IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 77/2003

In the matter between:

ATLAS MOTORS (PTY) LIMITED	**APPLICANT**
AND	
ROBERTO MACHAVA	**1st RESPONDENT**
THE PRESIDENT OF THE INDUSTRIAL COURT OF SWAZILAND	**2nd RESPONDENT**
CORAM:	**MAMBA AJ**
FOR APPLICANT:	**MR. SIBANDZE**
FOR 1st RESPONDENT:	**MR. DUNSEITH**

JUDGEMENT
21/04/06

[1] The first respondent was employed by the applicant as a Radiator Technician on the 15th day of April, 1995. He remained in continuous employment until the 17th day of October, 1997 when he was dismissed by the Applicant for "fiddling with radiator pricing system or fiddling with the prices of radiators".

[2] Prior to his dismissal, the first Respondent was called to a meeting convened by the management of the applicant and there he was confronted or presented with certain documents alleging that he had interfered with the radiator prices. Whether this was a disciplinary hearing or not, nothing much turns on it for purposes of this review. What is material though is that at the end of the gathering or meeting he signed a document in which he is said to have pleaded guilty to the alleged fiddling. This document is referred to as the minutes of the disciplinary hearing pertaining to the first respondent's alleged "fiddling". He was then summarily dismissed for the said fiddling.

[3] After the dispute between the applicant and the first respondent was certified as unresolved by the Commissioner of Labour the first respondent applied before the court a quo for compensation alleging that he had been unfairly dismissed by the applicant. In its defence the applicant stated that the first respondent had been lawfully dismissed for theft or dishonesty to which he had pleaded guilty during the hearing or meeting of the 17th October 1997 referred to above.

[4] The first respondent is said to have been a skilled and competent technician in his field and needed practically no supervision at his work. He denied having acted dishonestly in the course of his employment and stated further that he had not pleaded guilty to such dishonesty and had merely signed the alleged minutes of the said meeting to signify that he would, given the proper opportunity, be prepared to answer for his actions.

[5] In support of its claim that the first respondent had been fairly and lawfully dismissed from his employment for theft or dishonesty, applicant led inter alia, evidence that first respondent had ordered a water cooled radiator core purportedly to fit on or re-core a D7 caterpillar from Inyatsi Superfos which used or operated on a hydraulic oil cooled radiator. The evidence proved that this could not have been practically possible. In short the ordered radiator core could not have been used on the hydraulic oil cooled radiator for the caterpillar. I pause here to say that the applicant then argued that because of this the only reasonable inference to be drawn from this is that the first respondent took the ordered radiator or radiator core for his own benefit to the prejudice of the applicant.

[6] Another incident relevant to the first respondent's alleged dishonesty is that a Massy Ferguson

forklift from Peak Timbers was brought to him at his place of employment for repairs to be done on the radiator. The first respondent is alleged to have recorded that he had drawn a radiator core for a mercedes Benz 2219D truck which core was much larger and incompatible with that of the Massey Ferguson forklift.

[7] Again I pause to note that there was no evidence from either Inyatsi Superfos or Peak Timbers that was led before the court a quo to say what had exactly happened as the first respondent denied any wrong doing. His answers to these allegations are contained in the judgement of the second respondent to which I shall turn presently.

[8] At the conclusion of that hearing the second respondent found for the first respondent, holding that the applicant had failed to satisfy the court that the first respondent had been dishonest or had been guilty of theft from his employer or that his dismissal was lawful. That is the decision that is the subject of this review.

[9] The ground upon which the applicant seeks to have the said judgement reviewed and set aside and or corrected is summarised in paragraph 4 of the applicant's heads of argument which reads as follows;

> "4. Clearly, where there is an allegation that a decision was so grossly unreasonable as to suggest that the court failed to apply its mind the matter is one for review at common law as anticipated by the Industrial Relations Act".

[10] It was further amplified by the applicant's attorney in argument that it was the applicant's contention that the conclusion and or result reached by the second respondent was totally unjustified or not supported by the evidence such that the only inference to be drawn therefrom is that the second respondent failed to apply his mind thereto or that inpropriety may be inferred.

[11] Section 19 (5) of the Industrial Relations Act 1/2000 provides that;

> "A decision or order of the court or arbitrator shall at the request of any interested party be subject to review by the High Court on grounds permissible at common law."

[12] The grounds upon which this court may review a decision or order of any subordinate court or tribunal were comprehensively stated by CORBETT CJ (as he then was) in the case of HIRA AND ANOTHER v BOOYSEN AND ANOTHER, 1992 (4) SA 69 at page 93 as follows;

> "...The present day position in our law in regard to common law review is, in my view, as follows;
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> (1) Generally speaking, the non performance or wrong performance of a statutory duty or power by the person or body entrusted with the duty or power will entitle persons injured or aggrieved thereby to approach the court for relief by way of

common law review. (See the JOHANNESBURG CONSOLIDATED INVESTMENT CASE supra at 115.) In that case the same Learned Judge stated that "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.' .. .Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated. ...Some of these grounds tended to overlap." The learned Judge continued

"(2) Where the duty/power is essentially a decision-making one and the person or body concerned (I shall call it 'the tribunal') has taken a decision, the grounds upon which the Court may, in the exercise of its common-law review jurisdiction, interfere with the decision are limited. These grounds are set forth in the **JOHANNESBURG STOCK EXCHANGE case supra at 152A-E.**

(3) Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend, basically, upon whether or not the Legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision.

(4) Where the tribunal exercises powers or functions of purely judicial nature, for example where it is merely required to decide whether or not a person's conduct falls within a defined and objectively ascertainable statutory criterion, then the Court will be slow to conclude that the tribunal is intended to have exclusive jurisdiction to decide all questions, including the meaning to be attached to the statutory criterion, and that a misinterpretation of the statutory criterion will not render the decision assailable by way of common-law review. In a particular case it may appear that the tribunal was intended to have such exclusive jurisdiction, but then the legislative intent must be clear.

(5) Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph (i.e. where the question of interpretation is not left to the exclusive jurisdiction of the tribunal concerned), renders the decision invalid depends upon its materiality. If, for instance, the facts found by the tribunal are such as to justify its decision even on a correct interpretation of the statutory criterion, then normally (i.e. in the absence of some other review ground) there would be no ground for interference. ***Aliter,*** if applying the correct criterion, there

> are no facts upon which the decision can reasonably be justified. In this latter type of case it may justifiably be said that, by reason of its error of law, the tribunal 'asked itself the wrong question', or 'applied the wrong test', or 'based its decision on some matter not prescribed for its decision', or 'failed to apply its mind to the relevant issues in accordance with the behests of the statute'; and that as a result its decision should be set aside on review."

[13] The present application is based on the common law in particular the grounds listed in paragraph 1 of the above quotation.

[14] I now return to the facts of this application. In doing so I shall deal with the specific instances complained of or alleged as showing or proving that the second respondent failed to apply his mind to the matter and thus arrived at a decision or conclusion that is grossly unreasonable in the circumstances. I also note, as I should, the judgement of the Court of Appeal in the case of COUNCILLOR MANDLA DLAMINI AND ANOTHER v MUSA NXUMALO, appeal case 10/2002 to which I was referred by Mr Sibandze for the Applicant. There the learned Judge President held that it was now time for the courts in Swaziland to hold that it is no longer necessary for a litigant to prove that a decision-maker acted grossly unreasonable in order for such litigant to succeed on review. The court held that in this day and age, the test of gross unreasonableness was too narrow or too stringent or perhaps unreasonably too high a threshold. The court ruled that the test must be whether the decision-maker acted procedurally fairly or unfairly in the circumstances.

[15] The emphasis is still on the conduct of the proceedings and not the result thereof. The requirement is still that the proceedings must be conducted in a fair manner in the sense that for example the rules of natural justice must be observed. Even doing away with the requirements of gross irregularity the words of MASON J in ELLIS v MORGAN, ELLIS **v** DESSAI, 1909 TS 576 at 581 that "an irregularity in proceedings does not mean an incorrect judgement, it refers not to the result but to the method of a trial such as for example, some high handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined," still apply.

[16] With the advent of the new constitution in the Republic of South Africa, the position or test for review there has fundamentally changed. There the constitution requires that the action under review must be "justifiable according to the reasons given for it." This is to give expression to the fundamental "values of accountability, responsiveness and openness." **See CAREPHONE (PTY) LTD v MARCUS N.O. & OTHERS, 1999 (3) SA 304.**

[17] The applicant's complaint, broadly speaking, is on two fronts or issues. First, applicant argues

that the second respondent was wrong to conclude that there was no evidence to prove that the first respondent had pleaded guilty to theft or at the very least to acting dishonestly in dealing with the radiators at applicant's establishment. Secondly pertaining to the Inyatsi Superfos and Peak Timbers transactions, that in this regard the only reasonable inference to be drawn from the available evidence was that the first respondent had stolen the parts he ordered since they could not be used on the machinery he purportedly bought them for.

[18] Dealing with this issue the second respondent stated as follows at page 29 to page 30 of the book of pleadings;

> "A lot of emphasis was however placed on exhibit 45, a job card for a large corporate customer by the name of Inyatsi Superfos. The company brought in a caterpillar D7 model for the repair of the hydraulic oil cooler.
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> During cross examination the applicant told the court that he ordered a core as per exhibit 44B upon finding out that the oil cooler could not be repaired. The core ordered was (7 x 10 x 700 x 49) in size. The pricing for repair was done by Mr Emidio but the order of a new one, a much larger one than that required was ordered by the applicant. Mr Oliveria and Mr Emidio dismissed the suggestion that the radiator needed a recore. They further explained that they did not nor had the capacity to recore oil coolers in Swaziland workshops.

The core was ordered from South Africa and the order was approved by the Manager of the applicant. The radiator ordered was a water cooled one and was completely incompatible with the hydraulic oil cooler.

The applicant was hard pressed to explain why he ordered a water cooled radiator when in fact the job card was for a repair of an oil cooled one. It was suggested by counsel for the applicant that the core ordered was of the same type as the hydraulic oil cooler. It was also suggested that the large radiator ordered could be cut down to fit the purpose. The applicant had not offered such explanation in his evidence. A hydraulic oil cooler for a D7 caterpillar was produced before court as exhibit R2 and a radiator core the same size ordered by the applicant was also produced. From the look of the two, the one ordered was almost three times larger than the hydraulic oil cooler.

No reasonable explanation was offered by the applicant as to why he ordered the large water cooled radiator to repair an oil cooled radiator.

Again evidence from the customer was not adduced since no explanation was sought to find out if indeed the D7 caterpillar radiator was repaired or whether in fact they had received a new one. Transactions which took place more than 5 years ago were difficult to explain because no

immediate investigations were conducted by the respondent upon discovery of this anomaly. Inyatsi Superfos was not approached to explain what service they had received and how much was paid for the service. No evidence of an audit was produced to prove stock loss or monetary loss to the respondent emanating from the particular transaction or any other.

> The question whether the customer received the new core and at what price still begs an answer."

[19] In my judgement, the second respondent dealt with the issues head-on, extensively or in great detail. In the absence of any evidence of mala fide or improper motive, as a review court I am not in a position to interfere with his conclusions thereon. It may well be that a different judge might have reached another conclusion, but that is not a ground sufficient for me to interfere with the judgement of the second respondent and substitute it with my own opinion thereon.

[20] Again, concerning the alleged confession by the first respondent the second respondent dealt with this issue at page 24 of the book of pleadings. He concluded that he could not conclude from the evidence that there was any allegation of and admission to theft. The allegation was "fiddling with the radiator pricing system". The second respondent accepted the explanation by the first respondent on why he signed the minutes, namely, to signify or indicate that he would if given the opportunity give an explanation on the alleged fiddling. He was not, so the court a quo held, admitting to theft or any dishonesty. I am unable to hold that this conclusion is so unreasonable as to lead to one inference only, that the second respondent was motivated by some ulterior motive to reach that conclusion.

[21] In the result, the application for review is dismissed with costs.

MAMBA AJ