CASE NO. 606/09

BETWEEN

SWAZILAND BUILDING SOCIETY... APPLICANT

AND

MENZI NGCAMPHALALA... FIRST RESPONDENT

THE PRESIDING JUDGE OF THE

INDUSTRIAL COURT OF SWAZILAND... SECOND RESPONDENT

CDRAM AGYEMANGJ

FOR THE APPLICANT: M. SIBANDZE ESQ.

FOR THE FIRST RESPONDENT: S.V. MDLADLA ESQ.

DATED THE 23rd DAY OF JUNE 2009

JUDGMENT

In this application, the applicant seeks the following prayers:

1. That the judgment of the Industrial Court in Case No. 20/2005 granted on 8/10/2008 reinstating the first respondent to his former employment by the applicant be reviewed and corrected or set aside;
2. Costs to be paid by the party opposing.

These are the antecedents of this case: the first respondent herein who worked as the Branch Controller of the applicant, was detained by the Police overnight following a domestic fray. Upon his release, having allegedly sent word to his immediate supervisor one Jabulani Manana that he was absent from work due to a family problem, and allegedly feeling unwell, he saw a doctor who gave him the day off. The next day, he showed up at work and allegedly held a discussion with that superior officer regarding the reason for his absence. Following this, the applicant which received information that the first respondent had been absent from work because he was incarcerated by the Police and not because he was ill, ordered an inquiry into the circumstance of his absence. This was because the said Mr. Manana allegedly informed the applicant that the first respondent had lied about the reason for his absence from work, alleging that that he had been ill and following it up with a sick sheet. After the inquiry was held, the first respondent, was dismissed from his employment for alleged misconduct. The first respondent approached CMAC regarding the dismissal. When that body was unable to resolve the dispute between the first respondent and his employer the applicant, he pursued the matter at the Industrial Court. After the parties were heard, the trial learned judge gave judgment for the first respondent in the following terms: "The respondent is ordered to reinstate the applicant to his position as Branch Controller, or any other similar position of equivalent rank and remuneration in the respondent's undertaking with effect from **1st** July 2007..."

It Is regarding the said order that the present application has been brought. The sole ground upon which a review is being sought of the judgment of the Industrial Court in this court, is this:

That the order of reinstatement made after uncontroverted evidence had been led by the applicant that the first respondents position had been filled, was unreasonable, amounting to an irregularity.

In a twenty-one paragraph founding affidavit sworn to by one Joseph Ndlangamandla, Managing Director of the applicant, the deponent alleged that when the first respondent instituted his suit against the applicant following the termination of his employment with the applicant, he made a claim for compensation and for other sums of money arising out of his employment. He further deposed that, it was at the hearing that the first respondent amended his claim to seek reinstatement. The claim of reinstatement having been granted, the result was that the applicant had to pay to the first respondent, the sum of E249, 699.00 computed from July 2007 until October 8 2008 when judgment was delivered. He deposed that this allegedly prejudicial order was in disregard of the uncontroverted evidence led by the applicant per its employee the said Mr. Manana, that the position of the first respondent had been filled, making it impracticable for reinstatement. The order for reinstatement the said piece of evidence notwithstanding, he alleged to be grossly unreasonable, as predicated upon an incorrect construction and application of S. 16 (2) (c) of the Industrial Relations Act which led to a misconstruing of the mandate of the Industrial

Court in the exercise of its discretion regarding the appropriate order to make in an unfair dismissal case.

The applicant complained more particularly about the following dictum of the learned judge a quo: "a claim for reinstatement, cannot be defeated merely by filling the dismissed employee's position whilst the dispute awaits adjudication, otherwise the relief of reinstatement provided by the Act would be rendered nugatory. S.16 of the Act requires the respondent to go further and show on a balance of probabilities that it is not reasonably practical for it to reinstate the applicant. Discharging the onus requires more than a bald statement that the applicant's position has been filled". It was the case of the

applicant per the said deponent, that the said burden of showing that it was not reasonably practicable to reinstate the first respondent was met by the applicant with the adduction of uncontroverted evidence by its witness Mr. Manana, that the first respondent's position had been filled.

In argument, learned counsel reiterating this position, added that not only was it unreasonable for the court to order reinstatement when uncontroverted evidence had been led that the position once occupied by the first respondent had been filled, but reinstatement was impracticable as the incumbent would be displaced, contrary to the provisions of S.26 and S.35 of the Employment Act, thus opening the applicant up to litigation for breach of the provisions of that enactment by that employee and anyone else who would be displaced in that line, ad infinitum.

It is this he said, that made the order for- reinstatement so grossly unreasonable as to amount to an irregularity, the sole ground for seeking the present review. He buttressed his contention with an enlightening quote from Erasmus' The Book of Superior Court Practice at A1-72, which reads: "irregularities relating to evidence...these are irregularities, other than those relating to improper admission or rejection of evidence...in *Mpemvu v. Mqasala* [109 26 sc 531 at 534, Devillers CJ said: "to give judgment against a man without any evidence whatever against him seems to be a greater irregularity than to reject legal evidence for it ignores the very object for which all rules of evidence exist".

Contrary to the assertions of the deponent in the founding affidavit, learned counsel for the applicant contended that S. 16 (2) (c) did not vest a discretion in the second respondent regarding the orders to grant in a case such as the instant one. In his submission, the court a quo was bound by the said provision to order reinstatement unless it was found to be reasonably impracticable for that order to be carried out. He contended that the fact that the court ordered reinstatement in spite of the alleged due discharge by the applicant of its burden of showing its impracticability, rendered it an order made, not in the exercise of discretion, but in excess of, and without due regard to the court's powers vested in it by S. 16 (2) of the Industrial Relations Act. Learned counsel contended that the learned judge a quo, concerning himself with such matters as the age of the first respondent, his employability by other institutions et al, so

beclouded his view with empathetic considerations that he failed to adhere to the provisions of S. 16

(2)(c) of the Industrial Relations Act. The alleged resultant irregularity he contended, was thus a proper subject for the review of this court.

He thus prayed that the prayers sought be granted and the matter be sent back to the Industrial Court for an appropriate order of compensation to be made.

The second respondent did not oppose the application. The application was however vehemently opposed by the first respondent. In his answering affidavit, the first respondent raised the legal shield of waiver as a point *in limine:* that the applicant following the judgment of the court communicated an intention to reinstate him and indeed continued paying his salary. He thus contended that the applicant had by its conduct, waived the right to bring the instant application.

On the merits, he deposed, denying the averments of the applicant's representative, that the order of reinstatement was made properly after due consideration of the evidence led. The point raised *in limine* was not pursued.

In argument, learned counsel relying on the case of ***Bester v. Easigas (Pty)*** *Ltd* ***1993 (1) SA 30 at 43,*** contended that the present case of the applicant which is that the court a quo misapplied the law viz. S. 16 (2) (c) of the Industrial Relations Act, or made an order without due regard to or in excess of, that provision, should have been the subject of an appeal and not the review that is being sought in the instant application. He contended that the order for reinstatement was properly made and in accordance with the statutory provisions after the evidence led by the applicant had been duly considered. He averred that all that the applicant which had the burden of persuasion adduced by way of evidence was an assertion by its witness that the first respondent's position had been filled. Learned counsel contended that the court a quo in making the reinstatement order, directed itself properly on sound legal principles and held that the mere assertion that a position had been filled would not defeat a claim for reinstatement. Citing the case of, ***Collie Dlamini v. Swaziland Electricity Board IC Case No. 105/2005*** relied on by the court a quo in its judgment, he alleged that this position was indeed settled law both in Swaziland and in South Africa.

It was also the contention of learned counsel that upon the application of S. 16 (2) (c) of the Industrial Relations Act, the court a quo had a discretion to order reinstatement unless the applicant demonstrated that reinstatement was impracticable. This discretion he said, exercised by the court a quo after due consideration of all the evidence that was placed before it was proper and in line with decisions such as ***Modesi v. Mosiga 1927 TPD 16,*** was not to be the subject of a review application where one deemed it unsatisfactory. A challenge of such exercise had to be by way of an appeal.

At the close of the arguments, these matters stood out as issues for determination:

3. Whether or not the order of reinstatement was an unreasonable order amounting to an irregularity;

4. Whether or not the order for reinstatement was an act of discretion;

5. Whether or not the instant application for review is the proper mode of challenging the orders before the court a quo.

In this application, the applicant has alleged a number of things including that the court, in directing the reinstatement of the first respondent did so in violation of, or in disregard of its statutory mandate contained in S.16 (2) (c). The applicant contends that the judgment of the court that the applicant had not met its burden of showing impracticability of the order for reinstatement, was unreasonable, for according to the applicant, there is no more forceful argument for demonstrating the impracticability of reinstatement than that the position of a dismissed employee has been filled. I am unable to agree with the contention of the applicant. S. 16 (2) (c) provides that the court shall require the employer to reinstate the employee unless it is not reasonably practical for the employer to reinstate or reengage the employee.

It seems to me from a reading of the judgment of the court a quo, that when the it held that it was not enough for the applicant to rely on the mere fact of filling the first respondent's position to demonstrate the impracticability of reinstating the dismissed employee, it did so having directed itself on the requirements of the said provision which required the court to be persuaded that it was not reasonably practicable to reinstate the first respondent. There is no controversy over the fact that S. 16 (2) (c) placed the burden on the applicant herein to demonstrate that reinstatement would not be

reasonably practicable. The court, directing itself on the legal position as obtained in ***Collie Dlamini****'s* held that the burden had not been met. I see nothing in the well-reasoned judgement of the court a quo that considered the evidence adduced by the applicant to be insufficient in persuading it, as having been made in disregard of the said provision as canvassed by the applicant.

The question regarding whether or not the legal burden was met by the first respondent is a question of law. Furthermore, whether or not an order of reinstatement was the proper order to make in a case of unfair dismissal is also a matter of law. Generally, (except in the very exceptional circumstances discussed hereafter), a complaint that the wrongful evaluation of the evidence adduced by the applicant led to an erroneous finding and an alleged misapplication of the law, grounds an appeal arid not the review sought by this application.

This court on a review, is empowered to examine the validity of the decision of the second respondent having regard to its method of adjudication of the matter placed before it, and not its correctness, see ***Herbstein v. Van Winsen The Civil Practice of the Supreme Court of South Africa 4 ED. 932 at para D.***

Of the review jurisdiction, the dictum of Innes CJ in *Johannesburg Consolidated Investment Co.* ***v.*** *Johannesburg Town Council 1903* ***TS 111 at 114-116*** regarding practice in South Africa, analogous to our practice here, is relevant: "...In its first and most usual signification it denotes the process by which apart from appeal, the proceedings of inferior Courts of Justice... are brought before this court in respect of grave irregularities or illegalities occurring during the course of such proceedings...". It is settled law that the grounds for seeking a review include irregularity in the proceedings. Although the courts in the exercise of the review jurisdiction, are generally reluctant to interfere with findings made by a court where the process of adjudication is not complained of as tainted, where it becomes clear that the judicial officer did not apply his mind to the matter at hand such that the resultant finding is unwarranted by any rule of law or procedure, it is said to amount to an irregularity, see ***Bester v. Easigas (Pty) Ltd. 1993 (1) SA (C) 43.***

In this application, the applicant alleges that there was irregularity, and that same is found in the allegedly unreasonable order of reinstatement made without due regard to

the uncontroverted evidence led by the applicant that the first respondent's position had been filled. The applicant asserts that by the said uncontroverted piece of evidence, the applicant met its burden. Learned counsel for the applicant therefore contended in argument that the order of reinstatement operated against it as if a finding of fact had been made against it rather than that it met its burden, rendering it so grossly unreasonable as to amount to an irregularity.

That argument in my view is not tenable. This is because it is my view that the judge a quo in the exercise of his powers under S. 16 (2) (c) had regard to the evidence led to demonstrate the impracticability of an order for reinstatement. His evaluation thereof was that it was not enough to meet the burden. Indeed he went so far as to spell out the kind of evidence that should have been adduced (but was not) in discharge of the burden embedded in that provision. In my view this was not on fours with the situation described by Devillers CJ in *Mpemvu v. Mqasala* [109 26 sc 531 at 534, to which recourse has been had by learned counsel for the applicant, of penalising of a man regarding whom no finding of fact had been made from the evidence. The learned judge a quo it seems to me adverted his mind to what was before him and had regard to his statutory duty of examining evidence adduced to demonstrate impracticability of a reinstatement order before he

made the order of reinstatement. Indeed the court a quo demonstrated its reasonableness by not insisting that the first respondent be returned to the very position he occupied before his dismissal, but gave the applicant room to look for a position that was commensurate with the one he was removed from, should that be expedient.

It is my view then that there is no basis for the assertion that the order was unreasonable such as amounted to an irregularity regarding which the review jurisdiction of the court may be invoked. Was the order of reinstatement an exercise of judicial discretion? It is the contention of learned counsel for the applicant (although that stance differs from that of the applicant as found in the founding affidavit of its Managing Director), that there was no discretion in the learned judge a quo. He contended that a proper interpretation of S. 16 (2)(c) would show that the order for reinstatement was a

mandatory one and that it ceased to operate as such where evidence of practicability was adduced. For this reason he said, the order should have been based on the legal mandate contained in the said provision which he alleged it was not, rendering it grossly unreasonable and irregular in consequence. The first respondent differed from this position and maintained that the order for reinstatement was a proper exercise of the court's discretion under S. 16 (2) (c) of the Industrial Relations Act.

The question of whether the statutory mandate gave rise to the application of judicial discretion has become pertinent because should the order of reinstatement be found to be an exercise of discretion, the question regarding whether or not this court will interfere with it in an application for review arises. This is so because it is generally considered ill-advised for one court

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to substitute its own discretion for that of a court which has exercised same on sound legal principles, unless the circumstances are dire. Indeed at common law, the principle has crystallised into settled law that such discretion ought not to be tampered with on appeal or review, unless it was shown to have been exercised on wrong principles of law, under a mistake of fact, that it was arrived at by recourse to irrelevant evidence, or the wrongful rejection or the misapplication of relevant evidence. It seems to me that the argument of learned counsel for the applicant that there was no discretion in the judge a quo upon a careful reading of S.16 (2) (c) of the Industrial Relations Act, is an artificial one. I say this because it seems to me that as long as that statute placed in the court, the right to depart from the main and preferred relief of reinstatement for good reason, it placed a discretion in it.

In the allocation of the burden of proof in civil cases, the requirement that the court be persuaded of the impracticability of the order of reinstatement demanded that evidence be led by the employer in discharge of its burden. The court, in evaluating the evidence adduced to ascertain whether the burden had been discharged had to be guided by sound legal principles. Where therefore, the court made a choice for reinstatement over some other mode of compensation in spite of a manifest demonstration that reinstatement was impracticable, although it be an exercise of discretion, it would be

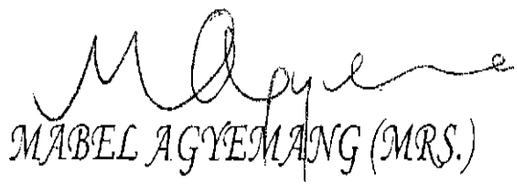
grossly unreasonable, grounding a finding of irregularity for which a review order may be made.

In the instant case however, I find that the court considered the evidence proffered, found it insufficient to meet the burden imposed on the applicant and in line with the legal position obtaining in Swaziland, considered it unnecessary to make an order alternative to reinstatement. The exercise of discretion was thus made properly. There was nothing irregular about it that might warrant interference.

The last issue in this matter is whether a review and not an appeal is the proper mode by which the court should have been approached in the instant case. Learned opposing counsel for the first respondent has contended that the instant application is an appeal clothed in the garb of a review application and that same must not be countenanced. I share the same view.

It was amply demonstrated by the applicant in its founding affidavit as buttressed by counsel, that the challenge to the judgment that has given rise to this application, is that the court a quo failed to assess the discharge of the burden of proof by the applicant herein. This is regarding the demonstration of the impracticability of the relief of reinstatement sought by the first respondent before the court a quo which burden is imposed by the application of S. 16 (2) (c) of the Industrial Relations Act. The said challenge is a charge that there was an error in the application of law by the court a quo. But a review unlike an appeal, is concerned with the method of adjudication and not its result, unless the result is so perverse that it is indicative of a flawed method of adjudication in that the judicial officer acting bona fide, failed to "direct his mind to the issue before him and so prevents the aggrieved party from having his case fully and fairly determined", see: ***Goldfields Investment Ltd and Anor v. City Council of Johannesburg and An or. 1938 TPD 551,*** or that he failed to "appreciate the nature of the discretion or power conferred upon him" and thus failed to or refused to exercise the discretion or power, see per Corbett CJ in: ***Hira and Anor v. Booysen and Anor. 1992 (4) SA 69 (AD) at 84 B*** relied on in the Swaziland Court of Appeal Case of ***Takhona Dlamini v. President of the Industrial Court and Anor Case No. 23/1997.***

That is the level of unreasonableness in the result referred to as an irregularity regarding which a review order may be sought and made. Such is not the case here. I find then that in the instant case, subject of complaint which I find to be an alleged error of law, should have been aired on an appeal and not the review sought in this application. I find also that the court a quo in making the order for reinstatement did so properly, on sound legal principles. There was nothing unreasonable about it and nothing irregular regarding it.



MABEL AGYEMANG (MRS.)

HIGH COURT JUDGE

The application seeking an order reviewing the judgment of the Industrial Court in Case No. 20/2005 granted on 8/10/2008, reinstating the first respondent to his former employment by the applicant is hereby dismissed with costs.