IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civil Case No. 1796/2005

SWAZILAND BOTTLING COMPANY Applicant

And

JOSEPH MHLANGA 1st

Respondent

THE PRESIDING JUDGE OF THE

INDUSTRIAL COURT OF SWAZILAND 2nd Respondent

Coram	S.B. MAPHALALA - J
For the Applicant	MR. M. SIBANDZE
For the Respondent	MR. B. S. DLAMINI

JUDGMENT

12th March 2009

---

[1] The Applicant has filed this application that the order of

the Industrial Court in Case No. 40/2000 granted on the 14th April 2005 be and hereby reviewed, corrected or set aside. In prayer 2 thereof costs of this application to be paid by the party or parties opposing the application.

[2] The application is founded on the affidavit of one Clement Dlamini who is employed by the Applicant as Security Director. In the said affidavit all the material facts surrounding this case are outlined. In paragraph 12 with sub-paragraphs up to 20 the grounds for review are outlined. The essence of these grounds is that the findings were unreasonable and grossly so, to the extent that it can only lead to the conclusion that the 2nd Respondent did not properly apply his mind to the matter.

[3] The Respondents oppose the application and has filed an Answering Affidavit of the 1st Respondent.

[4] In order to fully understand the dispute between the parties it is important to sketch a brief history of how it came about. The 1st Respondent instituted an application in terms of the Industrial Relation Act No. 1 of 1996 under Case No. 40/2000 in terms of which he claimed that his services had been unfairly terminated by the Applicant contrary to the provisions of Section 36 and Section 42 (2) of the Employment Act 1980.

[5] The 1st Respondent sought compensation and the payment of other amounts arising of his employment by the Applicant. The 1st Respondent was dismissed for transgression of specified rules and policies in particular, that as an employee of the Applicant he was not allowed to take part in any promotion or competition that the Applicant would from time to time offer to the public.

[6] It was found by the Applicant that the 1st Respondent was not guilt of fraud as he had been charged with but was guilty of the second charge as aforesaid in that he allowed his family to participate in a competition or promotion ran by the Applicant. The 2nd Respondent found that the termination of the 1st Respondent's services was unfair and unreasonable in all the circumstances and ordered that the Applicant pay to the 1st Respondent compensation for unfair dismissal, notice pay, additional notice and severance pay.

[7] The court *a quo* also ordered that the Applicant pay to the 1st Respondent the costs of the application.

[8] The Applicant has filed this application for review on the grounds stated at paragraph 12 of the Founding affidavit.

[9] The main argument of the Applicant is that the finding by the court *a quo* that the Applicant did not prove that the

1st Respondent allowed his children to participate in the Coca Cola bicycle promotion was unreasonable in all the circumstances. Notwithstanding all the various explanations in this respect (see paragraphs 12.7, 12.8, 12.9 of the Founding Affidavit).

[10] According to the Applicant the entire reasoning of the 2nd Respondent is based upon the 2nd Respondent failure to appreciate the evidence of the witnesses, “RW1” and “RW3”, Clement Dlamini, a Security Director of the Applicant and Sergeant Jabulani Dlamini of the Royal Swaziland Police. Sergeant Jabulani Dlamini gave evidence that he accompanied Clement Dlamini to the home of 1st Respondent and found two boys riding bicycles **with Coca Cola inscriptions.**

[11] When questioned, the boys said they had won the

bicycles that they had bought the winning liner at Mhlaleni. He further gave evidence that they went to the boys' home where they found the 1st Respondent and his wife.

[12] Importantly he says that they asked the 1st Respondent about the bicycles and the told them that **"his two sons won the bicycles after buying winning liners at Mhlaleni"**. PW3 Clement Dlamini gave exactly the same evidence. At page 27 of the record he states that **"when they asked the Applicant about the bicycles the Applicant said the children had won them but not himself".**

[13] The court *a quo* seem to accept this evidence but states at paragraph 2 and 3 of page 30 of the record, **"if anything he may be accused to not taking immediate action to report the matter to the Respondent when he first saw the children with the bicycles".**

[14] The Applicant further advanced submissions in paragraphs 10 to 18 of the Heads of Arguments coming to the final argument that no reasonable court would have drawn such a conclusion and this court is asked to review and set aside the judgment of the 2nd Respondent and substitute it with a judgment to the effect that 1st Respondent was guilty of transgressing the rules and regulations at his work place by allowing his family to participate in a Coca Cola promotion. This was committed by omitting to inform his employer that his children had won Coca Cola bicycles, that such omission was dishonest and that in all the circumstances of the matter it was fair and reasonable to terminate the services of 1st Respondent. Alternatively that the review application is upheld and the judgment of the 2nd Respondent is set aside and the matter is referred to the Industrial Court for re-hearing.

[15] The crux of the Respondent's opposition is that the entire basis of Applicant's application is founded on the factual findings and analysis of evidence by the Industrial Court. Put conversely, the Applicant is complaining about the factual conclusions made by the court *a quo*. All of the grounds for review as stated by the Applicant are based on factual issues. That all of the Applicant's grounds for review are not proper grounds recognizable in law.

[16] To support this argument the court was referred to what was stated by the learned former Chief Justice Sapire in the *University of Swaziland vs The President of the Industrial Court of Swaziland and Another – Civil Case No. 3060/2001 (unreported)* where he stated the position of the law as follows:

> "The provisions of Section 42 (2) (a) and (b) [of the Employment Act, 1980] are cumulative. The employer has to prove both that the reason for termination was permitted by Section 36, and that in all the

> circumstances it was reasonable to terminate the services of the employee.

In the present case the President of the Court was at great pains to consider the circumstances of the dismissal. He concentrated his thoughts on this particular issue. It does not matter therefore what his finding was in regard to the fairness under Section 36, if he found as he did do that in all the circumstances the dismissal was nevertheless unfair.

> It is not for this court on review to consider the correctness of his decision or whether he properly came to that conclusion on the facts before him. The Judge in the court *a quo* certainly put his mind to the question of whether the dismissal was fair or not and had particular reference to the considerations required to him by the provisions of Section 42".

[17] Counsel for the Respondent further cited the cases of *Klipriver Licensing Board vs Ebrahim 1911 AD 458, African Reality Trust vs Johannesburg Municipality 1906 T.H. 179 and that of Union Government vs Union Steel Corporation (SA) Limited 1928 AD 236*.

[18] Having considered the arguments of Counsel and having read the affidavits before me I have come to the view that the Respondent is correct. The entire basis of Applicant's application is founded on the factual findings and analysis of evidence by the Industrial Court. The Applicant is complaining about the factual conclusions made by the court *a quo*. In this regard I find what was said by Sapire CJ (as he then was) in *University of Swaziland vs The President*

of the Industrial Court of Swaziland (supra) apposite where he said:

> "It is not for this court on review to consider the correctness of his decision or whether he properly came to that conclusion on the facts before him. The Judge in the court *a quo* certainly put his mind to the question of whether the dismissal was fair or not and had particular reference to the considerations required to him by the provisions of Section 42".

[19] After assessing all the facts of the present case I find the *dictum* in the above case apposite.

[19] In the result, for the afore-going reason the application for review is dismissed with costs.

S.B. MAPHALALA

PRINCIPAL JUDGE