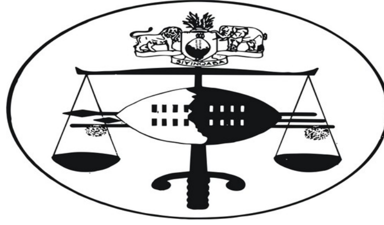

<u>IN THE INDUSTRIAL COURT OF SWAZILAND</u>

JUDGMENT

Case No.1/2011

In the matter between:

MDUDUZI ZWANE **Applicant**

and

SWAZILAND POST AND TELECOMMUNICATIONS CORPORATION **1st Respondent**

MPHILISI MNTSHALI N.O. **2nd Respondent**

MBUSO SIMELANE N.O. **3rd Respondent**

Neutral citation: *Mduduzi Zwane & Swaziland Post and Telecommunications Corporation & Others (1/11 [2012]* SZIC 6 (**MARCH 2012)**

Coram: NKONYANE J,
(Sitting with G. Ndzinisa & S. Mvubu Nominated Members of the Court)

Heard: **09 MARCH 2012**

Delivered: **30 MARCH 2012**

Summary:

Applicant, a private sector employee, dismissed by the employer after a disciplinary hearing—Applicant challenging the decision of the employer to dismiss him and seeking an order for re-instatement by launching application proceedings in terms of Rule 14 of the Industrial Court's Rules to review the disciplinary hearing and also the employer's decision.

Jurisdiction—The Industrial Court has exclusive jurisdiction in all labour related disputes in the country with the exclusion of the armed forces. Once the employer has taken the decision to dismiss the employee, the Industrial Court may not simply set aside the dismissal on the basis of a review of the disciplinary hearing. The Industrial Court does not sit as a Court of appeal or review on the decisions of employers, it must make its own enquiry on the evidence before it whether the dismissal was fair or not fair, and also whether it is reasonably possible to order re-instatement of the dismissed employee.

Motion/application proceedings—not competent where a material dispute of fact could reasonably be foreseen—Application dismissed and Applicant directed to approach the Court in terms of Rule 7 if he still wants to pursue the matter.

JUDGMENT
30.03.12

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[1] This is an application brought by the Applicant against the Respondents for an order in the following terms;

> "1. That the decision and proceedings of the 1st Respondent terminating Applicant's employment services with the former be and is hereby reviewed, corrected and/or set aside as being invalid.
>
> 2. That an order be and is hereby issued reinstating the Applicant to the same position he held prior to his dismissal.
>
> 3. That an order be and is hereby issued directing the 1st Respondent to pay to the Applicant all arrear salary and benefits from the date of dismissal to the date of conclusion of this matter.

4. Costs of application.

5. Further and/or alternative relief."

[2] The application is opposed by the Respondents on whose behalf an Answering Affidavit was filed deposed thereto by Lucky Sukati who stated therein that he is employed by the 1st Respondent as the Human Resources Executive. The Applicant thereafter duly filed his Replying Affidavit.

[3] The matter was argued before the Court on 09.03.12 after both Counsels had filed their heads of argument. The Court is grateful to both Counsels for the helpful heads of argument.

[4] The facts of the matter are largely common cause. The only dispute between the parties is whether or not the Applicant was fairly dismissed in the circumstances of the case.

[5] The facts revealed that the Applicant was employed by the 1st Respondent on 13th May 2002. He occupied the position of Technician II. He was in the continuous employment of the 1st Respondent until 21st December 2009 when he was dismissed after he was found guilty on two charges of gross misconduct. He appealed against the decision of the 2nd Respondent, the appeal was dismissed by the 3rd Respondent.

[6] During the disciplinary hearing the Applicant at some point applied for a postponement because the date set for the hearing was not suitable to his attorney. The application for postponement was dismissed by the 2nd

Respondent. The Applicant did not however seek the court's intervention at that point. The disciplinary hearing proceeded to finality and the Applicant was found guilty as charged on the two counts of gross misconduct. The Applicant filed an appeal to the 3rd Respondent. The appeal was dismissed. He was thereafter dismissed by the employer, the 1st Respondent.

[7] The Applicant has now approached the Court by way of motion proceedings and is entreating the Court to review, correct and/or set aside the disciplinary hearing proceedings and also the decision of the employer, 1st Respondent dismissing him from the employment.

[8] The 1st Respondent has raised two preliminary objections, namely, that;

a) The Court does not have jurisdiction to review disciplinary hearing process that has been finalized and a sanction of dismissal having taken on notice of application under **Rule 14 of the Industrial Court's Rules.**

b) The court has no power to grant a reinstatement order in the absence of an enquiry.

[9] The court will deal with the first objection as follows: It was not in dispute that this is a matter that emanates from an employer/employee relationship. The Industrial Court as established by the **Industrial Relations Act No.1 of 2000** has exclusive jurisdiction in all labour related disputes in the country with the exception only of the armed forces. In the Supreme Court of Appeal case of **Swaziland Breweries Limited (1st Respondent) & Sicelo Mabuza (2nd Respondent) v. Constantine Ginindza, Case No. 33/06 (SCA), Ramodibedi**

JA after having analysed the history of the Industrial Relations Act in Swaziland stated as follows on page 8:

> **"It is important to recognize that the purpose of the Legislature in establishing the Industrial Court was clearly to create a specialist tribunal which enjoys expertise in Industrial matters."**

[11] I concur with these observations which were also the *ratio decidendi* of the Supreme Court of Appeal decision.

[12] The law is therefore now settled that the Industrial Court is the port of first call for all labour disputes in the country. (See: Section 8(1) of the Industrial Relations Act No. 1 of 2000).

[13] The corollary question is whether the Applicant has properly approached the Court by instituting application proceedings under **Rule 14 of the Industrial Court Rules** taking into account that the Applicant has already been dismissed by the employer. The position of the law is that the Industrial Court does not sit as a court of appeal or review on the decisions of employers. After the employee is dismissed, the Industrial Court must make its own enquiry on the evidence presented before it as to whether the dismissal was fair or not, and thereafter, if it finds that the dismissal was unfair, to decide whether the proper remedy is re-instatement, re-engagement or compensation. The enquiry by the Industrial Court also involves investigation into any alleged procedural irregularities

during the disciplinary hearing. (See: **The Central Bank of Swaziland v Memory Matiwane, case No. 11/1993**).

[14] **Rule 14** of this Court's Rules makes provision for a party to institute motion proceedings before this Court. **Sub-Rule (1)** provides that;

> **"Where a material dispute of fact is not reasonably foreseen a party may institute an application by way of Notice of Motion supported by Affidavit"**

[15] The operative phrase in this Sub-rule is **"where a material dispute of fact is not reasonably foreseen"** The rules of the Court must be adhered to by litigants. If they are not adhered to they might lose themselves in a field of judicial discretion where no secure foothold is to be found by litigants. Legal proceedings could end in a dismal swamp filled with quaking quagmires.

[16] The applicant's Counsel argued that they were entitled to bring the application under **Rule 14** and that it was not the 1st Respondent's case that there were material disputes of fact.

[17] This argument was clearly misconceived. Not only were the disputes of fact shown in the Answering Affidavit, but they were also addressed by the 1st Respondent in the heads of argument. For example, the Applicant stated as follows in paragraph 8.3 of the Founding Affidavit;

> **"I respectfully submit that on the evidence led before the disciplinary hearing the 2nd and 3rd Respondents ought to have returned a verdict of not guilty on all the charges. This is so because firstly I was not afforded a fair hearing in the initial**

process and also because on the merits, there was no evidence to justify the verdict reached by the second and third Respondents."

[18] To this, the 1st Respondent answered as follows under its paragraph 9:-

> **"Once again, there are no primary facts to substantiate this conclusion. The fact of the matter is that the Applicant went through both a disciplinary and appeal process, and there is no basis for suggesting that he did not have a fair hearing, neither is there a basis for suggesting that there was no evidence place before either tribunal. I submit that there was evidence placed before the tribunals upon which a finding of guilt could be made."**

[19] Again paragraphs 8.4, 9.1. 9.2, 9.3, 9.4, 9.5, 9.6, 9.7, 9.8, 9.9, 9.10, 9.10.1, 9.10.2, 9.10.3, 9.10.4, 9.10.5, 9.10.6, 10 and 11 are disputed by the 1st Respondent

[20] I have no doubt in my mind on reading the pleadings as a whole that there are a litany of disputes of fact in this application, and that such disputes of fact are material.

[201] In dealing with a similar matter on appeal in the case of **Lynette Felicity Groening v. Standard Bank of Swaziland Ltd & Tineyi Mawocha, case No.02/11 (ICA), Masuku AJA** held as follows in paragraph 22;

> **"It would appear to me that the Industrial Court Rules permit the launching of matters on motion proceedings provided that no dispute of fact is reasonably foreseen. In this regard, the Applicant must fully consider the matter on the information available; its merits and demerits and cast his eyes ahead on the probabilities whether a dispute is likely, given all the facts at hand, to arise."**

[22] I align myself fully with these observations by the Industrial Court of Appeal.

[23] In the present case, after the Applicant was dismissed by the 1st Respondent, he reported a dispute with the Conciliation, Mediation and Arbitration Commission ("CMAC"). The dispute was not resolved and a certificate of unresolved dispute was issued by the Commission. It is Annexure "LM4" of the Applicant's Founding Affidavit. Paragraph 3 of the certificate states that the dispute between the parties could not be resolved due to the following reasons;

> **"3.1 The Applicant's position is that he was unfairly dismissed by the Respondent for carrying out a union mandate.**
>
> **3.2 The Respondent's position is that the dismissal was fair and was as a result of invoking discipline.**
>
> **3.3 The dispute remains unresolved."**

[24] There is therefore no doubt that there is a dispute between the parties whether the dismissal of the Applicant was fair or not. The existence of the certificate of unresolved dispute is also *prima facie* proof of the dispute between the parties which would require oral evidence to resolve.

[25] It is not in dispute that the Applicant has since been dismissed by the 1st Respondent following the outcome of the disciplinary hearing. In this regard the observations of **DUNSEITH P,** in the case of **Gcina Dlamini v. NERCHA & Sikhumbuzo Simelane, case No. 633/08 (IC)** are instructive. He held in paragraph 13 in a case whose facts were similar to the present case as follows;

> **"Once the employer has exercised its prerogative to terminate the services of an employee, the contract of employment comes to an end.**

> **The Industrial Court has the power and jurisdiction thereafter to award compensation for unfair dismissal, whether the farness is substantive or procedural, or to restore the employment contract by making an order for re-instatement or re-engagement. The court must however take into consideration all the circumstances of the dismissal, <u>and may not simply set aside the dismissal on the basis of a review of the disciplinary hearing."</u>** (My underlining)

[26] In paragraph 14 **DUNSEITH P** went on to point out that;

> **"A private sector employee who wishes to seek redress for his/her dismissal must ordinarily comply with the dispute reporting procedures prescribed by Part VIII of the Industrial Relations Act …"**

[27] The use of the word "ordinarily" by the court in this case clearly shows that there may be exceptional circumstances where the private sector employee could seek redress before Industrial Court without first following the dispute reporting procedures prescribed by **Part VIII of the Industrial Relations Act.** An example of this is where an aggrieved employee or former employee;

- **I. Institutes application proceedings solely for the determination of a question of law. See: Rule 14(6)(b)**
- **II. Institutes application proceedings and there is no material dispute of fact reasonably foreseeable.**
- **III. Institutes an urgent application under Rule 15.**

[28] In the present case the Applicant has followed the dispute reporting procedures prescribed by Part V111 of the Industrial Relations Act. The application is however fraught with material disputes of fact which render the matter not amenable to be resolved on Notice of Motion and the Applicant should be directed to approach the Industrial Court in terms of **Rule 7.**

[29] The Applicant's counsel also relied on the decision of the Court of Appeal in the case of **Concillor Mandla Dlamini & Manzini City Council v Musa Nxumalo case No.10/2002, (CA)** for his argument that this court does have the power to review the decisions of employers. That case is however distinguishable from the present one because it involved the review of a decision of a public body. The law is now trite that the Industrial Court does have jurisdiction to review public bodies acting *qua* employers. (See: **Melody Dlamini v The Secretary, Teaching Service Commission & Others, case No. 121/2008 (IC).** It was not the case of the Applicant before the court that the 1st Respondent is a public body.

[30] The Applicant's counsel also relied on the provisions of Section 8(3) of the Industrial Relations Act. That section provides that the Industrial Court shall have <u>all the powers</u> of the High Court in the discharge of its functions under the Act. There is no doubt that this Court has the power to review the decisions of employers. This Court does that almost everyday in applications brought before it for the determination of unresolved disputes following the dismissal of an employee. If the Court finds that the dismissal was unfair either substantively or procedurally, the Court has the power to order re-instatement of the dismissed employee, effectively reviewing and setting aside the earlier decision of the employer dismissing the employee. Procedurally, it means that the Court also makes an enquiry into any alleged procedural irregularity or unfairness during the internal disciplinary hearing. That is how the Industrial Court ordinarily reviews the decisions of employers in the private sector. It has not been shown in the present case that there exist special circumstances warranting the Court to depart from this procedure. I am unable to read Section

8(3) to mean that in the discharge of its functions the Industrial Court must adopt all the procedures of the High Court.

[31] I now proceed to deal with the second preliminary objection. The 1st Respondent argued that the Court has no power to grant an order for re-instatement in the absence of an enquiry first being gone into by the Court to enable it to assess whether or not it is advisable to order the re-instatement of the Applicant to his former position. The Applicant was terminated in December 2009, two years ago. The court must therefore enquire whether the position that the Applicant was holding is still vacant. The Court must also enquire whether or not continued employment relationship would be tolerable.

[32] The Industrial Court has discretion whether to order re-instatement, re-engagement or payment of compensation to the dismissed former employee. (See: **Section 16 of the Industrial Relations Act No.1 of 2000).**

[33] The court must therefore hear oral evidence on the question of whether or not it is still reasonably practicable for the employer to reinstate or re-engage the Applicant. The objection by the 1st Respondent must therefore be upheld.

[34] The present proceedings are therefore inappropriate and the Applicant could have reasonably foreseen that the issues involved were likely to raise disputes of fact which would require to be resolved by oral evidence.

[35] For the Industrial Court to arrive at a decision as to whether the 1st Respondent's conduct or decision of dismissing the Applicant was fair or not fair and therefore unlawful, it must make its own independent enquiry.(See: **Central Bank of Swaziland v. Memory Matiwane, case No. 11/1993 (ICA).**

[36] Taking into account all the aforegoing observations and also all the circumstances of this case the Court will make the following order.

a) The application is dismissed with no order as to costs.

b) The Applicant is directed to bring an application in terms of Rule 7 if he is still interested in pursuing the matter.

[37] The members agree.

NKONYANE J

For Applicant : **Mr. B. S. Dlamini**
(B. S. Dlamini & Associates)

For Respondents : **Mr. N. D. Jele**
(Robinson Bertram)