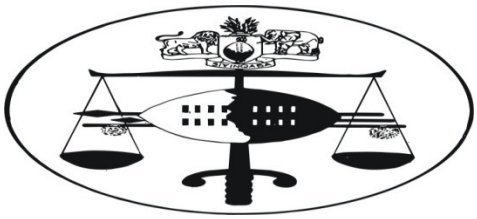


IN THE HIGH COURT OF SWAZILAND

JUDGEMENT

Civil Appeal Case No. 382/2014

In the matter between:

Swaziland Poultry Processors	**1st Applicant**
And	
The Presiding Judge of the Industrial Court	**1st Respondent**
Of Swaziland N.O.	
Swaziland Manufacturing & Allied Workers Union	**2nd Respondent**
Unionisable Employees of the Applicant	**Further Respondents**

Neutral Citation: *Swaziland Poultry Processing, The Presiding Judge of the Industrial Court of Swaziland, Swaziland Manufacturing & Allied Workers Union, Unionisable Employees of the Applicant (382/14)* [2015] SZHC 190 (30 October 2015)

Coram:	MLANGENI J.
Heard:	23 October 2015
Order issued:	Application granted.
Delivered:	30 October 2015
Summary:	***Civil Procedure – review of judgment of Industrial Court – irregularities including assertion by the court that a replying affidavit was not filed when in fact it had been filed – court totally oblivious of the replying affidavit – this causing denial of audi alteram partem to the Applicant.*** ***Counter – application was granted reinstating employees, such order granted without ventilation of the issue in terms of the statutory procedure – this constituting gross irregularity and, on the facts, order could be impossible to comply with.*** ***Application granted with costs and matter remitted to the Industrial Court to be heard by another Judge.***

JUDGMENT

[1] This matter is an application for review of the judgment of His Lordship Mazibuko J. sitting with Assessors, which was handed down on the 6th March 2014 in Industrial Court Case No. 454/2013. The essence of the judgment sought to be reviewed is captured in an order that was endorsed by the Registrar of the Industrial Court on the 10th March 2014, in the following terms:-

> ***"1. The application is dismissed.***
>
> ***2. The counter-application succeeds.***
>
> ***3. The dismissal of the workers (further Respondents) is set aside and they are hereby reinstated.***
>
> ***4. The Applicant is to pay the costs of suit."***

[2] The main ground upon which review is sought is articulated in the founding affidavit of PHILISIWE GAMA – HLATSHWAYO. At paragraph 11 of the affidavit the deponent states:

> ***"It is respectfully submitted that the Honourable Presiding Judge ----- clearly did not apply their minds to the matter before them to the extent that this deprived the Applicant of its right to audi alter am partem ---".***

[3] Central to the attack on the judgment is the factual assertion by the Honourable Judge at paragraph 1 of the judgment that the Applicant ***"has chosen not to file a replying affidavit."*** It is common cause between the parties that the Applicant did, in fact, file an extensive replying affidavit in the order of seventeen pages. The Honourable Court was therefore factually incorrect in observing that the Applicant had not filed a reply. The effects of this unfortunate error are, in my view, far reaching. They boil down to the disconcerting reality that the entire contents of the replying affidavit were never taken into consideration. The replying affidavit raised, among many other things, several points of law that include an allegation of unclean hands on the part of the further Respondents.

[4] Together with their opposing papers the Respondents had filed a counter-application for an order setting aside their dismissal from work. One issue that arises is whether it is procedurally proper to set aside a dismissal without the statutory procedure for the ventilation of the dispute. I will touch upon this point later in the judgment.

[5] When the matter came up for legal arguments my prima facie view of it was that, with respect, some things had gone very wrong in the hearing at the Industrial Court. I was of the view that the procedural flaws that I perceived could not possibly be justified.

BRIEF BACKGROUND

[6] On the 26th September 2013 the Applicant launched an urgent application under Industrial Court Case No. 454/13 seeking, in the main, an order declaring that its employees, in refusing to work overtime, were in breach of the contract of employment.

[7] The Applicant was granted interim relief and the matter was postponed, to enable the filing of further pleadings. Further pleadings were indeed filed, starting with a supplementary affidavit by Applicant which was filed on the 2nd October, 2013. A *"preliminary answering affidavit"* was filed on the 3rd October 2013, deposed to by one Zweli Sihlongonyane. I am not certain what is meant by a preliminary affidavit. I would assume this to suggest that a subsequent affidavit would be filed in due course.

[8] In the intervening period the Respondents were dismissed from work after failing to comply with an ultimatum to work overtime. They then filed a counter-application in which they sought to have their dismissal set aside and that they be reinstated.

[9] In its reply the Applicant dealt with the issues that were raised by the Respondents in their answer. Over and above insisting upon the remedy that it sought, it also vigorously opposed the counter-application. In its opposition it raised a number of points of law which include unclean hands, existence of disputes of fact, etc. This is the affidavit that the Court became completely oblivious of. At the conclusion of the replying affidavit the deponent, one PHILISIWE HLATSHWAYO – GAMA prays that *"RESPONDENTS COUNTER APPLICATION BE DISMISSED"*.

[10] The matter was finally heard by His Lordship Mazibuko J. on the 30th October 2013. Judgment was handed down on the 6th March 2014, about four months later. Crucial in this judgment is the erroneous notion that a replying affidavit had not been filed by the Applicant. The counter – application was therefore granted on the basis that it was not opposed. This unfortunate situation gives an idea of the potential damage that can be done by the time lag between the hearing of a matter and the writing of judgment.

LEGAL ISSUES

[11] Several legal issues arise from the manner in which the Industrial Court dealt with the matter.

AUDI ALTERAM PARTEM

[12] This rule of thumb states that each party to a dispute must be given a fair hearing. It is now enshrined in our constitution, per Section 21. To look for legal authority for this salutary rule would be trying too hard. In the context of pleadings it requires that each litigant be allowed an opportunity to file all the papers that it is in law allowed in order to put forward its case or defence, as the case may be. The process of exchanging pleadings is so important that, in civil pleadings one can, by leave of court, file a further affidavit, the purpose being to ensure full ventilation of the issues that are of relevance to the matter.

[13] On the facts before me, it is clear that the Applicant was denied a hearing in at least two important respects.

(i) Applicant's response to the Respondents' grounds of opposition to its case;

(ii) Applicant's response and defence to the Respondents' counter application.

This, in my view, is a gross irregularity that justifies the setting aside of the judgment. It is also my view that the matter could well end here.

The unavoidable conclusion is that the Honourable Court did not apply its mind to all the issues that were before it. In the process it completely missed important points of law that were raised by the Applicant. Some of the points of law have the potential to have determined the direction and future conduct of the matter. If, for instance, it was to be found as a fact that the Respondents had acted in contempt of the order of the 30th September 2013 in terms of which they were directed to comply with clauses 1.2 and 3 of the Collective Agreement, they may have been directed to purge their contempt in one way or the other before being allowed a further hearing on the matter. Again assuming that the point about disputes of fact was to be up-held, the matter may have gone for oral evidence or whatever the court would have considered proper in the circumstances.

SETTING ASIDE A DISMISSAL OUTSIDE THE STATUTORY PROCEDURE

[15] To set aside a decision that has led to the dismissal of an employee there must be a finding that the dismissal is unfair, substantively, or otherwise. The statutory process for that purpose it in the Industrial Relations Act 2000 as amended. It appears to me that this procedure can neither be circumvented nor abridged. The matter must be reported as a dispute, dealt with by the appropriate structures before it gets to the Industrial Court as an unresolved dispute.

[16] The workers that were dismissed from work are substantial in number, described in the Applicant's heads of argument as ***"virtually the Applicant's entire workforce".*** By order of the Honourable Court these workers were to be reinstated. But how pragmatic is such an order, coming as it did several months after the workers were dismissed? In the normal course of events these workers would have been long replaced, and how practical is it to direct that they be reinstated, period? It is possible that such an order might, in the circumstances of this case be impossible to comply with. Courts do not issue orders that are incapable of enforcement.

SEE: MANSEL V MANSEL, 1953 (3) SA 716 at 720

It is likely that the Honourable Court a quo did not apply its mind to this very important aspect of the matter.

[17] In defence of the judgment sought to be impugned, the Respondents argue that the alleged irregularities are of no consequence because the *ratio decidendi* of the court's decision has nothing to do with the issues raised by the Applicant. The argument postulates that even if the flaws complained of had not occurred, the judgment of the court would be the same.

[18] Mr. Mzizi for the Respondents offered no legal authority for this argument. In the absence of clear authority on point, for me the argument is untenable. If we follow the argument to its logical conclusion, we have to accept a regime that says that irregularities, no matter how gross, are of no consequence unless they go against the *ratio decidendi* of the decision. It ushers in an ex – post facto determination – i.e. you need to know the ratio in order to determine whether the decision is reviewable or not. This kind of reasoning can only serve to complicate an otherwise very clear and well-established aspect of the law, that decisions are reviewable at common law if there are procedural irregularies in one form or the other. Per Rooney J. in the case of ROYAL SWAZI NATIONAL AIRWAYS CORPORATION NATFOMO, 1987-1995 (3) SLR 207 at page 211, quoting Innes C.J., had this to say:-

> ***"---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---"***

[19] On the issue of reinstatement of the Respondents, they argue that it was based on the fact that the ultimatum that led to the dismissals was misleading. This refers to the paraphrased court order of the 27th September 2013. But assuming that the essence of the court order was lost in the paraphrasing, does that change the fact that the appropriate process for arriving at this conclusion is not motion proceedings? Does it change the fact that there is a statutory process that deals with such matters? I think that it does not.

[20] The Honourable Court came to the conclusion that the employer deliberately distorted the court order of the 27th September 2013 in order to intimidate the employees to work overtime. The Applicant strongly disagrees with this and raises it as a further ground of review. In view of the conclusion that I have arrived at above, there is no need to interrogate this aspect of the matter. Suffice to say that the most prudent thing for the Applicant to do was to issue a court order strictly on the terms, and not to interpret or paraphrase it. It was the responsibility of the Respondents to have the order interpreted for their benefit, if they so wished.

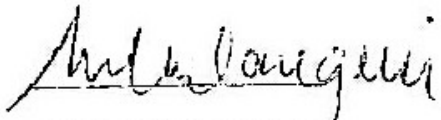
[21] I now deal with the issue of costs. Advocate P. Kennedy for the Applicant urged me to award cost to the Applicant, including certified costs of counsel. His response to a question that I raised was that the matter is of sufficient importance to justify the engagement of counsel. Important it may be, but is it so complex as to justify the expense of Senior Counsel? I do not think so. I do, however, think that the Respondents sought to defend the indefensible and cannot avoid an order for costs against them. Taking into account the stark imbalance between employer and employee, I decline to award the costs of counsel.

[22] On the basis of the forgoing, I make the following orders:-

22.1 The application is granted.

22.2 The matter is remitted back to the Industrial Court, to be heard *de novo* by another Judge.

22.3 Costs to follow the event.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

FOR APPLICANT: **Adv. P Kennedy instructed by Musa Sibandze**

FOR RESPONDENT: **Lloyd Mzizi**