IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE Case No 115/2020

In the matter between:

BONGANI SIMELANE Applicant

And

SWAZI OBSERVER (PTY) LTD Respondent

Neutral citation: Bongani Simelane v The Swazi Observer (Pty) Ltd [115/20) [2022] SZIC 53 (09 May, 2022)

Coram: **NGCAMPHALALA AJ**
(Sitting with Mr. D.P.M.Mmango and Ms. Dlamini, Nominated Members of the Court)

DATE DELIVERED: 09th May, 2022

*SUMMARY: **Application brought reviewing termination of contract- further seeking re instatement- provisions of Rule 14 of the Industrial Court Rules- point in limine raised- material dispute of facts – competency of Court to grant re instatement without enquiry.***

*Held – **Matter remitted to oral evidence to deal with the dispute of facts.***

JUDGMENT

[1] The Applicant is Bongani Simelane an adult LiSwati male of Mbabane Township, Mbabane, District of Hhohho.

[2] The Respondent is The Swazi Observer (Pty) Ltd, a company duly registered and incorporated as such in accordance with the laws of Eswatini, based at Betfusile Street, Mbabane, District of Hhohho.

[3] **BRIEF BACKGROUND**

The present proceedings seek to review, correct and or set aside the decision of the Respondent to terminate the Applicants employment of on the grounds of dishonesty. Failing which the Respondent be directed to reinstate the Applicant to his position from the 29th October, 2018, or alternatively be ordered to pay the Applicant the sum of E260,712.00 (two hundred and sixty, seven hundred and twelve Emalangeni) that he would have earned during the remainder of his fixed term contract of employment with the Respondent. Further the Respondent be called upon to furnish the Registrar of the Industrial Court, with the record of disciplinary hearing (if any) within 14 days of being served with the application. It is on this basis that the Applicant has approached the Court seeking an Order in the following terms:

3.1 That an order be and is hereby issued reviewing, correcting an/or setting aside the Respondent's decision of terminating the

Applicant's services in a letter contained in a letter dated 29th October, 2018, attached hereto and marked as "BS 1";

3.2 That an order be and is hereby issued directing the Respondent to reinstate the Applicant to his position from the 29th October, 2018, alternatively;

3.3 Directing the Respondent to pay the um of E260, 712.00 being a sum of money equivalent to what (Applicant) would have earned had he remained in employment with the Respondent in terms of his fixed term contract of employment.;

3.4 That an order be and is hereby issued calling upon the Respondent to furnish to the Registrar of the above Honourable Court, a record of the disciplinary hearing (if any) with 14 days of being served with this application.;

3.5 Costs of application in the event of unsuccessful opposition, and

3.6 Further and/or alternative relief.

[4] The Applicant's Application is opposed by the Respondent and an Answering Affidavit was duly filed and deposed thereto by Mr. Alan Mkhonta the Respondent's Managing Director. The Applicant thereafter filed its Replying Affidavit.

[5] The matter came before Court after the filing of pleading and several aments to the pleadings, heads of arguments, and was accordingly argued and judgment reserved.

ANALYSIS OF FACTS AND APPLICABLE LAW

[6] Through the Answering Affidavit of the Respondents Managing Director, a point *in limine* was been raised by the Respondent, in its Answering Affidavit on material dispute of facts.

Material Dispute of Facts

[7] It was the Applicants submission that he was employed by the Respondent on the 10th April, 2017 as a Circulation Officer on a fixed term contract of employment, earning a monthly amount of E 14,484.00 (fourteen thousand, four hundred and eight four Emalangeni). It was his averment that he was in continuous employ with the Respondent until the 24th September, 2018, wherein he was preferred with three charges by the Respondent. The charges were dishonesty, unsatisfactory work performance and gross insubordination. A disciplinary hearing was convened by the Respondent and of the three charges preferred against him, he was found guilty of two and acquitted on the last charge.

[8] It was the Chairman's recommendation, that the Applicant be issued with a written warning on the two counts which meant that he was to continue with his employment with the Respondent, in line with the company's policies. However, to his dismay the Respondent elected to disregard the decision of the Chairman and instead, chose to substitute same with its own

decision, and proceeded to terminate the Applicant's contract of employment in a letter dated the 29th October, 2018.

[9] It was the Applicant's argument that the decision taken by the Respondent to terminate his services was improper, unlawful and done in a grossly unreasonable manner. He further stated that the decision to terminate his services effected by the Respondent was grossly unreasonable, unfair and improper in that the decision was not backed by facts and evidence. The decision was grossly arbitrary, unfair and unlawful in that it contradicted the decision of the Chairperson, who was the trier of facts and evidence in the matter.

[10] It was further his averment that when the decision was taken by the Respondent to substitute the decision of the lawfully appointed Chairperson, he was not called to present his side of the matter and/ or make submissions. Therefore, his fundamental right to be heard was taken from him. In closing it was the Applicant's submission that the Respondent was bound by the decision taken by its own appointed chairman and to hold otherwise would mean the process of conducting a fair and impartial disciplinary hearing was in itself a mockery, and meaningless exercise. Therefore, the decision by the Respondent was therefore in the circumstances grossly improper and grossly unfair.

[11] Respondent in rebuttal firstly raised a point *in limine*, material dispute of fact. It began its argument by giving a brief background to the matter. It was Respondent's submission that it was common cause that the Applicant

was dismissed by the Respondent, despite a recommendation by the Chairperson for a final written warning on the charges. It was Respondent's submission that the reason for its actions was due to the severity of the conduct by the Applicant. An appeal was launched by the Applicant against the decision to dismiss, wherein the appeal chairperson upheld the decision to dismiss. Subsequently the Applicant reported a dispute with CMAC and the dispute was declared unresolved.

[12] It was further Respondent's averment, that the Applicant thereafter instated proceedings at the High Court for the review and setting aside of its decision to dismiss him. A point *in limine* was raised by itself, citing lack of jurisdiction of the High Court in determining any proceedings relating to a dispute arising from an employment contract. The Applicant's attorney withdrew the application during the hearing of arguments, at the High Court. It was his averment that the Applicant has now resurfaced before the present Court seeking a review of the decision to dismiss. It was its submission that the present application still suffers the same ills as antecedent application of the High Court.

[13] The Respondent avers that the present application contains a material dispute of facts which cannot be determined on the papers. It was its further submission that the material dispute of facts was reasonably foreseeable before the launch of the present application. It was its averment that the procedure it effected when dismissing the Applicant was correct procedurally in terms of the policies of the company. Further that the Applicants allegation that the dismissal was procedurally incorrect and

should be reversed and set aside, cannot be dealt with by motion proceedings. This presents a material dispute of facts on the papers and it cannot be resolved without the Court making its own enquiry by way of action proceedings.

[14] In closing it was the Respondents argument that reinstatement as applied for by the Applicant is not a competent order that can be applied for in motion proceedings. It was its contention that the Court must hear oral evidence on whether or not it is to reinstate the Applicant. The Court must enquire whether the position the Applicant was holding is still vacant and whether or not a continued working relationship would be tolerable. Respondent averred that the Applicant was dismissed on or about October, 2018, and that the vacancy was thereafter filled by another employee who was engaged on a permanent basis. Further that the breach of trust between itself and the Applicant was diminished and therefore the working relationship was no longer possible given the circumstances. The Court was referred to the case of **MDUDUZI ZWANE V SWAZILAND POST & TELECOMMUNICATION CORPORATION AND OTHERS (1/11) [2017] SZIC 6.** Therefore, as a result of the above, the present application cannot be granted on the papers as they stand and the Applicant cannot be granted on the paper as they stand and the application should be dismissed *in toto*.

[15] The law in our jurisdiction dictates that if as Court is unable to decide an application on paper it may dismiss the application or refer it to oral evidence or refer the matter to trial. Overreachingly, unless the application

is dismissed the Court should adopt the procedure that is best calculated to ensure that justice is done with the least delay. In every case the Court should examine the alleged dispute of facts and determine whether there is a real issue of facts that cannot be satisfactorily resolved without trial. The emphasis is on proper examination of facts as it stands on paper, it may dismiss the application. The decision is not taken lightly. A robust approach may be employed to avoid fastidiousness and abuse of procedure. The approach, must be applied within reason and the advantages of oral evidence must be carefully weighted to prevent the setting of facts on probabilities. The manner in which *viva voce* evidence would disturb the balance of probabilities is the yard stick and whether a factual dispute exists is not a discretionary decision, it is a question of fact.

[16] In the **ROOM HIRE CO (PTY) LTD V JEPPES STREET MANSION (PTY) LTD 1949 (3) SA, 1155 (T)**, it was stated that (except) in interlocutory matters, it is undesirable for the Court to attempt to settle dispute solely on probabilities disclosed in contractionary affidavits, this was denounced 90 years ago by Tindall, J in **SAPERSTEIN V VENTER'S ASSIGNEE 1929 TPD 14 P.H AT (71)** and it is still the law. This law has been given full judicial effect in this jurisdiction, the principal having been stated in **DIDABANTFU KHUMALO V THE ATTORNEY GENERAL CIVIL APP NO. 31/2010** and **HLOBSILE MASEKO (NEE SUKATI) AND OTHERS V SELLINAH MASEKO (NEE MABUZA) AND OTHERS NO. 3815/2010.**

[17] **Section 14 (6)(a) and (b)** of the Rules of the Industrial Court, prescribe that where no dispute of is reasonably foreseeable in the sense that the application is solely for the determination of a question of law, the procedure laid down in **Part VIII of the Industrial Relations Act,2000 (as amended)** can be dispensed with. The inherently level form and nature of evidence on affidavit means that on occasion an application will not be able to be properly decided on affidavit, because there are factual disputes which cannot or should not be resolved on paper in the absence of oral evidence. The various provisions of **Rule 14** of the **Industrial Court Rules,** takes cognisance of this reality. **Rule 14(5)** requires the Applicant to set out the material facts in the Founding Affidavit with sufficient particularity to allow the Respondent to reply to them. While **Rule 14(8)** expects the same on the part of the Respondent.

[18] The difficulty that the Applicant now faces in this matter is that the dispute of facts as raised by the Respondent cannot be ignored by the Court, and the averment that the matter was referred to Conciliation Mediation Arbitration Commission (CMAC), and upon conciliation the matter was declared unresolved, because of a dispute of facts. Further that Applicant alleges that the Respondent unilaterally formulated its disciplinary code, requires an enquiry to be conducted by the Court to determine the alleged irregularity or unfairness in the Respondents conduct. It is particularly clear from the set of Affidavits by the respective parties, that wherein the Applicant claims that the Respondent flouted its policies and procedure, the Respondent alleges that the policies were adhered to, and that Applicants dismissal was procedurally and substantively fair.

[19] From the arguments raised before Court, if the Court was to grant the orders sought by the Applicant, it would be effectively reviewing the decision of the employer without it having conducted an enquiry into the lawfulness or fairness- of the employer's conduct. Further the Court cannot order re instatement without having made its own enquiry about the lawfulness or fairness of the dismissal, as it does have the inherent power to order reinstatement of an employee, save for the powers conferred by section 16 of the Employment Act, 1980, which powers are exercise in circumstances wherein the Court would itself have enquired into and found that the employee has been unfairly dismissed.

[20] In the case of **GROENING V STANDARD BANK OF SWAZILAND 01/2011**, as correctly cited by the Respondent, the Court state,

"The court cannot grant a reinstatement order, without having made an enquiry whether the circumstances surrounding the dismissal are such that continued employment relationship would be tolerable and, secondly whether is reasonably practicable for the employer to re instate the employee."

[21] Taking into consideration the evidence as adduced above, there is clearly a need for the matter to be referred to oral evidence. It is the Courts view that the Applicant must have foreseen the many disputes of facts, which are evident from the submissions made which can only be cured by the giving

of oral evidence. It is therefore the Court's decision that the point *in limine* stands. The application is accordingly referred to oral evidence

[22] This is the Order of Court;

1) **The matter is referred to oral evidence.**
2) **The Registrar is hereby directed to ensure that the hearing of the matter is expedited.**
3) **Each party be hereby ordered to pay its own costs.**

The Members Agree.

B. NOCAMPHALALA
ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

FOR APPLICANT: B.S Dlamini & Associates

FOR RESPONDENT: Magagula & Hlophe Attorneys