IN THE HIGH COURT OF SWAZILAND

FAMILY LIFE ASSOCIATION OF SWAZILAND

Applicant

V

THULILE DORIS MSANE

1st Respondent

THE PRESIDENT OF THE INDUSTRIAL COURT

2nd Respondent

Civ, Case No. 209/99

CORAM S.B. MAPHALALA

For the Applicant MR. P. FLYNN

For the 1st Respondent MR. L. KHUMALO

JUDGEMENT

(03/09/99)

Maphalala J:

The applicant (who was respondent) in the Industrial Court has moved this court to review the proceedings of the Industrial Court with the view to setting that court's judgement aside.

The grounds for review appear to be the ones set out in paragraph 12 of the founding affidavit namely that:

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"The finding [of the Industrial Court] was so grossly unreasonable as to lead to the inference that the court could not have applied its mind to the evidence led.

The court took into account irrelevant considerations in reaching its judgement.

The court acted arbitrarily with regard to the award of compensation" The first respondent raised the following points in limine.

The review proceedings have been irregularly, inappropriately brought by the applicant before court in that.

3.1. The decision sought to be reviewed is that of a court of law not a statutory body or quasi judicial authority;

3.2 In terms of the Industrial Relations Act 1996, a party aggrieved by the decision has a right to either appeal or seek to have the decision reviewed;

3.3 The purported grounds for review set out by the applicant clearly amount to that the Industrial Court came to an incorrect conclusion on the facts,

3.4 In essence, the purported grounds assert that the Industrial Court gave a judgement not justified by the evidence and therefore the applicants attacks the correctness of the decision rather than its validity, and

3.5 The appropriate remedy for the applicant and the proper approach to a higher court is on the basis of appeal, not review;

The applicant in this matter is the Family Life Association of Swaziland, an association which has its head office at First Floor Liqhaga Building, Nkoseluhlaza Street, Manzini. The applicant was the respondent in Case No. 31/96 in the Industrial Court of Swaziland.

The first respondent is Thulile Doris Msane, an adult Swazi female who was the applicant in the Industrial Court of Swaziland in Case No, 31/96, and who is a former employee of the applicant herein.

The second respondent is the President of the Industrial Court of Swaziland who presided over Case No. 31/96 and was appointed as such in terms of Section 4 (2) (a) of the Industrial Relations Act, 1996.

The issue before the Industrial Court can be summarized as follows;

The first respondent instituted an application in terms of the Industrial Relations Act, 1996 on 17th May, 1996 in terms of which she sought compensation for unfair dismissal in the sum of E71, 143-68 which amounted to twenty four months salary. This amount was amended at the hearing to the amount of E64, 676 - 16. She further claimed severance allowance in the sum of E10, 105 - 65, notice pay in the sum of E2, 694 - 84 and additional notice sum of E4, 042 - 36. In her pleadings the first respondent stated that in the circumstances, the respondent (applicant in the present proceedings) by effecting the transfer or variation of the applicant's employment, conducted itself in such a way as to make it no longer reasonably expected that applicant would remain in employment, and accordingly the applicant tendered her resignation.

The first respondent averred that the conduct of the applicant and the resultant resignation of the first respondent constituted a constructive dismissal of the first respondent.

The second respondent gave judgement in the matter on the 10th March 1998, and found that "she was in the circumstances dismissed constructively by the respondent". Applicant was ordered to pay twelve months salary as compensation in the sum of E26, 948 - 40. The second respondent also awarded severance allowance and notice pay.

This was essentially the cause of action before the Industrial Court.

Having set forth the background of the matter I now revert back to the issues at hand viz, the determination of the efficacy or otherwise of the points in limine raised by the first respondent. It was contended on behalf of the first respondent that the court in determining this issue is to be guided by the law on review, when same might be competent, under what circumstances, etc as embodied in Herbstein at al the Civil Practice of the Supreme Court of South Africa, (4th ED) at page 928 where the learned authors outlined the grounds upon which proceedings can be brought under review before a competent court as follows:

a) Absence of jurisdiction on the part of the court;
b) Interest in the cause, bias, malice or corruption on the part of the presiding of a judicial officer;
c) Gross irregularity in the proceedings; and
d) The admission of inadmissible or incompetent evidence, or the rejection of admissible or competent evidence.

In the leading case of Krumm and another vs The Master and another 1989 (3) S.A. 944 at 951 and 952 Booysen J had this to say:

"Upon review the court is thus in general terms concerned with the legality of the decision and not its

merits".

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A further description of review is found in the case of Mpanyane vs Thlone and others 1991 (4) S.A. 450 (b) at 458 (A - B) in the following terms:

"It follows that a court is unable to interfere with a due and honest exercise of discretion, even if it considers the exercise inequitable or wrong...

The exercise of a discretion can only be attacked on review on the basis that the person entrusted with the duty failed to exercise Ms discretion at all, that he acted mala fide, or was motivated by improper consideration".

It was submitted on behalf of the first respondent that this court has jurisdiction and power to review the decision of the Industrial Court in terms of Section 11 of the Industrial Relations Act of 1996 The power to consider appeals from that court vest in another court (Section 11 (2) of the Industrial Relations Act).

Mr. Khumalo for the first respondent contended that where the court did apply its mind to the matter yet came up with unreasonable decision, alternatively, even where the court made a decision which is not supported or supportable by the evidence led a higher court shall not interfere unless it is shown that:

- There was mala fide; or There was improper motive.
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Or that an inference of any of these may be drawn in the circumstances under which the lower court arrived at its decision, (see Transport Company vs Swift Transport 1956 (3) S.A. 480 at 488 A to 4896 (Southern Rhodesia case) and the Administrator Transvaal and another vs Johannesburg City Council 1971 (1) S. A 56 (A.D))

It was argued that the matter, particularly the decision of the Industrial Court in the present proceedings, is not appropriately or competency one for review, possibly for

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appeal although Mr. Khumalo expressed his reservation that it is also doubtful in so far as it would not be on matters of law.

It is the first respondent's case that a proper reading of the judgement and the reasons for it as well as evidence that was led shows that the Industrial Court did apply its mind to the evidence; and the court did not take into account irrelevant considerations, alternatively, any such irrelevant material did not form the basis of the court's decision,
Mr. Khumalo went on to relate the evidence adduced in the court a quo to the grounds for review that have been set out by the applicant in the founding affidavit. He displayed this at great length in his Head of Arguments. Mr. Khumalo submitted that this application for review is a disguised retrial.

The applicant opposed the points in limine, Mr. Flynn contended on behalf of the applicant that the ground for review is that the finding of the Industrial Court was so grossly unreasonable as to lead to the inference that the court could not have applied its mind to the evidence led. The court was referred to an unwritten judgement by the learned Chief Justice in the case of Joseph Matse vs Swaziland Breweries where in that matter the employer led evidence to the effect that a number of strikers were involved in a fracas situation with members of staff. One Joseph Matse was found by the court to have perpetrated an act of violence against the Human Resources Manager. The court held that the others were not involved in the violence and Joseph Matse was dismissed. The Industrial Court made that factual finding. That the employer had a reason for dismissal. On review the High Court came to a finding that the evidence led suggested that the finding by the court a quo was grossly unreasonable.

Mr. Flynn further directed the court to the Appeal Court Case - Standard Chartered Bank of Swaziland

vs Israel Mahlalela. He submitted that Mr. Khumalo agreed that if it appears to be grossly unreasonable then that is a ground for review at common law. He contended that "application of the mind" means more than the "consideration of evidence". It entails a logical examination of evidence, analysis or reflection. If that

analysis is faulty the court can say the court a quo did not think it through. Mr. Flynn further contended that the grounds outlined in Herbstein et at (supra) are not exhaustive. To this effect he directed the court's attention to the case of Takhona Dlamini vs President of the Industrial Court and Nantex (Swaziland) (PTY) Limited Appeal Court Case No. 23/1997 at page 11 where Tebbutt J A dealing with the grounds for review at common law stated thus:

"Those grounds embrace inter alia the fact that the decision in question was arrived at arbitrarily or capaciously or mala fide, or as a result of unwarranted adherence to a fixed principle, or that the court misconceived its function or took into account irrelevant considerations or ignored relevant ones, or that the decision was grossly unreasonable to warrant the inference that the court had failed to apply its mind to the matter (my emphasis), (see Johannesburg Stock Exchange and another vs Witwatersrand Nigel ltd and another 1988 (3) SA. 132 (AD) at 152 A- E). Those grounds are however, not exhaustive. It may also be that an error of law may give rise to a good ground for review (see Hira and another vs Booysen and another 1992 (4) SA. 69 (A.D.) at 84 B)".

Mr. Flynn contended that Herbstein (supra) does not go far enough. He argued that it was grossly unreasonable for the second respondent to have found that there was no internal grievance mechanism within the association. This point need to be argued. Further that the points in limine raised by the first respondent do not stand up to have the matter simply dismissed at this stage without a need to go into the merits of the review. On the strength of Section 11 (5) of the Act point 3,2 is not a point in limine but a statement of the law and not a point of law. Points 3.3 and 3.4 can be treated as one and seems to be the view taken by Mr. Khumalo in his submissions.

On points of law in reply Mr. Khumalo cautioned the court to tread carefully in determining this issue as the court might find itself having to re-try this matter. He further argued that if one carefully reads Herbstein (supra) one can detect a general thread running through the grounds for review which is stated at page 932 as follows:

"The giving of a judgement not justified by evidence would be a matter of appeal and not review, upon this test. The essential question in review proceedings is not the correctness

of the decision under review but its validity" (see Computer Investors Group Inc and another vs Minister of Finance 1979 (1) S.A. 879 (T) at 890 c -d) (my emphasis).

Mr. Khumalo went further to distinguish the Joseph Matse case (supra) and that of Standard Bank (supra) as not in point.

Lastly, that the court is called upon to do in reviewing these proceedings where a judgement was made by a court of competent jurisdiction which based its judgement on the facts is that the court will find itself having to access the evidence, and thus be seen to re-try the case.

These are the issues for determination. I have listened to the arguments advanced in this matter. I am in agreement with Mr. Khumalo that the Industrial Court is not an Administrator, some Government authority, a Board of some other institution exercising quasi-judicial powers and discretion. It is a court of law that makes a decision as an informed conclusion on evidence led before it. Its decision may therefore not be interfered with by another court simply because that court would have arrived at a different conclusion on the same facts and evidence. This court may not interfere to review the proceedings of the Industrial Court merely because this court does not agree with such decision. That would be the function of an Appellate Court.

It appears to me from the grounds of review following the dicta in the case of Krumm (supra) that it

would not be proper for the court to review these proceedings. Booysen J in that case had this to say:

"This being in essence a review and not an appeal. I am not entitled to set aside the first respondent's decision merely because I believe it to be wrong (my emphasis). Judicial review is in essence concerned not with the decision but with the decision making process.

Further, on the strength of the dictum in the case of Computer Investor Group Inc and another op cit 890 C - D.

I thus rule that the points in limine succeed with costs

S.B. MAPHALALA

JUDGE