MON - 51

In the High Court of Swaziland

Civ. Case No.528/93

In the matter between:

Standard Chartered Bank Swaziland Limited — Applicant

and

President of the Industrial Court — 1st Respondent
Israel Mahlalela — 2nd Respondent

CORAM: Hull, C.J.
FOR APPLICANT Mr. Flynn
FOR SECOND RESPONDENT Mr. Kennedy

Judgment
(3/12/93)

The applicant is a bank and the second respondent was employed by it formerly as a clerk, serving from time to time as a teller.

He also had a personal account with the bank. In December of 1990, he had bought a stove from a store in Manzini. Later, while still under guarantee, it gave him problems. He took it back to be repaired. In the meantime, he arranged with the store to give him a stand by gas cylinder. It did so, but asked him for a post-dated cheque, as security. He gave it a cheque for E147.30, post-dated 27th September 1991.

2/...

It is important to emphasise, in passing, that it has not been suggested that there was anything in itself wrong with this at all. It was a legitimate transaction in the course of his personal affairs.

Subsequently, however, the second respondent was told by a colleague in the bank that his account was overdrawn. At the time, he was at his post as a teller. He went to check, and discovered that the cheque that he had given to the stove had been deposited before its due date. It has not suggested that his account had been overdrawn for any reason other that the premature lodgement of the post-dated cheque. It therefore follows, I think, that the bank itself was in the first instance at fault in honouring the cheque before its due date, and thereby causing the second respondent's account to become overdrawn.

What the second respondent then did, however, was to remove the cheque from the bank's records, replacing it with funds that he obtained from the store's manager, to whom he had gone to explain the position. He did not inform his own manager about this. His course of action came to the attention of the bank. In the result he was summarily dismissed for dishonesty - i.e. in respect of his removal of the post-dated cheque from the bank's records, and the replacing of it with other funds.

On his application, the matter came before the Industrial Court, where he claimed compensation for unlawful and unfair dismissal. At the first hearing before that court, it found in his favour. It did so, essentially, by holding that his actions were not dishonest.

The bank appealed to this court. On 2nd December 1992, I held that the Industrial Court had erred in law in holding that his actions were not dishonest. I set aside the judgment and remitted the case to the Industrial

Court, for it to determine whether or not the bank's dismissal of the second respondent for dishonesty was reasonable and, if not, what award that court should make.

The matter came back before the Industrial Court accordingly. On 23rd March 1993 it gave its judgment on those issues. It found that the penalty of dismissal imposed by the bank was not reasonable, and it made an award to the second respondent.

The bank now applies to this court for an order setting aside, upon a review, the second judgment of the Industrial Court. It does so on three grounds, which are set out in paragraphs 8.1, 8.2 and 8.3 of the affidavit of its managing director, filed in support of its application. These are:

(a) that the Industrial Court failed to take into account relevant considerations in deciding that the dismissal was not reasonable;

(b) that it took into account irrelevant considerations in reaching that decision;

(c) that the decision of the Industrial Court was unreasonable in the light of all the evidence that was led (i.e. before it).

At the present hearing, the bank relied principally on the third ground. It nevertheless maintained each of the other two grounds as well.

I can conveniently summarise the grounds from the applicant's set, for its own part, of the very helpful heads of argument that have been filed by counsel for the parties.

Mr. Flynn submitted that the evidence showed that the bank had given the second respondent every opportunity to be

heard on the allegations that he had acted dishonestly. He had taken that opportunity. In doing, so he had admitted the substance of those allegations. The bank had then gone on to consider what mitigating circumstances weighed in his favour, including in that regard his entire record of employment with the bank. The officer who conducted the investigation and hearing had in due course recommended that the second respondent should be dismissed. The bank had nevertheless taken into account all relevant factors. Its decision to dismiss him was one of a number of reasonable decisions that it could have made. What Mr. Flynn was saying, in that regard, was that upon that evidence, the Industrial Court could not reasonably have come to the conclusion that the bank's action was unreasonable.

Although they are put as separate grounds for review, I think that it is also appropriate to summarise at once Mr. Flynn's other two objections.

Taking them in reverse order, he contended that the Industrial Court had taken into account the fact that the bank had failed to ascertain from the store's manager whether the second respondent's account as to why he had interfered with the bank's records was true. Mr. Flynn submitted that this was irrelevant to the decision to dismiss him for a dishonest act that he had himself admitted.

On the other hand, in arriving at its conclusion, the Industrial Court had failed entirely to consider the bank's concerns that a teller in a position of trust had acted dishonestly, and had failed to give any consideration or weight to the importance that the bank attached to the accuracy of its records.

Although I have already dealt with it in my own previous judgment in this matter, I think it is desirable to recall again the circumstances in which the second respondent came to interfere with the bank's records.

His concern, in doing so, was to avoid getting himself into trouble with his employer. The bank had an internal rule that its staff were not to issue post-dated cheques, and it appears from the second judgment of the Industrial Court that there was also an internal rule that they were not to overdraw their accounts. Even though he was not responsible for the fact that his account went into overdraft, I think that it is clear enough that he was concerned for that combination of reasons not to get into trouble with his superiors. He had previously had problems in respect of his employment, for which he had been warned.

The approach adopted by the Industrial Court to the issue is found on page 3 of its judgment.

The applicant before it (the bank teller) had argued that the fact that the bank may have ignored relevant factors or had regard to irrelevant factors would itself establish that it had acted unreasonably.

The bank submitted that the Court should not take into account that it, the Court, might have decided the matter differently. It should consider whether or not a reasonable employer could have acted as the bank had done.

The Court itself indicated its approach in these words:

"We believe the question to be determined by this court is did the employer take into account all factors that it ought to have taken into account before making its decision. Did the employer act reasonably."

The Industrial Court, in reaching its decision, stated that the bank had found no mitigating factors in favour of the second respondent; that the bank had rejected outright his written explanation to it for his conduct; that it had considered him a security risk because of his previous record; that his annual performance assessment had not been

taken into account; that because of a collective agreement, the bank had decided that it had no discretion as to what disciplinary action it should take; that it decided that his written explanation was untrue; that it did not call the store manager to find out whether it was true; that it did not tell the second respondent that it regarded the explanation as false; that it disregarded his long service as irrelevant; that it considered him a security risk because he had, five years previously, allowed his account to become overdrawn by E90; that it had not shown why it had regarded his written explanation as false; that it decided to dismiss him to stop him from committing something worse than dishonesty; that it took into account the fact that his financial affairs left a lot to be desired; and that it did not take into account his previous satisfactory performance reports.

As I read the judgment those are, comprehensively and in the sequence in which they are expressed, the factors that the Industrial Court explicitly considered in arriving at its finding - as it did - that in dismissing the second respondent summarily, the bank had acted unreasonably. No other factors are explicitly referred to in the judgment.

Whether or not a course of action is reasonable is a question of fact. By virtue of section 5 of the Industrial Relations Act, 1980, which with the Employment Act, 1980, governs the proceedings that the bank here seeks to review, the Industrial Court has exclusive jurisdiction on questions of fact, subject to the right of the higher courts to review its proceedings on grounds permissible at common Law.

Under the Employment Act, 1980, (by virtue of section 42(2)), the bank had the onus of proving in the proceedings before the Industrial Court that its action in dismissing the second respondent summarily was reasonable.

Although under the Industrial Relations Act 1980, the Industrial Court has exclusive jurisdiction on matters of

fact, this Court may (as I have indicated already) review its decisions on grounds permissible at common Law.

In Johannesburg Stock Exchange v. Witwatersrand Nigel Limited 1988 3 SA 132 (AD) at (at paragraphs A-E on page 152) (cited in argument) Corbett, J.A. (as he then was) said:

"Broadly, in order to establish review grounds it must be shown that the President failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice'".

He went on to say that such failure could be shown, inter alia, by proof that the decision was arrived at because the body had misconceived the nature of a discretion conferred on it, and taken into account irrelevant considerations or ignored relevant ones; or where the decision was so grossly unreasonable as to warrant the inference that the body had failed to apply its mind to the matter, in the sense already indicated.

In Susan Dlamini v. President of the Industrial Court and Melman's Pharmacy Pty Limited (Industrial Court Appeal 13/88), a decision of Hannah C.J. in this court, also cited in argument, the learned Chief Justice at page 12 adopted the criteria of gross unreasonability as the correct test on the third ground of review. With respect, I also think that is the proper test.

Before reaching my own conclusion in this case, I wish to make some general observations.

The Industrial Court has an exclusive jurisdiction (subject only to the common law right of review of this court) on questions of fact. It also has a considerable measure of leeway as to the formality of its proceedings. There are good reasons for these things. Nevertheless it is entrusted with wide powers.

It also has a duty to act judicially. It is a court; at the risk of apparent tautology, I will add that it enjoys the status of a court. There are good reasons for that, too. One, undoubtedly, is to invest its proceedings and its decisions with the requirements for fairness, consistency of principle and openess of process which are characteristic features of courts of law - and thereby to foster confidence in its own functions.

It is in those circumstances important, in my view, that it should be perceived by those who have business before it to fulfill those requirements in its proceedings.

In particular, notwithstanding that two of its members are assessors, it should as far as is reasonably possible give reasons for its decisions, which reasons should as far as possible demonstrate that it has duly considered both sides of the issue. Of course it has its own discretion (subject to the conclusions that higher courts may draw on appeal or review) as to how far it needs to go in those respects. Every judge knows that, as in the case of a summing up in a criminal trial to a jury, that is necessarily a matter of judgment in the end, and the court's decision is always to be weighed in the context of its own judgment, read as a whole, and of the record of evidence and argument.

But the basic point is in my view an important one. The court should strive, by its reasoned judgment, to demonstrate that it has considered - and weighed - both sides of the issue in arriving at its decision.

In this present case, I think that there are three significant aspects of the matter.

The first is the importance, to a bank, of ensuring that its staff are persons who are honest, and that the records of its financial transactions are strictly kept. In my judgment on the appeal, I sought to emphasise this. In its own judgment

9/...

now under review, the Industrial Court does not indicate, overtly, that it has in any way turned its mind to that issue. That is in my view a shortcoming in the judgment, and a serious one. I say that not because of my own earlier remarks as such, because they were not necessary for that decision. Reasonableness is a question of fact, and questions of fact are matters for the Industrial Court.

I say it because I think it is, in anyone's language, a matter of very obvious common sense that the integrity of its staff members, and also of its records, are extremely important matters for any bank. Making every allowance for the Industrial Court's own discretion as to the way in which it thought fit to express its decision, I think myself that this was a case in which (apart from any other consideration) it ought to have demonstrated explicitly that it had given full weight to that consideration. It has not done so at all. In that respect, the judgment is, in my view, open to serious criticism.

The issue before the Industrial Court was whether the bank had proved, on a balance of probabilities, that its action in dismissing the second respondent summarily was reasonable.

The issue before this court is whether the Industrial Court's own conclusion, upon the evidence and the submissions, that the bank had acted unreasonably, is itself grossly unreasonable.

It is a stricter test. There is a reason why it is stricter, and because of the apparent similarity of the issue in each forum - i.e., in the one which the Industrial Court had to consider it, and in the one which this court has to consider it on review - it is perhaps important, too, to explain it. The question before the court below - namely, whether the bank had proved that it probably acted reasonably in dismissing the second respondent summarily - reflected

legislative policy in respect of industrial relations. The question before me - whether it is shown that the Industrial Court's conclusion, that the bank did not act reasonably, was itself grossly unreasonable - reflects a legal principle relating to the respective roles of judicial or administrative tribunals vested with jurisdiction or functions at first instance, and judicial bodies with powers of review.

Despite the apparent similarities, the governing considerations in each case are quite different.

The second thing that is in my view important is this. What the second respondent did was dishonest, in the sense that it involved a subterfuge, or element of concealment, that was calculated to mislead. As to the gravity of the deception, however, although in certain respects Mr. Flynn did in my view show that the Industrial Court drew incorrect conclusions from the evidence, I also think that there were undoubtedly mitigating circumstances. The second respondent was not concerned, on the facts as determined by the court below, to achieve dishonest financial gain. He was concerned - by subterfuge - to avoid being embarrassed, and possibly disciplined, in his employment. In some instances, that motive may be just as culpable, if I may put it that way, as a dishonest intention to obtain a direct financial gain, of course - but my point is that it is a question of fact, in the particular circumstances of a case, as to how serious a transgression it really is. In this case, given that it was the Industrial Court itself that had the responsibility for weighing it, and the bank the burden of proving that its action was reasonable, I consider that it was open to that court, in principle, to decide that it was not such a serious matter as to justify dismissal.

This brings me to the third point. Another tribunal might very well have concluded that a bank, in the circumstances, had proved that it had acted reasonably in dismissing

11/...

summarily a teller. But that decision was a matter for the Industrial Court. It decided that the bank in this case had not shown that it acted reasonably. Although I consider that its failure to demonstrate, in its reasons, that it had duly weighed the bank's need to ensure the integrity of its staff and of its financial records, is open to serious criticism, I am not satisfied that the grounds for review have been made out. There was in my view a basis for the Industrial Court, as the arbiter of fact, to have decided as it did that the second respondent's action was not so serious as to justify dismissal. It is not, as my predecessor Hannah C.J., said in Dlamini, the function of this court simply to substitute its own judgment for that of the Industrial Court. The test of gross unreasonableness is a high one: I am not persuaded, as he was not, that it can properly be said that the Industrial Court's decision was grossly unreasonable. I am not persuaded, either, that the fact that its judgment does not demonstrate overtly that it did consider the importance to the bank of the integrity of its staff and of its records is sufficient to justify this court in intervening in a review.

The application is therefore dismissed, with costs to the second respondent.

D. Hull

DAVID HULL
CHIEF JUSTICE