IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No. 43/2017

In the matter between:

SWAZILAND REVENUE AUTHORITY Appellant

And

RUTH MKHALIPHI Respondent

Neutral Citation: Swaziland Revenue Authority v Ruth Mkhaliphi (*43/2017*) [2017] SZSC 35 (30/11/2017)

Coram: DR B.J. ODOKI JA, S.P. DLAMINI JA and M.J. DLAMINI JA

Heard : 30 August 2017

Delivered : 30/11/2017

Summary: *Private arbitration and Review proceedings – Fixed-term contract of employment, – Whether labour law or administrative law apply, – Whether Section 33 of the Constitution or Section 35 of the Employment Act applies – Held that Section 33 of the Constitution does not apply held that Section 35 of the Employment Act does apply to the matter –*

Held further that the failure by the Appellant to provide the Respondent the opportunity to be heard constituted both substantive and procedural unfairness – Held further that the matter is to be referred back for arbitration before a different arbitrator on the basis of the contractual breach of the Appellant's right to be heard – Held further that, to that extent, the appeal partially succeeds and the orders of the Court a quo are corrected and substituted accordingly.

JUDGMENT

S.P. DLAMINI JA

[1] This is an appeal against the judgment of the High Court delivered on the 21 April 2017.

[2] The brief background of the matter is as follows;

2.1 The Appellant entered into fixed-term contract **(the contract)** of employment with the Respondent. The contract was for a renewable term of four years which ran from 1 January 2011 to 31 December 2014;

2.2 The contract, *inter alia*, provided that its renewal **"shall be at the instance and discretion of the Employer"**. The Appellant did not

renew the contract and the Respondent's employment was terminated on

31 December 2014;

2.3 The Appellant challenged the termination of her employment. In accordance with the contract, the dispute was referred to arbitration;

2.4 The Arbitrator held that the termination of the Respondent's employment was lawful. The Respondent then approached the High Court to review the decision of the arbitrator;

The Respondent before the *Court a quo* sought relief in the following terms;

> *"1. That an order be and is hereby issued calling upon the 2nd Respondent to file with the Registrar of the above Honourable Court the entire record of proceedings relating to the arbitration proceedings between itself and the Applicant herein within such period as the above Honourable Court may determine.*
>
> *2. That an order as be and is hereby issued reviewing, correcting and setting aside the decision and/or legal conclusion made by the 1st*

Respondent in the arbitration hearing involving the Applicant and the 2nd Respondent herein.

3. Costs of application.

4. Further and/or alternative relief."

2.5 The Learned Judge set aside the arbitration award and ordered the Appellant to compensate the Respondent for wages from the 1 January 2015 up to the Respondent's 60th birthday. At the time of the termination of the contract, the Respondent was 54 years of age. Effectively, the Respondent was awarded compensation for the equivalent of six years wages. In addition, the *Court a quo* awarded costs against the Appellant.

[3] The Appellant was dissatisfied with the judgment of the *Court a quo* and noted an appeal, hence the present proceedings before this Court. The Appellants grounds of appeal are as follows;

"1. The Honourable Court erred in entertaining the Respondent's arguments on Section 33 of the Constitution of Swaziland, as this was not a ground upon which the arbitration had been brought.

2. *The Honourable court erred in finding that in exercising its contractual discretion to renew or not renew the Respondents fixed term contract of employment the employer was making an administrative decision as contemplated by Section 33(1) of the Constitution of Swaziland and according that the Respondent had a right to be heard before the decision was taken by the Appellant, exercising administrative authority.*

3. *The Honourable court erred in finding that the Respondent had a legitimate expectation of renewal of the contract of employment because this was not a basis of the review before the court a quo, in particular, the Respondent did not allege or submit that the facts of the matter gave rise to a legitimate expectation of renewal of a contract of employment but alleged*

3.1 Fixed term contracts that exceed 6 weeks in duration are unlawful alternatively that Section 35 of the Employment Act does not apply to her contract because it exceeded 6 months in duration.

3.2 That the only consideration relevant for the Appellant to consider was whether or not the Respondent had performed satisfactorily and

therefore that if she had, she was entitled, as of right to have her contract renewed and that this right was not based upon a legitimate expectation.

3.3 That the Arbitrator decided the matter on the applicability of Section 35 of the Employment Act, an issue which the Respondent had not addressed or been given an opportunity to address him on.

4. The Honourable Court erred in that it went beyond and in fact did not deal with the stated grounds upon which the review application was premised and conducted a re-hearing of the Arbitration.

5. The Honourable Court erred in that even if it correctly found that the non-renewal of the contracts was unfair, this could only have given rise to an unfair dismissal and the court a quo would not have been entitled and was not entitled to grant a remedy that it did in that the court was therefore limited to granting the remedies available to the Respondent under Section 16 of the Industrial Relations Act and having decided against reinstating the Respondent or ordering the Appellant to re-engage her was limited to awarding compensation for unfair dismissal."

[4] Appellant contends that the judgment of the *Court a quo* was flawed in that the *Court a quo*;

4.1 Failed to apply the correct review test for the review of private arbitration awards;

4.2 Misapplied the common law review test it sought to apply; and

4.3 Made several incorrect findings on the merits.

[5] The Appeal is opposed by the Respondent. In addition to opposing the appeal on the merits, the Respondent also raised two points *in limine.*

[6] The two points *in limine* raised by Respondent are that;

6.1 This Court lacks the necessary jurisdiction to hear the appeal. Respondent relies on Section 151(1) (9) and (6) of the Constitution of Swaziland. The argument being made by the Respondent is that the High Court when it heard the review proceedings was not exercising original jurisdiction since the matter was first heard by the arbitrator. Therefore, according to the Respondent, Appellant ought to have sought and been granted leave to institute the appeal, and

6.2 The second point *in limine* is that the appeal is defective in that it does not state whether the whole or part of the judgement is appealed against.

[7] The Court heard submissions on behalf of the Respondent and Appellant on the two points *in limine* and made an *ex tempore* order dismissing both points *in limine*. I now give the reasons for the Court for dismissing both points *in limine*;

7.1 Firstly, with regard to jurisdiction, the Court found that this point has no merit and held that in fact the High Court exercised original jurisdiction when it heard the review proceedings. The submission on behalf of the Respondent to the effect that the arbitration was a tribunal as envisaged by Section 139 (1) (b) of the Constitution of Swaziland Act No 1 of 2006 (**the Constitution**) is completely misguided and plainly erroneous. I agree with the Appellant's contention on this point that an Arbitrator dealing with a private arbitration does not fall within the definition of the **"The Judiciary"** as envisaged in the Constitution.

[7.1.1] The relevant part of Section 139 provides as follows;

"139 (1) The Judiciary consists of –

(a) The Superior Court of Judicature comprising –
(i) The Supreme Court, and
(ii) The High Court;

(b) such specialized, subordinate and Swazi courts or tribunals exercising a judicial function as Parliament may by law establish." my own underlining.

[7.1.2] It is not in dispute that the parties agreed on a private arbitration; Such an arbitration cannot be said to be a "specialized court" or "subordinate or Swazi court" or tribunal" exercising a judicial function and/or established by Parliament. Therefore, the appeal is properly before this court and the Court has the necessary jurisdiction to hear the appeal.

7.2 Similarly, regarding the contention by Respondent that the notice of Appeal is materially defective for failure to disclose whether the whole or a part of the judgment is appealed against, I am of the view that there is no merit in this point. The Notice of Appeal is in line with form 1 under Rule 6 of the Court of Appeal Rules. Furthermore, the grounds of appeal are clearly stated in the Notice of Appeal and Appellant's Heads of Argument. Both sides know fully the issues to be adjudicated upon. Counsel for Respondent did not insist on this point, correctly so in my

view. Accordingly, this point is dismissed. See **Appeal Case No. 20/2005 Alton Ngcamphalala and 3 Others v The King** at page 2 where His Lordship Justice Tebbut said the following;

"*In its inherent jurisdiction this Court mero motu may excuse any party from strict compliance with any of its rules if there is no prejudice to any other party, (see* ***HERBSTEIN AND VAN WINSEN : The Civil Practice of the Superior Courts in South Africa 3rd Edition*** *page 19-20). That is clearly the position here. Each party knows full well what the other party's case is; each came prepared to meet the other's case and even though each one may have not strictly brought its case in the manner prescribed by the rules, this Court will condone that. The matter must be decided on the merits of the matter and the principles applicable to them and not on some inconsequential technical procedural defect."*

[8] I now turn to the merits of the appeal. The grounds of appeal are summarised in Appellant's Heads of argument as follows;

"17.1 First, the High Court erred in not applying the correct, narrow review

test of private arbitration awards made in terms of the Arbitration Act. The High Court instead sought to apply a common law administrative review test, which we respectfully submit, is incorrect. On that basis alone, the appeal should be upheld.

17.2 *<u>In the alternative</u>, even if the broader test of common law administrative review is applied (which is denied), the High Court misapplied this test by approaching the matter as if it were an appeal and not a review. The High Court reviewed the Award based on several perceived errors of law, an approach which is impermissible. It essentially dealt with the matter as if it were an appeal and not what it truly was – a review, which fails both the narrow and correct arbitration review test and the broader but incorrect common law review test.*

17.3 *The High Court further made several errors of law on the merits. It erred in finding that:*

17.3.1 The doctrine of legitimate expectation applied.

17.3.2 The September Memo created an expectation of renewal of the Contract and was disregarded by the Arbitrator.

17.3.3 The SRA exercised a discretion in deciding not to renew the Contract and Ms Mkhaliphi was entitled to make representations in line with section 33 of the Constitution.

17.3.4 The Arbitrator should have afforded the parties an opportunity to make submission based on section 35 of the Employment Act before he based any findings thereon.

17.4 As a result, there is no legal basis for the remedy ordered which awards Ms Mkhaliphi compensation equivalent to remuneration for approximately six years until she reaches 60 years of age at the cost of the SRA."

[9] In first and second grounds of appeal the Appellant contended that the *Court a quo* misdirected itself in holding that there was a breach of Section 33 of the Constitution of Swaziland. According to the Appellant, the issue of Section 33 of the Constitution was not a ground upon which the arbitration had been brought. The Respondent, on the other hand, contended that full arguments were heard on Section 33 at the arbitration. Therefore, the *Court a quo* according to the Respondent correctly decided that Section 33 was breached.

[10] Section 33 of the Constitution provides that;

"(1) A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved.

(2) A person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority."

[11] The Appellant as a statutory body in my view is an administrative authority as envisaged by Section 33. In dealing with the public it is bound by the provisions of section 33. However, the Appellant is also an employer and its relationship with its employees is governed by the labour laws of the country that are specifically enacted for this purpose.

[12] Therefore, in my view, while the lofty and laudable principles underlying Section 33 may well find expression in the labour laws of the country, Section 33 does not apply to the Appellant in its capacity as an employer. Therefore, the *Court a quo* misdirected itself in holding that Section 33 was applicable.

[13] The third ground of appeal relates to the finding by the *Court a quo* that Section 35 of the Employment Act applied to the matter.

[14] Section 35 of the Employment Act provides that;

"35. (1) This section shall not apply to —

(a) an employee who has not completed the period of probationary employment provided for in section 32;

(b) an employee whose contract of employment requires him to work less than twenty-one hours each week;

(c) an employee who is a member of the immediate family of the employer;

(d) an employee engaged for a fixed term and whose term of engagement has expired.

(2) No employer shall terminate the services of an employee unfairly.

(3) The termination of an employee's services shall be deemed to be unfair if it takes place for any one or more of the following reasons –

(a) the employee's membership of an organization or participation in an organisation's activities outside working hours or, with the consent of the employer, within working hours;

(b) because the employee is seeking office as, or is acting or has acted in the capacity of an employee's representative;

(c) the filing in good faith of a complaint or the participation in a proceeding against an employer involving alleged violation of any law or the breach of the terms and conditions of employment under which the employee is employed;

(d) the race, colour, religion, marital status, sex, national origin, tribal or clan extraction, political affiliation or social status of the employee;

(e) where the employee is certified by a medical practitioner as being incapable of carrying out his normal duties because of a medical condition brought about by work he has carried out for his present employer except where the employer proves that he has no suitable alternative employment to offer that employee;

(f) because of the employee's absence from duty due to sickness certified by a medical practitioner for a period not exceeding six months or to accident or injury arising out of his employment, except where the employer proves that, in all the circumstances of the case, it was necessary for him permanently to replace the employee at the time his services are terminated."

[15] Section 35 (1) (d) excludes an employee engaged for a fixed term and whose term of engagement had expired. It is my view that notwithstanding Section 35 (1) (d), Section 35 (2) applies in the circumstances of this matter at least to the extent that the memorandum referred to in detail in the paragraphs below created an obligation on the Appellant to afford the Respondent an opportunity to be heard.

[16] In view of the memorandum issued to all staff members by the Appellant dated 8 September 2014 (the Memorandum) and in the absence of adhering to the process provided for therein regarding employees being made permanent or not, Respondent's employment could not be said to have expired. This point is addressed in greater detail in the ensuing paragraphs and in relation to the rest of the grounds of appeal that Appellant dealt with in an interconnected approach in the Heads of argument.

[17] When there were about 4 months remaining for the Respondent's contract of employment to expire, the Appellant issued to all staff an internal memorandum dated 8 September 2014 and it is important to reproduce it here;

"1. ***Fixed Term Contracts***

On its establishment the SRA took a business decision to engage from staff Grade 4 and above on fixed term contracts. The first group of fixed term contracts is coming to an end in November/December this year.

Based on a recommendation from management, the Board has decided to move staff that are at three levels from the Commissioner General, (Current Grade 6 downwards) from fixed term contract employment to permanent employment as and when their contracts expire. That is, the Executive Committee and senior management (Director level) will be engaged on fixed term contracts and the other levels of employees will be engaged on permanent contracts of employment.

3. ***Implications of Permanent Employment on Performance***

The organisation's initial decision to engage employees on fixed term contracts was based on experience elsewhere where similar reforms were implemented. In view of uncertainty around the optimum size of the

institution in order to fully meet its mandate in a cost effective manner, it was necessary to start with most staff on fixed terms contracts in order to minimize the complications of right sizing should such a need arise. Having operated for over three years now, we are certain that for now we are operating optimally with the team we have and this is likely to be the case for some time to come. Please note that the move to convert employees from fixed term contracts to permanent employment does not imply a change in the organisation's philosophy of building a high performance culture. This is a non-negotiable expectation from our stakeholders.

SRA has put in place a strategic performance management system and key to effective performance management is on-going monitoring and alignment of performance to business goals. One of the main objectives of the process of performance management is to enable employees to receive performance-related feedback on a regular basis so as to align, guide and maximize their potential and contributions to teams, business units and ultimately the whole of SRA.

The feedback process allows for continuous tracking and feedback on agreed objectives. In the event an employee continuously fails to perform to the standards expected by the organization, the organization will follow a fair procedure which will lead to dismissal for incapacity/poor work performance.

2. ***End of Contract Process***

The organization strives to ensure that it has sufficient people with appropriate skills and abilities to meet current strategic requirements and also contribute to growth, development, and innovation in the future.

- *The information on all contracts that are coming to an end this year has been circulated to management for decision making.*
- *The decision whether to renew or not renew the contract will be taken departmentally (of course through recommendations from supervisors) and submitted to Human Resources.*
- *Human Resources will generate letters advising employees about the organisation's intention to renew or not renew the contract.*
- *The plan is that employees whose contracts expire in November and December will receive the letters during the course of September and October respectively. Non-receipt of such a letter will in no way imply non-renewal. Everyone should have received their letter by 30 September and 31 October respectively. Should you not have received yours by that date, please contact your Supervisor who shall in turn inform the Human Resources Department."*

[18] On 9 December 2010 pursuant to an interview, the Appellant offered the Respondent employment as "Grade 6 Income Tax Field Operations Manager" The parties thereafter signed a Contract of Employment (herein after called the contract). Therefore, the aforesaid memorandum was applicable to the Respondent as well other employees falling within these categories specified therein.

[19] The Appellant wrote letter dated 22 September 2014 informing the Respondent contract would not be renewed. The said letter reads as follows;

"Dear Ruth

"Notice of Intent

As you are aware, your fixed term contract is due to end on 31/12/2014

This letter is to provide you notice that your appointment will not be renewed when it expires.

Your employment agreement with SRA provides that the organization may renew or not renew your fixed-term contract.

Prior to this date, however, you are invited to apply for any suitable vacancies advertised within the organization.

As you have been employed with the organization on a fixed term contract you are entitled to a gratuity payment. You will also receive payment for any outstanding annual leave entitlement.

Finally, we would like to wish you well in your future endeavours."

Yours Sincerely,

EDWARD SITHOLE — *BONGANI NTSHANGASE*
DIRECTOR – HUMAN RESOURCES — *DIRECTOR FIELD OPS*

cc: Commissioner General"

[20] At this juncture it is important to record that on 22 October 2014 the Respondent replied to the said letter in writing. However, her reply letter was not filed in the record. The Court requested a copy of the letter from both Counsel but they did not have it either.

[21] Be that as may, it is not in dispute that the Respondent replied in writing and that she was challenging or objecting to the termination of her employment because on 24 October 2014 the Appellant wrote a letter to her stating that;

"NOTICE OF INTENT

We refer to your letter of your letter of 22 October 2014 regarding the subject matter.

In response to your letter we wish to advise that in terms of your contract the relationship between the parties is coming to term and end on 31 December 2014.

The organization has considered its position and will not exercise its option to discuss a new contract. In other words, The Swaziland Revenue Authority (SRA) has no intention to renew the Agreement as per clause 4.1 of the contract, which reads,

"The renewal of the Agreement shall be at the instance and discretion of the Employer.

Going forward may I request that you refer any correspondence on the matter to the line Director Field Operations."

Yours sincerely

EDWARD SITHOLE
DIRECTOR – HUMAN RESOURCES

cc: Director Field Operations"

[22] The aforesaid correspondence gives rise to the following points:

(i) The letters are entitled **"Notice of Intent"**. This gives the impression that the Respondent was being advised of a consideration not favourable to her as far as her employment and thereby invited to respond. However, the Appellant had really made up its mind and there was no room for a discussion or consultation. As it appears in the letter dated 24 October 2014 the Appellant states that *"… The Swaziland Revenue*

Authority (SRA) has no intention to renew the Agreement as per clause 4.1 of the Contract…";

(ii) Curiously, the Appellant was quite prepared to consider the Respondent for employment in another position as opposed to the one she held at the time. In the letter of the 22 September 2014, the Appellant stated that; *"… you are invited to apply for any suitable vacancies advertised within the organization";*

(iii) No reference at all is made to the internal memorandum dated 8 September 2014 that was issued to all staff yet it had a bearing on the matter. Further to the memorandum, the Appellant in the correspondence was referring to the contract of the employment of the Respondent as if it was forgone conclusion that it would not be renewed. Such contradicted the contents of the memorandum on this point namely that;

"1. ***Fixed Term Contracts***

On its establishment the SRA took a business decision to engage staff Grade 4 and above on fixed term contracts. The first group of fixed term contracts is coming to an end in November/December this year.

Based on a recommendation from management, the Board has decided to move staff that are at three levels from the Commissioner General, (Current Grade 6 downwards) from fixed term contract employment to permanent employment as and when their contracts expire. That is, the Executive Committee and senior management (Director level) will be engaged on fixed term contracts and the other levels of employees will be engaged on permanent contracts of employment." Therefore, the Respondent's position (Grade 6) at that point was to be available *"… on permanent contracts of employment" and not "… on fixed term contracts";* and

(iv) Pursuant to the memorandum, the contracts of the Appellant's staff at Grade 6 and above were no long subject to a renewal. All the affected employees were now to be considered for employment on a permanent basis if they met the requirements. It was not disputed that in fact many of the employees were then employed on a permanent basis in line with the memorandum.

[23] Therefore, at that stage whether the parties wanted to renew the contract or not there was room for the renewal of the contract. The Respondent could only be employed on a permanent basis subjected to the processes outlined in the memorandum.

[24] The central issue here is not whether there was a basis of a legitimate expectation on the part of the Respondent to have her contract renewed as it was stated in the arbitration and the judgment of the *Court a quo*. The crux of the matter, in my view, is the legal effect of the memorandum. That is to say, when the Appellant through the memorandum, it introduced an additional and material term to the contract thus requiring the Appellant to consult the Respondent on whether to put her on permanent employment or to allow her employment to expire at the end of the contract.

[25] The Employment Act, 1980, deals with changes in terms of Employment and provides that;

> *"26. (1) Where the terms of employment specified in the copy of the form in the Second Schedule given to the employee under section 22 are changed, the employer shall notify the employee in writing specifying the changes which are being made and subject to the following subsections, the changed terms set out in the notification shall be deemed to be effective and to be part of the terms of service of that employee.*
>
> *(2) Where, in the employee's opinion, the changes notified to him under subsection (1) would result in less favourable terms and conditions of employment than those previously enjoyed by him, the employee may, within fourteen days of such notification, request his employer, in writing, (sending a copy of the request to the Labour Commissioner), to submit to the Labour Commissioner a copy of the form given to him, under Section 22, together*

with the notification provided under subsection (1) and the employer shall comply with the request within three days of it being received by him.

(3) On receipt of the copy of the documents sent to him under subsection (2), the Labour Commissioner shall examine the changes in the terms of employment contained in the notification. Where, in his opinion, the changes would result in less favourable terms and conditions of employment than those enjoyed by the employee in question prior to the changes set out in the notification, the Labour Commissioner shall, within fourteen days of the receipt of the notification, inform the employer in writing of this opinion and the notification given to the employee under subsection (1) shall be void and of no effect.

(4) Any person dissatisfied with any decision made by the Labour Commissioner under subsection (3) may apply in writing for a review to the Labour Commissioner, who using the powers accorded to him under Part II, shall endeavour to settle the matter. Where he is unable to do so within fourteen days of the receipt of the application being made to him he shall refer the matter to the Industrial Court which may make an order."

[26] In providing for the opportunity to employees employed on contract to be considered for employment on a permanent basis the Appellant introduced changes in the terms of employment as envisaged in the Employment Act. These changes were beneficial to the group of workers specified in the memorandum and the Respondent belonged to this group. The changes were especially beneficial to the Respondent because she potentially stood to benefit by 6 years of employment if she joined the permanent staff of the Appellant.

[27] The Respondent or any other employee for that matter did not object or challenge the change in the terms of employment. There is no evidence that the Respondent protested against the changes in terms of Section 26 (2) of the Employment or any other mechanism.

[28] It follows that a proper consideration should have been made by the Appellant at the end of the Respondent's contract as to whether she met the requirements set out in the memorandum to join the permanent work force. No such exercise ever took place. The Respondent was not afforded any opportunity at all to be heard on this issue. Therefore, there was procedural and substantive unfairness in the manner in which the Appellant terminated the employment of the Respondent. This was in violation of Section 33 of the Employment Act. To hold otherwise would be to sanction arbitraryness or selectivity in the work place.

[29] Accordingly, this Court differs with the *Court a quo* in the following aspects;

(i) The *Court a quo* found that the doctrine of legitimate expectation applies whereas this Court is of the view that the doctrine has no bearing in the matter;

(ii) While the *Court a quo* made reference to the memorandum dated 8 September 2014 it did so without making it the determining factor, this Court is of the view that the memorandum constitutes the fundamental aspect of the matter; in so far as it creates a right in favour of the Appellant to be heard.

(iii) Furthermore, this Court differs with the *Court a quo* as far as the remedy is concerned and the reasons given for the order. While litigation has to be expeditiously conducted, with respect I disagree with the Learned Judge's conclusion that a significant period of time had passed when the matter was heard by the High Court. The matter had commenced in 2014 and by 2016 it was already before the High Court for hearing. While this in itself is not a cause for a celebration, many matters drag much longer than this period. With respect, and additional concerns with the Learned Judge's approach is that it does not take judicial notice of how slow our wheels of justice grind. Therefore, to favour the Respondent herein with an approach that her matter had to be treated specially because of the

years that had passed would create an unfortunate precedent in our jurisdiction which is not informed by the reality on the ground as it were.

(iv) Finally, this matter came before the Court for *"… reviewing or correcting or setting aside the decision of the arbitrator"*. The Legislature in its wisdom created a specialized jurisdiction i.e. the Industrial Court to deal with labour disputes and the other courts must exercise great caution against readily encroaching in the sphere of a specialized court unless there be compelling reasons based in law. The *Court a quo* concluded that there were such reasons but this Court with respect disagrees with the *Court a quo.*

[30] It is common cause that the Respondent was not consulted at the expiry of her contract notwithstanding the duty to do so created by the memorandum of 8 September 2014. The Appellant did in fact terminate her employment solely on the basis of the expiry of the contract, in my view, in breach of its obligations to give the Respondent an opportunity to be heard.

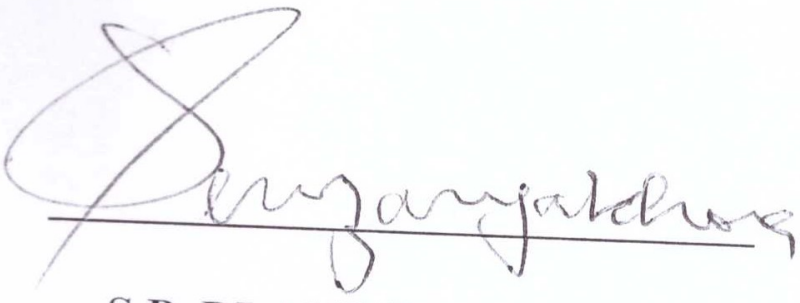
[31] Therefore, the court makes the following Order;

1. That the appeal partially succeeds as set out below;

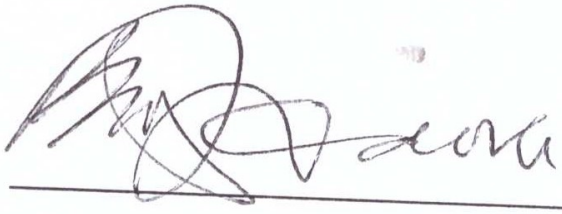
1.1 That the order of the *Court a quo* is set aside and replaced with the following order;

1.1.1 *"That the matter be and is hereby referred to arbitration before a different arbitrator to determine the appropriate remedy for the contractual breach on the part of the Respondent";* and

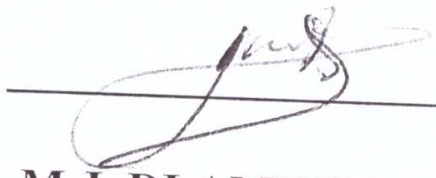
2. That the parties are to bear their own respective costs.



S.P. DLAMINI JA

I agree 

DR B.J. ODOKI JA

I agree 

M.J. DLAMINI JA

For the Appellant: Advocate Kennedy instructed by Musa Sibandze Attorneys

For the Respondent: B.S. Dlamini & Associates