does not equate to a sale or takeover of that company's business.

9.3 The Industrial Court erred in finding that the Appellants allowed a takeover of the business in terms of the agreement entered into between the Appellants and Inyatsi Group Holdings (Pty) Ltd.

9.4 The Industrial Court erred in finding that the decision that the employees would be paid their terminal benefits in terms of Section 33 *bis* communicated by the letter dated 21st July 2023

was the decision of the Appellants. The decision was not that of the Appellants, but it was the decision of the employer, ESwatini Meat Industries Limited.

9.5 The Industrial Court erred in failing to distinguish between duties of the employer company and that of its shareholders. The Industrial Court erred in failing to appreciate that the obligation to pay eligible employees their terminal benefits, both in terms of the Agreement and as a matter of law, was an obligation that rested on ESwatini Meat Industries Limited as the employer company and not on the Applicants.

9.6 The Industrial Court erred in making the order that the Appellants should pay the terminal benefits to the employees despite its finding that ESwatini Meat Industries Limited has a separate legal personality apart from its shareholders.

9.7 The Industrial Court erred in law and in fact in making an order that the Appellants should pay the costs of suit based on the attorney and own client scale in the absence of sufficient basis for such an order.

ISSUES TO BE DECIDED BY THE COURT

[10] The issues to be decided by the Court are, firstly; whether or not there was a sale of the business to another person or a takeover of the business by another person. If the Court finds that there was no sale or a takeover of the business by another person, then *cadit quaestio* and the appeal

would have to be upheld. Secondly; if the Court finds that there was a sale or takeover of the business by another person, who is liable to pay all the benefits accruing to the employees as envisaged by Section 33 *bis* of the Employment Act.

THE APPELLANTS' CASE

[11] The main arguments on behalf of the Appellants were articulated as follows;

11.1 The Industrial Court erred in holding that Section 33 *bis* of the Employment Act was applicable. It was argued that the transaction in this case was a sale of shares and not a sale of business as envisaged by Section 33 *bis*.

11.2 Even if Section 33 *bis* was applicable, the liability to pay the benefits accruing to the employees does not lie with the shareholders, but it lies with the employer, *to wit*, ESwatini Meat Industries Limited.

11.3 The shareholders are not personally liable. Even if there was a need to hold them personally liable, the employees would have to file an application for piercing of the corporate veil. There was no such an application before the Industrial Court.

11.4 There was no takeover of the business as envisaged by Section 33 *bis*. The business is still in the hands of Eswatini Meat Industries Limited.

THE EMPLOYEES' CASE

[12] On behalf of the employees the main submissions were presented as follows;

12.1 The Appellants were hundred per cent shareholders of ESwatini Meat Industries Limited; by selling the entire shareholding in ESwatini Meat Industries Limited, the Appellants allowed the buyer, Inyatsi Group Holdings, to take over ownership and control of the business.

12.2 Taking into account the language used by the parties in drafting the Share Purchase Agreement, it becomes clear that, in reality, the transaction was for a sale and/or takeover of the business.

12.3 Inyatsi Group Holdings now owns the entire shareholding in ESwatini Meat Industries Limited. It is now in control of the business of ESwatini Meat Industries Limited, the share Purchase Agreement was merely a disguise to conceal the actual nature of the transaction, that is, the sale and/or takeover of the business.

12.4 The agreement was freely and voluntarily entered into by the parties. The Appellants made an undertaking under clause 12(b)

of the agreement that they will ensure that all eligible employees would be paid their terminal benefits accruing to them in terms of Section 33 *bis*. The Appellants have failed to live up to this undertaking that they freely and voluntarily made.

ANALYSIS OF THE EVIDENCE, SUBMISSIONS AND THE LAW

[13] It was argued on behalf of the Appellants that the provisions of Section 33 *bis* were not triggered in this case because there was no sale of business but only a sale of shares. It was also argued that even if the provisions of Section 33 *bis* were correctly triggered by the transaction, the liability to pay the benefits accruing to the employees did not fall on the erstwhile shareholders, but it fell upon the employer company, ESwatini Meat Industries Limited.

[14] The Court is, therefore, called upon to enquire whether or not the transaction between parties amounted to a sale and/or takeover of the business by another person. The question of a sale and/or takeover of a business by another person is governed by Section 33 *bis* of the Employment Act. That section provides as follows;

"Payment of all benefits before selling business.

33 bis. (1) An employer shall not –

(a) sell his business to another person; or

(b) allow a takeover of the business by another person,

unless he first pays all the benefits accruing and/or due for payment to the employees at the time of such sale or take over.

(2) Notwithstanding subsection (1) if the person who is buying the business or taking it over, makes a written guarantee which is understood by and acceptable to each employee that all benefits accruing at the termination of his previous employment shall be paid by him within 30 days and by mutual agreement agreed in writing and approved by the Commissioner of Labour, subsection (1) shall not apply.

(3) An employer who fails to comply with subsection (1) shall, upon conviction, be liable to a fine not exceeding six thousand Emalangeni or to imprisonment not exceeding two years or both."

[15] What is clear from the language employed in this section is that, an employer is prohibited from selling or allowing the takeover of the business before certain conditions are met, one of which is first paying off all the benefits accruing to the employees. In *casu*, it was argued on behalf of the Appellants that there was never a sale or takeover of the business by another person. It was argued that the transaction between the Appellants and Inyatsi Group Holdings was simply a sale of shares and that the employer remained the same. Indeed, on the face of it the document is written "Share Purchase Agreement". The Appellants entreated the Court to regard this document as representing only what its name says it is and nothing else.

[16] The Court, however, has a duty to look at the agreement as a whole and all the surrounding circumstances for it to be in a position to make a determination of what the transaction amounted to. In the case of **Schutte & Others V Powerplus Performance (Pty) Ltd & Another, [199] 2 BLLR 169 (LC),** the Labour Court of South Africa had occasion to deal with a matter involving the application of Section 197 (1) (a) of the Labour Relations Act 66 of 1955. That section is similar in substance to our Section 33 *bis* though not cast in identical terms, because it also seeks to provide protection to employees in case of change of ownership of the business either by way of sale, takeover or transfer to another person. When dealing with the issue whether the facts of that case constituted a transfer of the business as a going

concern, the Labour Court, per Seady AJ, held as follows in paragraph 50:

"...This requires an examination of substance and not form; weighing factors that are indicative of a section 197 transfer against those which are not; treating previous cases as useful indicators, but not precedent, and in this way deciding what is ultimately a question of fact and degree."

(Underlining added for emphasis only)

This Court aligns itself with the above observations of the Labour Court.

[17] Again, in the case of **Maloba V Minaco Stone Germiston (Pty) Ltd & Another, [2000] 10 BLLR 1191 (LC),** the Labour Court addressing the issue of what constitutes transfer of business as contemplated by Section 197 of the Labour Relations Act 66 of 1955 had occasion to refer to an article by Advocate MJD Wallis SC published in [2000] 21 ILJ1 under the title "Section 197 is the medium. What is the message?" At page 5 of the article the author is quoted at page 1199 of this case by Jammy AJ as follows;

"The second aspect of the construction of these terms is one which was endorsed by Judge Seady in Schutte's case and is

derived from the English and European jurisprudence, namely that it is the substance rather than the form of the transaction which is important. That is of course a fundamental principle of our law not only in the field of labour but in the field of contract, taxation and elsewhere. The focus in this particular context is whether in substance the transaction is a transfer of the whole or part of the business, trade or undertakings."

(Underlining provided for emphasis only)

Similarly, in *casu*, the focus will be on whether in substance the transaction is merely a purchase of shares or it is a sale and/or takeover of the business by another person.

[18] The Appellants' Counsel urged the Court to find that the agreement was merely a sale of shares and not a sale or transfer of business. The Court was asked to follow the decision of the Industrial Court in the case of **Swazispa Holdings Ltd V Swaziland Hotel, Catering and Allied Workers Union (1st Respondent & Staff Association of Swazispa Holdings Ltd (2nd Respondent), case N0. 254/2011 (IC),** which concluded that the sale of shares by Sun International to a third party did not amount to a sale of the business to another person. In our view, the **Swazispa** case is distinguishable from the case at hand. In the **Swazispa** case there was only an intention to sell 50.6% of the shares. In *casu*, the entire issued share capital in ESwatini Meat Industries

Limited, which in aggregate constituted 100% was sold to Inyatsi Group Holdings. Secondly, the **Swazispa** case and the present matter are distinguishable on the facts. In the **Swazispa** case there was a purported sale of shares. There was no sale agreement that was produced in Court. In the present matter, there is a sale agreement which was signed by the parties which was presented to the Court. The Court had the opportunity to scrutinize the document and make a determination of the contents thereof.

[19] The evidence in this case also revealed that as part of the sale transaction, a board meeting was held on the 20th July, 2023 in which the erstwhile board members tendered their resignations and new board members from Inyatsi Group Holdings took over control of the business. In terms of both the resolution (Annexure "JW3") and the definition section of the Share Purchase Agreement under clause 1.2.6, the company into which the new board of directors were appointed is ESwatini Meat Industries Limited. The ordinary function of a board of directors is to be responsible for governance, oversight and major decision making in an organisation. The board has a duty to see to it that the company meets its obligations. In ordinary parlance, the board is in control of the business of the company. In *casu*, since Inyatsi Group Holdings purchased all the shares and its members having been appointed as the new board of directors, it means that Inyatsi Group Holdings is now in control of the business of the company.

[20] Furthermore, in the present matter there are numerous indicators in the agreement that show that the transaction amounted to a sale and/or take

over of the business by Inyatsi Group Holdings. In terms of clause 5 (ii) of the agreement, the parties made provision for competition approval; in clause 4 (v) there is provision for stock-take; in clause 4 (vi) there is provision for notification to the Labour Commissioner of ESwatini of the transaction in terms of Section 33 *bis* of the Employment Act; in clause 7 there is the description of the company assets and liabilities; in clause 11(a) (viii) the agreement provides that the Seller shall, after receipt of the purchase price on the Effective Date, place the Purchaser, Inyatsi Group Holdings;

> ***"... in free and undisturbed possession and control of the Company and handing over management control of the Company to the Purchaser..."***

20.1 In terms of clause 10 (a) (ix) the parties agreed that after the receipt of the purchase price on the Effective Date the sellers shall;

> **"deliver to the Purchaser all such documents as the Purchaser may require to effectively carry on the Company after the Effective Date...."**

20.2 In clause 11(b) the parties provided for ownership and risk as follows;

"Ownership and Risk: Against receipt of the Purchase price ownership, risk, and benefit in the Company shall pass from the Seller to the Purchaser with effect from the Effective Date."

20.3 In clause 12 (a) and (b) the parties agreed that the company will retain key personnel especially in management positions. They also agreed that:

"...Furthermore, the sellers shall ensure that the Company shall pay to all eligible employees the benefits payable in terms of section 33 bis, being the difference between the amount payable between the provident fund benefit and the amount due in terms of Section 33 bis."

(Underlining added for emphasis)

[21] All the terms of the agreement alluded to in the above paragraph dovetail with the observations of the Industrial Court of Appeal's judgement in the case of **Swaziland Hotel, Catering and Allied Workers Union** case (supra) where in paragraph 31 the Court held as follows;

> *"[31] It is therefore our considered view in the light of the foregoing, that the takeover envisaged by the Act is one that indeed and in reality, is capable of transferring the ownership, control and management of the company's business to another person, thus effectively creating a new owner side by side with the old one and therefore have the potential of adversely affecting the employees."*

[22] The Court's overall assessment of the key clauses of the agreement alluded to in paragraph 20 above, leads to the conclusion that there was a sale and/or takeover of the business of ESwatini Meat Industries Limited by Inyatsi Group Holdings as envisaged by Section 33 *bis* of the Employment Act.

[23] It was also argued on behalf of the Appellants that there was no sale or takeover of the business because the business of the company of livestock slaughter, meat processing and export remained with the company. In support of this argument the Court was referred to the cases of **Martin Long V Prism Holdings Limited (1st Appellant) and Net 1 Applied Technologies SA LTD (2nd Respondent) (JA 39/10) [2012] 231 ILJ** and that of **National Education, Health & Allied Workers Union V University of Cape Town & Others (2003) 24 ILJ**

95 (CC). The Court in the **Martin Long** case after having referred to the **NEHAWU** case stated the following in paragraph 34;

"[34] My view which is in line with the reasoning of Zondo J in Ndima (supra) is that the acquisition of shares by Net 1 from Prism did not amount to the transfer of business from one employer to another as set out in section 197 of the LRA. See too: Schutte and Others V Powerplus Performance (Pty) Ltd and Another. The identities of the entities remained the same and the employees are able to enforce their rights."

In the Court's view, the above cited cases are distinguishable from the case at hand on the facts. In the present case, as the result of the transaction, the ownership, possession and control of the company passed on to the purchaser, Inyatsi Group Holdings. Inyatsi Group Holdings is therefore now the new owner of the company. The sale in this case did indeed and in reality, transfer the ownership of the company and also the control and management of the company's business to another person, that is, Inyatsi Group Holdings. The Court concludes therefore that the provisions of section 33 *bis* were correctly and properly triggered by the transaction.

LIABILITY TO PAY

[24] The Court having come to the conclusion that there was a sale and/or takeover of the business by Inyatsi Group Holdings, the next inquiry is; who is liable to pay the benefits accruing to the employees. The answer to this question is twofold, that is, in terms of the Employment Act and in terms of the agreement.

LIABILITY IN TERMS OF THE EMPLOYMENT ACT

[25] The Employment Act is clear that it is the employer that is liable to pay all the accruing benefits to the employees. The employer in this case is ESwatini Meat Industries Limited. It is not the Appellants. The Appellants were merely shareholders.

[26] The employees, as Applicants in the Court *a quo*, did not seek any order against the employer company, ESwatini Meat Industries Limited. The employees in terms of prayer 3 were seeking an order directing the Appellants to facilitate the payment of the benefits accruing to them. This situation brought to the fore the doctrine of corporate personality of a company. The Court in the **Swazispa Holdings case** (IC) had occasion to address this principle. The Court held as follows in paragraph 14;

"14. The Applicant (Swazispa) as a legal entity enjoys separate legal personality apart from its members. This

principle is entrenched in our company law and is stated by the learned authors as follows;

'Upon formation, a company, as a separate entity, acquires the capacity to have its own rights and duties. It acquires legal personality and exists apart from its members. This important company law principle is exemplified in the leading case of Salomon V Salomon & Co [1897] AC 22'

(Underlining is added)

H S Cilliers et al: Entrepreneurial Law 2nd edition (Butterworths) 1998, ISBN 0 409 01976 3 at page 69."

[27] This principle of the law that a registered company is a legal person distinct from the members who compose it, is entrenched in our law. It was also confirmed by the Industrial Court of Appeal in the case of **Swaziland Hotel, Catering and Allied Workers Union (1st Appellant) and Staff Association of Swazispa Holdings LTD (2nd Appellant) V Swazispa Holdings LTD (06/12) [2012] SZICA 03 (04th October 2012).** The Industrial Court of Appeal held as follows in paragraph 16:-

> *"[16]Now, we agree with the Court a quo that the Respondent is a separate legal entity distinct from its members. This concept of a company being a separate legal entity from its members, with perpetual succession and the ability to sue or being sued eo nomine (in its own name), has been part of the jurisprudence across national borders since the locus classicus of Salomon V Salomon and Company Ltd (1897) AC 22 (HL)."*

[28] This Court is in full agreement with the principle of the law as restated by both the Industrial Court and the Industrial Court of Appeal that a company is a distinct legal person, separate from its shareholders. Under Section 33 *bis* therefore, the 1st to the 9th Appellants cannot be held personally liable for the obligations of the employer company. The employees' Attorney correctly abandoned the argument that the Appellants should be held personally liable based on piercing of the corporate veil as it was not pleaded and was never before the Industrial Court.

[29] Upon the realization that no order had been sought against the employer company, the employees' Attorney argued that in terms of Section 2 of the Employment Act, the definition of employer is wide and it includes a *"body of persons who is placed in authority over that employee"* which in our context should be taken to mean that the

Appellants were the employers. This argument however does not assist the employees because;

29.1 In *casu,* there is no dispute as to who the employer is. The employees themselves stated in their founding and supporting affidavits that they are employed by the 10th Respondent.

29.2 The employees' Attorney cannot, therefore, be allowed to change and/or amend what the employees stated under oath in their affidavits.

It is the finding of the Court therefore, that in the light of the entrenched principle of the law that a registered company is a legal person distinct from the members who compose it, the Appellants cannot be held personally liable.

LIABILITY UNDER THE AGREEMENT

[30] In terms of clause 12 (b) of the agreement, the Appellants made an undertaking that they shall ensure that the company '*shall pay to all eligible employees*' their accrued benefits. This is the reason why in prayer 3 of their application, the employees sought an order directing the Appellants to facilitate the payment of all benefits accruing and/or due, to the employees.

[31] It was argued on behalf of the Appellants that they did comply with their obligation to ensure that the company pays the employees their

terminal benefits by passing a resolution, Annexure "JW2" wherein the board approved that the terminal benefits be paid by ESwatini Meat Industries Limited. Paragraph 5 of the Board Minutes states that;

"Further, the Board approved that the terminal benefit be paid by EMI using the provident fund and that any shortfall may need to be held back by the selling shareholders from the proceeds of the sale of their shares."

(Underlining added for emphasis)

[32] The undertaking made by the Appellants, however, was to ensure payment to all eligible employees, not just to pass a resolution and end there. The full import of the undertaking is that, as long as the employees remain unpaid, it cannot be said that the Appellants have fulfilled their obligation under clause 12 (b) of the agreement. The evidence before the Court revealed that the Appellants were paid an amount of One Hundred and Twenty Million Emalangeni (E120, 000,000.00) as the purchase price and that this amount was inclusive of the terminal benefits. This evidence is stated in paragraph 8 of the affidavit that was filed by the employer company, Eswatini Meat Industries Limited. Paragraph 8 appears as follows;

"8. It is therefore the Sellers, the First to Ninth Respondents, that are obliged in terms of the Agreement to pay the terminal benefits because they

allowed the business of the Tenth Respondent to be taken over by Inyatsi. In terms of the Agreement the Sellers were paid the sum of E120,000,000.00 (One Hundred and Twenty Million Emalangeni) as purchase price of the business. Clearly, the terminal benefits were part of the purchase price and the Sellers have to pay the employees."

[33] The Appellants responded as follows to the above paragraph;

"24. AD PARAGRAPH 8

24.1 The allegation that the 1st and 9th Respondents are obliged "in terms of the agreement to pay the terminal benefits because they allowed the business of the 10th Respondent to be taken over by Inyatsi" is rejected and disputed."

24.2 That is a clear misunderstanding of the agreement. The agreement is clear in its terms as to who the obligation to pay the terminal benefits rests, and it is upon the 10th Respondent."

[34] The Appellants did not deny that;

32.1 they have been paid the purchase price of E120,000,000.00 by the purchaser, Inyatsi Goup Holdings and that,

32.2 the terminal benefits were included in the purchase price.

In light of the fact that the Appellants did not deny this crucial aspect of the evidence presented by the company, in the Court' view there is neither justice nor reason for the Appellants to make the employees to trek from pillar to post.

[34] The Appellants having failed to deny the company's evidence that the purchase price of E120,000,000.00 was inclusive of the terminal benefits of the employees, they have no legal basis to hold on to the portion of the money which was meant to cater for the employees' terminal benefits. The Appellants are also bound by the board resolution, annexure "JW 2" to make good any shortfall of the terminal benefits *"from the proceeds of the sale of their shares."*

[35] The Court therefore concludes that, as long as the employees remain unpaid, it cannot be said that the Appellants have discharged their obligation under clause 12 (b) of the agreement to ensure that all eligible employees are paid the benefits payable in terms of Section 33 *bis* of the Employment Act.

[36] An issue arose in argument whether or not it would be proper to resort to the provident fund to source the money to be used to pay the

employees their terminal benefits as per paragraph five of the board resolution, annexure "JW 2". The Appellants' representatives objected to the matter being raised for the first time on appeal. Indeed, this issue does not appear to have been raised before the Industrial Court as there is no indication that the Industrial Court addressed it in its judgement. Furthermore, there is undisputed evidence before the Court that the Appellants have been paid the sum of E120,000,000.00 as the purchase price and that this amount was inclusive of the accrued terminal benefits of all eligible employees. In light of this evidence, the Court cannot speculate that there would still be the need to resort to the provident fund. However, should a dispute arise about the source of funds to be used to pay the employees, the dispute would have to be first dealt with by the Industrial Court as a Court of first instance. For that reason, the Court will not proffer any opinion as this issue was not addressed by the Industrial Court.

PUNITIVE COSTS ORDER IN THE COURT *A QUO*

[37] The Appellants appealed against the punitive costs order issued by the Industrial Court. It was submitted on behalf of the Appellants that there was no basis for that order. An award of costs is a matter wholly within the discretion of the Court. The Industrial Court in paragraph 30 of its judgement expressed its displeasure in the conduct of the Appellants. The Industrial Court concluded that the Appellants' conduct was completely dishonest and that they were reneging from an agreement that they voluntarily entered into. When weighing the observations made by the Industrial Court against the arguments presented before the Court, it has not been demonstrated that the Industrial Court

wrongly or unlawfully exercised its discretion. This Court is therefore unmoved by the Appellants' plea that the Industrial Court's order on costs on the punitive scale be set aside.

COSTS ORDER ON APPEAL

[38] In the notice of appeal, the Appellants prayed that the appeal be upheld with costs. In their heads of argument, the Respondents applied that the appeal be dismissed with costs. As already pointed out in the preceding paragraph, an award for costs is a matter that is wholly within the discretion of the Court. The discretion must, however, be judiciously exercised and must also be informed by a consideration of all the circumstances of the case, the interests of justice, fairness and equity.

[39] In the Court's view, it cannot be said that the Appellants acted frivolously, vexatiously or with an intention to cause delay in the finalization of the litigation in filing the current appeal. The appeal raised significant questions of law that will have an impact in the field of labour law. In the exercise of its discretion, this Court is of the view that it will not be fair to mulct the Appellants with a costs order. The Court will therefore order that each party is to pay its own costs.

CONCLUSION AND ORDER

[40] Taking into account all the foregoing observations, reasons and findings, the Court will make the following order;

40.1 The Appellants' appeal is dismissed.

40.2 The judgement of the Court *a quo* delivered on the 18th September 2023 is upheld.

40.3 Each party to pay its own costs.

N. NKONYANE
JUSTICE OF APPEAL

I agree

S. NSIBANDE
JUDGE PRESIDENT

I also agree

A.M. LUKHELE
JUSTICE OF APPEAL

APPEARANCES:

For the Appellants: Adv. H. Barnes SC & Adv. N. Lewis.
(Instructed by Henwood & Company).

For the 1st to 199th Respondents: Mr. Modecai Donga (S.V. Mdladla & Associates).

For the Joined Respondents; Nombulelo Mhlanga & Lidia Martins: Mr. B. Gamedze (Musa M. Sibandze Attorneys).

For the 200th Respondent: Mr. N.D. Jele.
(Robinson Bertram).