THE HIGH COURT OF SWAZILAND

DUMSANI MASONDO

Applicant

And

THE JUDGE OF THE INDUSTRIAL COURT

1st Respondent

ELLERINES HOLDINGS LIMITED

2nd Respondent

Civil Case No. 2158/2001

Coram S.B. MAPHALALA – J

For the Applicant MR. M. SIMELANE

For the Respondents MR. M. SIBANDZE

JUDGMENT

(07/05/2004)

The Applicant seeks the following relief:

(i) Reviewing, correcting and setting aside the judgment of the Industrial Court of Swaziland delivered on the 8th May 2001, under Industrial Court Case No. 4/98;

(ii) Granting the Applicant costs of this application only in the event that same is opposed;

(iii) Granting any further and/or alternative relief as this above Honourable Court may deem just.

The Applicant had commenced proceedings before the Industrial Court for unfair dismissal. On the 8th May 2002, the Industrial Court delivered a judgment dismissing his application against the 2nd Respondent.

In support of his contention that the order of the Industrial Court be reviewed, corrected and set aside the Applicant states in paragraphs 5, 6and 7 of his founding affidavit, that:

5. I am dissatisfied with the said judgment of the court by reason that the court a quo grossly misdirected itself on material issues.

5.1 As a result of the misdirection the court dismissed rny claim and found that it was reasonable for the 2nd Respondent to terminate my employment with it.

6. The court a quo misdirected itself in that:

6.1 It allowed evidence of an offence allegedly committed by me in 1996, to prove a charge of dereliction of duty, which took place in 1997.

6.2 Despite the fact that no evidence was led by 2nd Respondent to prove a charge of dereliction of duty on my part from the 31st March 1997 to 30th June 1997, the court a quo found that previous

warnings given against me in 1996, were sufficient to prove that I was guilty on the offence for which I was dismissed. Evidence brought by the Respondent included dates when I was not working for Respondent let alone being a branch Manager.

6.3 There is no evidence on record to prove that from 31st march 1997 to 30th June 1997, I did not sign a receipt book, which is subject matter in this matter. In any event the 31st March 1997 was a public holiday, and from the 30th June 1997 I was not branch Manager at Respondent's Manzini branch. I had been transferred to Nhlangano.

6.4 The Respondent's only witness Christopher Bock testified that Credit Manager would sign a summary of all receipts captured as confirmation of correctness of the information. The witness further stated that thereafter the branch Manager would also check and sign the summary.

6.5 I submit that from the afore-going, it is clear that the branch Manager has discretion not to sign the summary or any other books used by the undertaking if he is not satisfied as to the correctness of same.

6.6 I further submit that I did not sign the receipt book in question because I was not satisfied with what appeared in the individual receipts captured on the 31st March

1997. I also stated this in my evidence in court. Otherwise I signed all other subsequent receipt,

7. I submit that the court a quo grossly misdirected itself as its findings are groundless. The court a quo's findings resulted in a failure of justice.

The 2nd Respondent has filed an answering affidavit and has raised a preliminary point of law and also answered on the merits. This judgment pertains to the point of law raised. The said point is found in paragraphs 4 of the answering affidavit and it reads as follows;

"The Applicant sets out no ground permissible in common law, which can form the basis of an application for review of the judgment of the 1st Respondent in that the grounds of review stated by Applicant are that the 1st Respondent firstly misdirected himself, considered or allowed the evidence of an offence committed by the Applicant in 1996 to prove a charge of dereliction of duties, which according to the Applicant, occurred in 1997".

The question therefore is whether the alleged irregularity complained of fall within the grounds permissible in common law, which can form the basis of an application for review of the judgement of the 1st Respondent.

According to the learned author, LA Rose-Innes in the Book Judicial Review of Administrative Tribunals in South Africa, 1963 at page 8, there are seven grounds with common law upon which the proceedings of administrative bodies may be subject to review and these are as follows:

1. Where the proceedings are ultra vires and this will include bad faith or fraud by the tribunal or official exercising his power,
2. Violation of the principles of natural justice,
3. Failure to give reasons for a decision where there is a duty upon a tribunal to do so,
4. Mistake of law or fact in certain circumstances,
5. Unreasonableness of decisions in certain circumstances,
6. Non-compliance with the rules of evidence in limited circumstances, and
7. Where the power exercised was unlawfully delegated.

Of the above grounds it is clear that none are present in the Applicant's founding affidavit. Grounds 1, 2, 3 and ? can be disregarded forthwith and grounds 4, 5 and 6 may be considered with a view to establish whether the facts in casu fits in any one of them.

It was contended for the Respondent that in this matter the application is not directed at correcting any irregularity as in fact no irregularity, gross or otherwise is alleged in the Applicant's founding affidavit. To support this proposition the court was referred to LA Rose Innes (supra) at page 201 where the learned author expressed himself in the following terms:
"Review is a remedy directed at correcting any irregularity of a procedural nature or any illegality in the proceedings of a tribunal, the court of review is not concerned with the merits of the decision arrived at by the administrative body, provided that the procedures and method adopted by that body are regular, the review court does not enter into the correctness in substance of the decision that was made. It has repeatedly been held that where a statute confirms authority upon an administrative body to decide a matter left to its discretion, the courts have no power to substitute their own decision for that of the administration body, especially authorised to make that decision".

It was further contended for the Respondent that the Applicant is asking the court to examine the merits of the decision arrived at by the 1st Respondent and the Applicant furthermore has not attacked the methods or procedures adopted by the 1st Respondent, he merely places the findings of the court a quo before this court, alleges that the findings were wrongly arrived at due to a misdirection by the 2nd Respondent and asks the court to substitute its own decision for that of the 1st Respondent. Again in this regard the court was referred to the writings of the learned author Rose-Innes (supra) where at page 201 the following appears:
"...A mistake of law or a wrong conclusion of fact duly arrived at is not an irregularity such as may justify a review. Such a mistake is not a gross irregularity within the meaning of the Supreme Court Act". The learned author goes on to say, "an incorrect ruling on appoint of law or a misapprehension of fact by an administrative tribunal or official, while itself not reviewable nevertheless may produce a consequential irregularity. If as a consequence of a mistake of law of fact, an irregularity is committed the proceedings are reviewable. To take once again the example of arbitration proceedings, if an award is so excessive as to point to irregularity or partiality on the part of the arbitrator, that may be a ground for review".

Mr. Sibandze for the Respondents further cited the authority of Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa at page 992 where the learned authors formulated the test which is to say that, where it is the outcome of the trial, in other words the conclusion, and not the method of the trial which is challenged, the appropriate way to proceed would be by way of appeal.

On the other hand Mr. Simelane advanced argument in opposition. He relied heavily on the dicta in the South African case of Hira vs Booysen 1992 (4) S.A. 69 (A) at 93 where the Appellate Division of the Supreme Court of South Africa following English cases adopted a wider and more active approach on judicial review of administrative acts where a mistake of law is committed by the administrative body entrusted with the decision making power. The Appellate Division further held that the question as to whether an error of law is reviewable depends upon the intention of the legislature and is therefore a matter of statutory interpretation towards ascertaining that intention upon whether or not the legislature intended the tribunal or statutory body to have exclusive authority to decide the question of law concerned.

Mr. Simelane further relied on what was said by Shabangu AJ in the case of Standard Bank Swaziland Limited vs Thembi Dlamini and another, Civil Case No. 3420/2000 where the learned Judge in this case said the following:

"...The time has arrived in Swaziland to jettison the narrow approach of gross unreasonableness".

The gravamen of the arguments advanced against the preliminary point of law is that the court a quo did not have evidence to justify the final verdict and as such it ought to be reviewed. In this regard Mr. Simelane cited what is said by Rose-Innes (op cit) at 213 as follows:

"Where an administrative tribunal makes a decision, its proceedings will be irregular and may be set aside on review if there is no evidence whatsoever to support its findings".

In this regard it was further argued that the decision was not justified by the evidence before the Industrial Court and it induces a sense of shock.

Mr. Simelane 's parting shot was that the Industrial Court did not satisfy itself in terms of Rule 42 of the Employment Act 1980 (as amended) that it was fair and reasonable for Respondent to terminate Applicant's employment. On this argument the court was referred to the case of University of Swaziland vs President of the Industrial Court and another (unreported) Civil Appeal No. 16/02. Without further ado however, this argument is not raised in the Applicant's founding affidavit it is only raised in the Heads of Argument, and therefore it does not deserve any further consideration in this judgment. The general rule which has been laid down repeatedly is that an Applicant must stand or fall by his founding affidavit and the facts alleged in it, although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application in the allegation of facts stated there, because those are the facts that the Respondent is called upon to either affirm or deny, (see Herbstein et A1 (supra) at 366 and the cases cited thereat).

On the main, it is my considered view, that the present application is an appeal clothed as a review. I say so for a number of reasons.

Firstly, in this matter it is clear that the review application is not directed at correcting any irregularity as in fact no irregularity, gross or otherwise in the Applicant's founding affidavit. In essence the Applicant is asking the court to examine the merits of the decision arrived at by the 1st Respondent. Following what is stated by the learned authors Herbstein and Van Winsen (op cit) at page 932 the Applicant has not attacked the methods or procedures adopted by the 1st Respondent. The learned authors stated the following at page 932:

"The reasons for bringing proceedings under review or appeal is usually the same, to have the judgment set aside. Where the reason for wanting this is that the court came into a wrong conclusion on the facts or the law the appropriate procedure is by way of appeal. Where the real grievance is against the method of the trial, it is proper to bring the case on review ... the giving of a judgment not justified by the evidence would be a matter of appeal and not of review from this test. The essential question in review proceedings is not the correctness of the decision on the review but its validity".

On perusal of the Applicant's founding affidavit, it is clear that the Applicant's contention is that the court a quo grossly misdirected itself on material issues, in other words that the conclusion it came to based on the evidence was not justified. Therefore following was stated by the authors cited above the Applicant's contention cannot be correct in law.

Secondly, in so far as the Applicant alleges misdirection which suggests that there has been a mistake of either fact of law the learned authors Herbstein and Van Winsen (supra) put the position in the following terms at page 934.

" A bona fide mistake of law is grounds for appeal only, not for review. Where therefore a Magistrates refuses to allow an amendment or to strike out an allegedly defective portion of a plea, the matter cannot be taken on review, the same applies to an incorrect decision as to the party on whom the onus of proof lies, the consequences of a mistake of law will however amount to a gross irregularity if the judicial officer through a mistake of law does not direct his mind to the issue before him and so prevents the aggrieved party from having his case fully and fairly determined in that event the proceedings are reviewable".

In the present case, in so far as it is suggested that there was a mistake of law or fact, there are no averments in the Applicant's founding affidavit that such mistake was not bona fide and furthermore there is no allegation that such mistake amounted to a gross irregularity in the proceedings or that there was a mistake of law which caused the Presiding Judge not to direct his mind to the issue before him and thereby preventing the Applicant from having his case fully and fairly heard. It is further not the Applicant's case that the decision that was reached was so unreasonable as to lead to the conclusion that no reasonable court could have come to the same conclusion.

In the result, the preliminary point of law is upheld with costs.

S.B MAPHALALA

JUDGE