



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 74/17

In the matter between:

SIMEON SIMELANE

APPLICANT

and

**PRESIDING JUDGE OF THE INDUSTRIAL COURT
SIYEMBILI MOTORS SWAZILAND (PTY) LTD
t/a LEITES MOTORS**

1ST RESPONDENT

2ND RESPONDENT

Neutral Citation : **Simeon Simelane vs Presiding Judge of the Industrial Court and Another (74/17) [2018] SZHC 136 (03 JULY 2018)**

Coram : **MABUZA – PJ**

Heard : **22 FEBRUARY 2018**

Delivered : **10 JULY 2018**

SUMMARY

***Labour Law: Application for review of judgment of Industrial Court –
Application fails – Judgment confirmed – Each party to
pay its own costs.***

JUDGMENT

MABUZA -PJ

- [1] The Applicants seeks an order in the following terms that:
- (a) **The judgment of the 1st Respondent sitting with nominated members delivered on the 9th day of December 2016 under Industrial Court case No. 75/2013 is hereby reviewed and/or set aside;**
 - (b) **The 2nd Respondent is ordered to pay the costs of this application;**
 - (c) **The applicant is granted further or alternative relief.**
- [2] The application is opposed by the 2nd Respondent.
- [3] The 1st Respondent is, The Presiding Judge of the Industrial Court, cited herein in his official capacity as the Judge of the Industrial Court.
- [4] The 2nd Respondent is, Siyembili Motors Swaziland (Pty) Ltd, a limited liability company duly incorporated in terms of the company laws of Swaziland carrying on business at Mbabane, trading as Leites Motors.

- [5] This is an application in terms of section 19 (5) of the Industrial Relations Act, 2000 (“the Act”) as read with section 152 of the Constitution of the Kingdom of Swaziland, 2005 to review and set aside the judgment of the Industrial Court in case No. 75/2013 delivered on the 9th December 2016.
- [6] The Applicant was employed by the 2nd Respondent as a motor mechanic on the 1st May 1992 until his services were terminated on the 10th May 2012.
- [7] He was suspended on the 28th February 2012 and was subsequently charged by the second Respondent for two offences as follows:

“Charge 1

You are charged with the offence of gross insubordination (insolence).

In that on or about the 27th February 2012, and on various dates, you have unlawfully and intentionally disrespected, threatened or ill-treated and/or refused to obey lawful instructions from your superiors Mr. Dave de Villiers and Mr. Louw by:

(a) Impudently and rudely talking to Mr. de Villiers and ordering him to get out of your workshop;

(b) Deliberately refusing to heed to his instruction to report to his office on the 28th February 2012.

Charge 2

Deliberately refusing to heed the instructions of one of the directors, Mr. Louw, to report to his office on the 28th February 2012.

Hence contravening section 36 (b) of the Employment Act of 1980 thus committing the offence of insolence”.

[8] He was subjected to a disciplinary hearing where he pleaded not guilty to the charges preferred against him. Evidence under oath was led against him by Mr. Dave de Villiers, Mr. Samuel “Magwaza” Dlamini and Mr. Louw. The Applicant also presented his evidence under oath.

[9] He was found guilty of refusing to report to Mr. de Villiers’ office and for refusing to report to Mr. Louw on the 28th February 2012. He was subsequently dismissed. He appealed and was unsuccessful.

[10] The Applicant did not accept the dismissal and he reported the matter to the Conciliation Mediation and Arbitration Commission (CMAC) as a dispute. The dispute could not be resolved and CMAC issued certificate of unresolved dispute. Whereupon the Applicant filed an application for the determination of unresolved dispute of unfair dismissal in the Industrial Court.

[11] The Applicant was employed by the Respondent on 1st May 1992 as an Assistant Mechanic. He remained in continuous employment until he was dismissed by the Respondent on 10th May 2012. At the time of the dismissal the Applicant was holding the post of Mechanic. He was earning a salary of E3,500.00 per month. Up until then, he had a clean disciplinary record.

[12] The Industrial Court heard oral evidence and legal arguments and issued judgment partly in favour of the Applicant and partly in favour of the 2nd Respondent.

[13] The Industrial Court found the Applicant not guilty on the first charge (which related to an incident on 27th February 2012), but guilty in respect of the second charge, of misconduct towards his senior managers on the following day (28 February 2012). The Court held that the Applicant's dismissal was substantially fair. However, the Court found that the dismissal was procedurally unfair, and granted the Applicant compensation for seven months, together with a costs order.

[14] It is the finding that the Applicant is guilty of the second charge which forms the subject of this review application.

[15] It is the contention of the Applicant that the judgment of the 1st Respondent was arrived at arbitrarily or capriciously or mala fide, or as a result of adherence to a fixed principle, or in order to achieve an ulterior motive, 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 failed to apply its mind to the matter at hand and that the Court committed an error of law.

[16] The application for review is firstly based on section 19 (5) of the Industrial Relations Act, 2000 which reads as follows:

“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”.

[17] The application is secondly based on the provisions of section 152 of the Constitution which reads:

“The High Court shall have and exercise review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority, and may, in exercise of that jurisdiction, issue orders and

directions for the purpose of enforcing or securing the enforcements of its review or supervisory powers”

[18] From the judgment of the Industrial Court it would appear that the Applicant’s

statement of claim was as follows:

4.1 His dismissal was substantively unfair and was not permitted by section

36 as read with section 42 (2) (b) of the Employment Act.

4.2 His dismissal was substantively unfair because he was dismissed for allegedly refusing to go to a Manager’s office yet he did not refuse but requested to go there with a witness as the Manager had verbally abused him on the previous day.

4.3 His dismissal was substantively unfair because he did not refuse to attend when called by another Manager of the Respondent, he only delayed by few minutes as he was waiting for an independent witness.

4.4 His dismissal was procedurally unfair because he was denied legal representation on appeal yet this was allowed during disciplinary hearing.

4.6 His dismissal was procedurally unfair because the sanction was very harsh as the Applicant had a clean disciplinary record at the time of the commission of the offence.

4.7 The Applicant had been in the service of the Respondent for over twenty years.

[19] The reply from the Respondent was as follows:

5.1 The dismissal of the Applicant was substantively and procedurally fair and in accordance with the provisions of section 36 and section 42 (2) (b) of the Employment Act.

5.2 The Applicant was dismissed for committing the offence of gross insubordination by refusing to take or heed instructions of two Senior Managers of the Respondent and further making derogatory and/or unpleasant gestures to the Managers.

[20] The evidence is summarized in the judgment. There is no objection or complaint before me that the evidence as summarized by the learned Judge in that Court is incorrect or imprecise. Consequently I set it out hereunder.

[21] The evidence led before the Court revealed that a certain customer brought a motor vehicle to the Respondent's place for service. The Applicant was not present at that time as he was on leave. The motor vehicle was diagnosed by the Workshop Foreman, Samuel Dlamini together with the electricians. The Foreman and electricians did not carry out the compression test. The Applicant returned from leave and he attended to the motor vehicle in terms of what was specified on the job card. In terms of the job card, he was supposed to fit certain parts on the motor vehicle. He did so and the motor vehicle was given back to the customer. The motor vehicle however,

continued to show signs of engine problems as it was backfiring which meant that the real problem had not be attended to.

[22] The customer brought back the motor vehicle and registered her complaint with the Service Manager, Mr. David de Villiers. The Applicant enquired from the Foreman if they did carry out the compression test and he admitted that they did not do that.

[23] The Applicant and the Foreman then conducted the compression test and it was found that only two cylinders were functioning. The Applicant told the Foreman to go and report to Mr. de Villiers so that he could tell the customer that the engine needed to be overhauled. Mr. de Villiers came to the Applicant and scolded him and accused him of not knowing what he was doing and that he should have discovered the problem when the motor vehicle first arrived at the workshop. Mr. de Villiers said the Applicant told him to get out of the workshop. The Applicant denied that he did that. The Applicant said he suspected that the Foreman did not tell Mr. de Villier the truth about the whole story about what led the motor vehicle to be brought back to the workshop.

[24] The incident occurred on 27th February 2012. On the following day Mr. de Villiers sent the Foreman to go and call the Applicant. The Applicant did not go to Mr. de Villiers's office. He told the Foreman that owing to what happened on the previous day, he would need to go there with a witness.

[25] Mr. de Villiers then went to report the matter of the Applicant's refusal to the General Manager, Mr. Wynand Louw, who came to call the Applicant to come to his office. The Applicant did not immediately heed the instruction but said he wanted to go there with a witness. Mr. Louw told the Applicant that if he did not want to come to his office he would call the police to remove him from the Respondent's premises. Mr. Louw went back to his office. After about fifteen minutes the Foreman was sent to go and call the Applicant and to come with his witness. The Applicant eventually went to the office with his witness by the name of Augusto Romalo. Mr. de Villiers also joined the meeting at the General Manager's office. The Applicant was served with a suspension and warning letters.

[26] The Applicant was served with a notice to attend a disciplinary enquiry. He was facing two charges. He was found guilty and dismissed. He appealed and the appeal was dismissed.

[27] The charges against the Applicant are set out in paragraph (7) supra.

[28] The learned Judge after analyzing the evidence found the Applicant not guilty on the first charge which related to the incident of the 27th February 2012.

[29] The learned Judge thereafter analysed the evidence in respect of the second charge.

[30] The incident relating to the second charge occurred on the 28th February 2012.

On that day Mr. de Villiers sent the Foreman to go and call the Applicant. He did not go and instead told the Foreman that owing to what had happened on the previous day, he would need to go there with a witness.

[31] Mr. de Villiers then went to report the matter of the Applicant's refusal to Mr. Louw who went himself to call the Applicant to come to his office).

[32] The Applicant did not immediately heed the instruction but he said that he wanted to go there with a witness. Mr. Louw returned to his office alone.

[33] After about fifteen minutes the Foreman was sent to go and call the Applicant to come with his witness.

[34] The Applicant eventually went to the office with his witness, Augusto Romalo. Mr. de Villiers also joined them.

[35] I agree with the observation of the learned Judge that as there was no altercation between the Applicant and Mr. Louw, why did the Applicant fail to respond to the instruction of Mr. Louw immediately?

[36] I further agree with the learned Judge that the Applicant was not justified in not complying with Mr. Louw's instruction immediately and insisting on having to come with a witness.

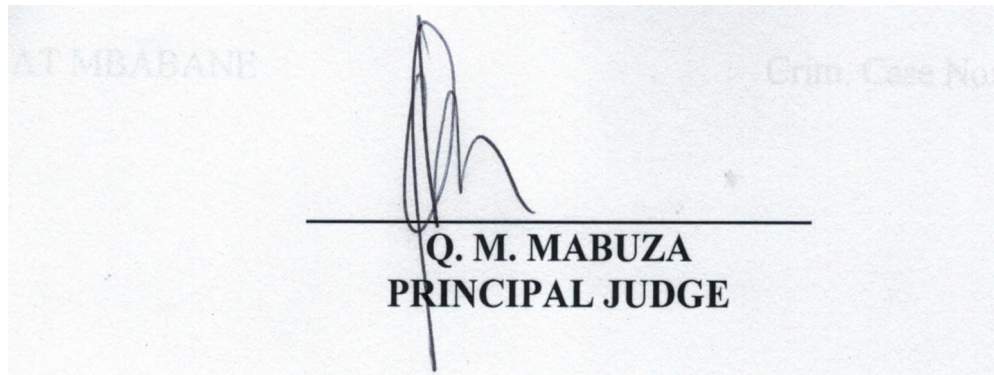
[37] It is clear that the Applicant wanted to comply with the instruction on his own terms.

[38] I further agree with the learned Judge that, that Court including this Court cannot condone the Applicants behavior towards Mr. Louw. And that this type of behavior would result in chaos at the work place if respect and obedience were not enforced as these tenets form the cornerstone of the employer/employee relationship.

[39] I agree with the learned Judge that in view of the circumstances outlined above the dismissal of the Applicant was substantively fair.

[40] The application for review was not frivolous. Furthermore the financial scales are tilted in favour of the Respondent; as a result in my order for costs I shall not follow the principle that the costs follow the event.

[41] Consequently the judgment and award of the Industrial Court are hereby confirmed and the application for review in respect of the second charge is hereby refused and dismissed. Each party to pay its own costs.



For the Applicant : Mr. D. Jele

For the Respondents : Mr. K. Simelane