IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

SWAZIPHARM WHOLESALERS (PTY) LTD APPELLANT

vs

MICHAEL KENNETH ELLISON RESPONDENT

CASE NO. 17 95

Coram S.W. SAPIRF, J P

J.M. MATSEBULA, J A

SB. MAPHALALA, J A

For Appellant. Mr. Jele

For Respondent Mr. PR. Dunseith

JUDGMENT

The appellant, a wholesale dealer in pharmaceuticals employed the respondent as its financial manager. The appointment took place on the 1st October 1994 and a letter briefly set forth the terms upon which such appointment was made In fact for reasons irrelevant to this judgment he commenced his duties only on the 31st October 1 994

The respondent remained in the employment with the appellant until the 16th November, 1994 when the appellant served a Setter suspending the respondent from employment. On the 21st November 1994 the appellant terminated the respondent's employment on the following terms-

"It is with regret that I must terminate your employment with immediate effect. You failed to bring to our attention the circumstances surrounding your dismissal from the S.A. Trade Mission during your interview for the position of Financial

Manager with Swazipharm. You also did not disclose this information in your Curriculum Vitae. You will appreciate that the position of Financial Manager requires someone with absolute integrity and trustworthiness. Please accept your salary for the month of November in lieu of your services for the period you have been here."

The letter was signed by one G.W. Fisk, Managing Director of the appellant.

The respondent complained that the dismissal was unfair in that:-

a) The applicant in his Curriculum Vitae forwarded to the respondent disclosed the information

pertaining to his employment at the South African Trade Mission.

b) Furthermore the applicant disclosed on the cover sheet of his Curriculum Vitae his willingness to discuss in detail reasons for leaving his or vious employment
c) he applicant's failure to disclose the reasons for his dismissal at the South African Trade Mission does not amount to dishonesty because he was never asked to disclose the reasons during the interview for the job notwithstanding his willingness to discuss his previous employment with the South African Trade Mission.

The applicant reported the dispute to the Labour Office and the Commissioner of Labour duly issued a certificate of an unresolved dispute. The matter went to the Industrial Court where in due course judgment was granted in favour of the respondent and an award of 8 months salary by way of compensation in the sum of E24 000 was made.

The only point of law before this court as far as the appeal was concerned was whether or not there is an obligation of an applicant for a position to disclose that he had been dismissed from previous employment on the grounds of dishonest conduct.

In considering this point it must be home in mind that the appellant interviewed the respondent before engaging him and had every opportunity of enquiring into the circumstances surrounding his dismissal from the South African Trade Mission. Despite tins Respondent was not asked any questions in this connection nor was he asked whether he had ever been convicted in a Court of Law for a crime involving dishonesty. We are of the view that no obligation exists on an applicant for a position to disclose past misconduct if he is not specifically required to do so. It is true that any employer requiring to fill an executive position, would be influenced in his choice of a person by knowledge that the prospective employee had been dismissed in the past from his employment on the grounds of dishonesty upon which a conviction followed. It would be apparent to any prospective employee that this is so. Nevertheless it does not follow that the prospective employee has a duty to make full disclosure of all or any of his past misdeeds when applying for a position. The difficulty of defining the limits of such a duty, militate against its acceptance as a contractual obligation.

Our view is that the law as stated in HOFFMAN v MONK'S WINERIES LIMITED

1948 (2) SA 163 © is applicable in Swaziland. The head note which accurately reflects the decision reads as follows

"A contract of service is not a contract uberrimae fidei and the non-disclosure of material facts is not a ground for its termination

Where the plaintiff, who had been engaged by the defendant as a sales manager, had failed to disclose (a) that he was an unrehabilitated insolvent and (b) that he had been comic-led under the Insolvency Act, 32 of 1916. and had been sentenced to a term of imprisonment.

Held, that there was no duty upon the plaintiff to have disclosed these facts to the defendant."

If an employer considers that the past misconduct of a prospective employee is material in considering the advisability of employing that person then such employer should, before engaging the employee, ascertain the position by appropriate questioning. There would be nothing improper about pulling such questions to the prospective employee and if the prospective employee did not answer the questions honestly then if an appointment took place on the basis of such misleading answers the

employer would be entitled to rescind the contract.

Although we were referred to criticisms of the Hoffman judgment these criticism do not persuade us that the reasoning in the Hoffman judgment is wrong. In particular we agree that a contract of employment is not a contract uberrimae fidei in the sense that it requires a prospective employee to make a complete disclosure of his past and where failure to do so would entitle the employer to rescind any contract entered into. For these reasons the appeal must fail.

The respondent has filed a cross appeal. The cross appeal raises the question of whether the award made by the Court aquo was adequate. It is argued on behalf of the respondent that the justice of the Industrial Court erred in law in failing to take into account in his calculation of the amount payable to the respondent in terms of Section 15(4) of the Industrial Relations Act. amounts categorised as allowances over and above basic salary' which were payable to respondent in terms of his contract.

That Section provides that where the services of an employee have been unlawfully or unfairly terminated an award of compensation in terms of Sub-Section 2(d) of not less than 6 months remuneration and not more than 24 months remuneration shall be awarded by the Court as it considers just and equitable in all the circumstances having regard to the loss sustained by the employee in consequence of the termination in so far as that loss is attributable to action taken by the employer and the extent if any to which the employee caused or contributed to the termination.

Without prejudice to the generality of the foregoing the Court is to have regard to the actual financial loss to the employee, his age, his prospects of obtaining of the equivalent employment and the circumstances of the termination.

It is further provided that where the Court finds that the dismissal is unfair by reason of the procedural defect the minimum compensation payable might be varied as the Court deems just and equitable.

This is one of the provisions of the Act which has been severely criticized The justification for a minimum or maximum amount is difficult to justify. The provisions of the section are in this respect penal for even where the employee who has been unlawfully or unfairly dismissed sutlers no actual loss at all by reason of his taking up immediate employment on his dismissal a minimum amount has to be paid to him.

The Court did enquire into the financial loss to the respondent following on his unfair dismissal. In so doing the court asked of the respondent whether his net monthly package upon which

a Michael Ellison

the compensation to be paid should be calculated was E5 200 per month. To this the respondent answered yes.

On appeal it was argued that the amount should be greater because certain allowances for motor car expenses and housing expenses were not included in the amount of Respondent's remuneration..

It is difficult to see why the Court should be said to have erred when the Respondent himself fixed the amount of his remuneration. The amount awarded was not less than the minimum provided for.

We have nevertheless considered the arguments advanced to us by the respondent's counsel and have come to the conclusion that making the calculation in terms of Section 15(4) the motor car allowance was not to be included as it was not remuneration for work done but simply a repayment for

the expense incurred by the respondent for the use of his own car. The housing allowance may be on a different footing because that us clearly part of the remuneration. We have come to the conclusion however that although there is this misdirection by the Court quo and we may be at large to interfere with the amount of the award we are not , inclined so to do.

This for two reasons, firstly the amount to be taken into account in making the calculation was agreed to by the respondent himself in evidence. Furthermore the amount awarded is in excess of the minimum and in our view is a fair compensation to the respondent having regard to all the circumstances revealed by the evidence. In the result both the appeal and cross appeal are dismissed with costs.

S. W. SAPIRE, J P

I agree

I agree

J. M. MATSEBULA. J A

S.B. MAPHALALA. J A