CASE NO. 1429/2005

BETWEEN

SWAZILAND DEVELOPMENT AND SAVINGS BANK...	**APPLICANT**
KENNETH NGCAMPHALALA...	**FIRST RESPONDENT**
THE PRESIDING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND...	**SECOND RESPONDENT**

CORAM	**AGYEMANGJ**
FDR THE PLAINTIFF:	**M. SIBANZE ESQ.**
FDR THE DEFENDANT:	**A.M. LUKHELE ESQ.**

DATED THE 30th DAY OF SEPTEMBER 2009

JUDGMENT

In this application, the applicant seeks the following prayers:

1. That the order of the Industrial Court in Case No. 26/2003 granted on 17th March 2005 be reviewed and corrected or set aside;

2. Costs;

3. Further and/or alternative relief.

The applicant is a Banking Institution with legal capacity and the respondent in Case No. 26/03 decided by the court a quo in favour of the applicant therein. The first respondent was an employee of the applicant who as applicant in Case No. 26/03, obtained judgment against the applicant herein. The second respondent is the presiding judge in the said case and has been cited in that capacity.

The matters that gave rise to the judgment of the Industrial Court (the court a *quo)* are these: the first respondent herein commenced a suit at the court a *quo* against the applicant seeking *inter alia,* orders reinstating him in the position he once occupied in the applicant's establishment or alternatively, a maximum compensation of twenty-four months' salary for automatically unfair dismissal, in the sum of E649, 032.00. That suit was grounded on the following matters: the first respondent responded to an advertisement for the post of Senior Manager Risk, placed by a company: Coopers and Lybrand on behalf of the applicant herein. The first respondent attended an interview after which he was employed by the applicant as Personal Assistant to the Managing Director. It is not clear how this happened except that there appears that another advertisement was put out by the same company on behalf of the

applicant for the said post of Personal Assistant to the Managing Director. In that advertisement for the post of Personal Assistant, it was stated that the successful candidate would report directly to the Managing Director and be his understudy.

It was common cause that the interviewers felt after they interviewed the first respondent, that he was suited for the second and enhanced position of Personal Assistant to the Managing Director. Thus was the first respondent appointed to that post on January 1 1997. It appears that the whole exercise of appointing a personal Assistant to the Managing Director, was to equip that employee to take up the post of Managing Director when the consultants referred to as AMSCO who at that time, had the management of the applicant, left Swaziland. After the first respondent worked in the said position for a while, reporting directly to the Managing Director and sitting in at Board meetings, he was informed that he had passed probation from March 1 1997. When the consultants AMSCO finished their task in the applicant's establishment and left, the Central Bank took over after which another group of consultants: IDI, took over the management of the applicant. It was the case of the first respondent herein as applicant before the court a quo, that considering that he had been working on the understanding that he was being groomed for the post of Managing Director left vacant by the departing AMSCO team, he was uncertain as to his new role when the new team of consultants took over the management. He thus started asking questions as to his role and status in the applicant's outfit. The questioning did not seem to have worked to his advantage with that management team or with officials of the Central Bank who took over the management of the applicant after the IDI team left. Over a period of about two years, the first respondent's role and status in the applicant's establishment seemed to be in some doubt. After he continued to engage those in authority for that length of time, the applicant was informed that the new management of the applicant had come up with a new structure which had no place for a Personal Assistant to the Managing Director. In what passed for a discussion regarding the way forward between the first respondent and one Mrs. Vinah Nkambule, official of the Central Bank who worked as Acting Managing Director at the time, a request was made by the

first respondent that he be made to fill one of two positions of Deputy Managing Director which he alleged obtained at the time and had been left vacant after the IDI team finished their work and left. This culminated in a discussion regarding an exit package for the first respondent who was told that his post had become redundant. When the parties failed to reach an understanding, the first respondent first reported the matter to the Conciliation, Mediation and Arbitration Commission (CMAC) and when the dispute between the parties was not resolved, to the court a quo under a Certificate of Unresolved Dispute. The court a quo having heard the parties, entered judgment for the applicant therein (the first respondent herein) ordering the applicant herein to pay to the first respondent, the sum of E264,516.00 being compensation for unfair dismissal.

It is against the said decision of the court a quo that the present application which seeks a review has been brought. In its founding affidavit, sworn to by one Stanley Matsebula, the Managing Director of the applicant, matters regarding the conduct of the court a quo in the proceedings before it were set out in a number of complaints. I have condensed them under two grounds thus:

1. That the court a quo misdirecting itself, evaluated the evidence before it wrongfully leading to grossly unreasonable and sometimes illogical findings;
2. That the court a quo misdirected itself on the issues and failed to apply its mind to what was before it.

With regard to the first ground, the applicant averred that the court, was furnished with the evidence of one Henry Mthetwa, the Human Resource Manager of First National Bank (FNB) regarding the first respondent's prior position in FNB. He alleged that this went to support the applicant's contention that the disciplinary hearing involving the first respondent for falsifying his curriculum vitae was justified. In spite of this, the court in determining the issues before it, disregarded and labelled same as irrelevant. This allegedly

disabled the court a quo from finding that the action of the applicant had just cause, thus resulting in the allegedly grossly unreasonable finding that it was aimed at procuring the termination of the applicant's employment at all costs. The applicant alleged furthermore that the court a quo failed to evaluate the evidence properly regarding disputes of fact, having preferred the allegedly discredited testimony of the first respondent over that of the applicant's witness: the said Mrs Vinah Nkarnbule, although same was corroborated by the deponent. A particular example was given of the assertion by Mrs. Nkarnbule duly corroborated by the deponent, that the first respondent was unwilling to accept any post other than the post of Managing Director of Deputy Managing Director (a non-existent post) thus bringing about his redundancy. The court, in allegedly evaluating the evidence improperly, relied on a consideration that Mrs. Nkarnbule could not remember certain aspects of the applicant's structure to find that she was an unreliable witness. By this finding, the court allegedly disabled itself from making certain findings of fact including: that the disciplinary action against the first respondent was justified; that the applicant did not force a redundancy but rather, that the first respondent had spurned alternative job offers as he maintained that he would only accept the post of Managing Director which had been filled, or Deputy Managing Director which did not exist; that there had been consultations with the first respondent which did not yield fruit because of his alleged stance and furthermore, that it was the first respondent who initiated the discussion on an exit package with the applicant and not the other way round.

Regarding the second ground of complaint, the applicant has contended that the court a quo's finding that it was unfair of the applicant to abolish the post of the first respondent without consulting him, was so unreasonable - considering that the post occupied by the applicant: Personal Assistant to the Managing Director was understood by all to be temporary - that it was clear that the court a quo did not direct its mind to the issues before it.

Other examples of the court's alleged failure to direct its mind to the issues included these: the question that the court a quo posed for itself being, whether or not the applicant was obliged to consult with the first respondent before retrenchment; the court a quo's allegedly grossly unreasonable finding that there was no evidence that the first respondent failed to carry out the applicant's work, in face of the finding that the first respondent's post was abolished.

For these reasons, the applicant prayed that the judgment of the court a quo be reviewed.

The application was vehemently resisted by the first respondent who in his answering affidavit both challenged the facts as stated by the applicant, and also the legal implications of bringing the present application which seeks a review. I shall in the course of this judgment, make reference to the case of the first respondent as canvassed in his behalf by counsel.

Having considered the respective cases of the parties on their papers and the arguments canvassed on their behalf by learned counsel, it seems to me that the issues for determination in this suit are the following:

1. Whether or not the findings of the court a quo amounted to gross unreasonableness;
2. Whether or not the court a quo failed to apply its mind to the issues before it;
3. Whether or not the court's review jurisdiction has been properly invoked in the present application.

It seems to me that the allegation that the court a quo's findings were unsupportable from the evidence is without merit. This is because having gone through the evidence both oral and documentary which was led before the court a quo, it seems to me that the court a quo assigned reasons for its findings which find support from the record. In that regard, it seems to me that

its finding regarding Henry Mthetwa's evidence is supportable. This is because although that gentleman's evidence went to demonstrate justification for the disciplinary hearing and may very well have exonerated the applicant from the charge that it was involved in witch-hunting by pursuing that course, there is no gainsaying that regarding the first respondent's redundancy in the applicant's firm per se, that piece of evidence (as was found by the court a quo), had little relevance indeed.

Moreover, the reasons assigned by the court a quo made it clear that it relied on pieces of evidence besides its evaluation of the evidence of Mthetwa to find that the applicant tried all it could to terminate the first respondent's employment.

Having perused the record of proceedings, it seems to me that the said finding of the court a quo complained of was not unreasonable at all as it found support from the evidence. This was that the first respondent whose case became a festering sore with the applicant for about two years, was dealt with in a manner that suggested that the applicant wished to rid itself of the first respondent.

The court a quo's finding finds support from a number of matters including that by a new structure under which the establishment was operated, the first respondent's post was abolished leaving him hanging. Thereafter, the first respondent who at this time seemed to have had bad relations with successive superiors with whom he raised a grievance regarding his role in the outfit while he received a salary for no work done, had disciplinary hearings launched against him. The disciplinary hearings were concerned *inter alia* with matters the applicant should have apprised itself of before confirming his appointment after probation, being the veracity of matters contained in his curriculum vitae. Sight must not be lost of the fact that the new Managing Director, tasked upon his assumption of office to deal with the first respondent's case as an

outstanding issue, tackled his assignment after receiving information from Mrs. Nkarnbule

(and also allegedly from the first respondent), that the first respondent considered the post of Managing Director to be rightfully his. There was ample evidence that in face of all these, the applicant's dealings with the first respondent became acrimonious even resulting in the door to his office being locked and the Managing Director threatening to call in the Police against him.

The failure to reach an exit package and the rendering of the first respondent's position redundant without an alternative offer of employment in face of all these matters, was consistent with actions by the applicant aimed at ridding itself of the first respondent. There was thus nothing unreasonable about the court a quo's finding in that regard. Nor was the finding that the first respondent ought to have been consulted before his post was abolished, grossly unreasonable or even simply unreasonable. This was because in the peculiar circumstances of this case, the first respondent had worked under the Managing Director as his Personal Assistant and was supposed to be groomed for that post as per the advertisement for that post. In this enterprise, he was made to report directly to the Managing Director and also attended Board meetings. As the applicant averred per the deponent to its founding affidavit, such was the case, making the post of Personal Assistant to the Managing Director, a temporary one.

In that circumstance when the management teams changed after AMSCO's withdrawal, any change to the structure that meant that the applicant's grooming for that high post was no longer necessary including his attendance at Board meetings, should have been done after consultation with him. Included in that discussion, should have been the new role if any that the restructuring would require him to play. Such would have been the fair practice of the employer instead of leaving the first respondent wondering as to his new role in a new structure which question was never answered.

Learned counsel for the applicant has contended that the court a quo in making such finding did not apply its mind to the issue before because failed to by bear in mind that the applicant went through three successive management teams. But I will say that the fact that the teams changed made it all the more imperative that the first respondent (whose role in the applicant was adversely affected by the changes), be consulted over matters that affected him. The said finding was thus far from unreasonable; it was in fact supportable from the evidence and did not in any way indicate that the court a quo failed to apply its mind to the issues before it as canvassed by the applicant.

I must point out that the complaint that Mrs. Nkambule ought not to have been held to have been an untruthful witness is one regarding the evaluation of evidence, that is findings of fact, as were many of the other complaints including the relevance of Mr. Mthetwa's evidence, the credibility of the first respondent, and whether or not the first respondent continued to carry out the business of the applicant.

Has this court's review jurisdiction been properly invoked in the present application?

This court's jurisdiction to review the judgment of the Industrial court, is grounded on S. 19 (5) of the Industrial Relations Act which provides: *"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".*

Traditionally the review jurisdiction has been exercisable at common law in respect of matters regarding the absence of jurisdiction, illegalities caused by bias and other interest in the cause, gross irregularity in the proceedings, the mis-reception of inadmissible evidence and the wrongful rejection of admissible evidence, see: per Bristowe J in ***African Reaity Trust Ltd v. Johannesburg Municipality 1906 TH 179 at 182*** see also per Innes CJ in

Johannesburg Consolidated Investment Co. v. Johannesburg Town Council 1903 TS111 at 114-116. This is all to say, that the review jurisdiction has been concerned with the questioning of the method of adjudication and not its result, or in other words, the validity of the adjudication process and not the correctness of the decision of the adjudicator, see: *Herbstein and Van Winsen Civil Practice of the Supreme Court of South Africa 4Th Ed, 932.* In ***Takhona Dlamini v. President of the Industrial Court and Anor. Case No. 23/1997*** *the* court set out some common law grounds for review thus: "...those grounds embrace *inter alia* the fact that the decision in question 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 court misconceived its function or took into account irrelevant considerations or ignored relevant ones, or that the decision was so grossly unreasonable as to warrant the inference that the court had failed to apply its mind to the matter...".

There is no gainsaying that an error of fact by the *court a quo,* ought to give rise to an appeal and not a review which as aforesaid, is concerned with the method of adjudication and not its result. In the present instance, the applicant's case is founded on the court's alleged misdirection on the facts or wrongful evaluation of the evidence regarding *inter alia,* whether or not Mrs. Nkambule ought not to have been held to have been an untruthful witness, the relevance of Mr. Mthetwa's evidence, the credibility of the first respondent, and whether or not the first respondent continued to carry out the business of the applicant. Learned counsel for the applicant has urged the court to find that the court a quo's findings were grossly unreasonable because having regard to the evidence led, it ought to have found differently. Clearly the use of the expression "grossly unreasonable" to describe the findings of fact made by the court a quo, was to ground jurisdiction for this court upon a review in the

instant case. It was as if that nomenclature would alone transform an alleged error of fact which should rightly be taken on appeal into a candidate for review.

Yet, even if I had not found support for the findings of the court a quo from the evidence (and I have pointed out that such is not the case here), I daresay that unless the court's findings being the result of such alleged misdirection on the facts were so unreasonable as to amount to a gross irregularity, and furthermore that such irregularity, may result in prejudice to the applicant, such a complaint ought not to be the subject of a review application, see: *Herbstein and Van Winsen's The Civil Practice of the Supreme Court of South Africa 936 E).* I have not found such to be the case here.

The applicant has also alleged that certain findings by the court a quo revealed that it failed to apply its mind to the issue before it. In ***Abel Sibandze v. Stanlib Swaziland (Pty) Ltd and two Ors. Case No. 2915/09,*** I had occasion to discuss the import of the oft-used expression "failed to apply its mind" when it is used to challenge a finding of the court in a review application. In that case, as in this, I adopted the guide provided by the esteemed learned judge Corbett JA in ***Johannesburg Stock Exchange v. Witwatersrand Nigel Limited 1988 (3) SA 132 AD at 152 A-D,*** in stating that such a circumstance must be when the finding of an adjudicator reveals that "...apart from having an ulterior motive for deciding the case in a particular way...(he) must have completely misconceived his powers, failed to appreciate the issues before him, or failed to realize the gravamen of the matter he is called upon to adjudicate, for such a charge to be tenable", see also dictum referred to earlier in *Takhona Dlamini's* case (supra).[1]-The complaint of the applicant in this regard fails to make the mark in the present instance. Indeed, I have found that the findings regarding the unfairness of the process of the redundancy of the first respondent and related matters such as the applicant's lack of consultation

with him before the post he occupied was abolished, were arrived at after due evaluation of the evidence and application of the law.

As the evidence before that court shows, they were not arrived at arbitrarily or capriciously, or were they made mala fide, arrived at as a result of "unwarranted adherence to a fixed principle", or made without reference to or in complete misapprehension of the issue the court had been called upon to determine, *Johannesburg Stock Exchange* (supra).

The application has thus been found to lack merit and cannot succeed.

I must at this point, register my disquiet regarding the spate of cases heard by the Industrial Court coming before the High Court on applications for review. Many of these, founded on complaints about misdirection of fact, have been turned away for lack of proper grounds. It seems to me that this unfortunate situation has arisen because the Legislature's provision for the appeal of the decisions of the Industrial

Court on questions of law, see: *S.19 (1) of the Industrial Relations Act 2000,* necessarily excludes appeals on questions of fact. Yet the same legislation providing for review by the High Court has made same exercisable on common law grounds, S. *19 (5)* (supra). These grounds generally exclude questions of fact (except in certain peculiar circumstances). The result is that the Industrial Tribunal which is a court of limited jurisdiction has been made the supreme judge of fact in labour matters. In our system of law which gives a person aggrieved by the decision of a court, redress on appeal, it is unfortunate that even a wrongful evaluation of evidence by the Industrial Court may go unchallenged and uncorrected for no appeal in respect of it may be made to its appellate body, and the High Court in an application for review, applying common law grounds, is fettered in correcting or setting aside same.

No wonder persons aggrieved by decisions of the court a quo regarding findings of fact are seeking redress by styling same as applications for review, with such regularity. It is my view that the time has come for law reform in this regard.

I have said before now that the instant application lacks merit.

It is accordingly dismissed.

Costs of the application to the first respondent.

MABEL AGYEMANG
HIGH COURT JUDGE