IN THE INDUSTRIAL COURT OF APPEAL

The Central Bank of Swaziland

vs

Memory Matiwane

Case No. 110/1993

Coram	SAPIRE, JP; MATSEBULA, J A;
	MAPHALALA, J A
For Appellant	P.E. Flynn
For Defendant	T.A. Simelane

Judgment

(01/07/98)

The Respondent who was the Applicant in the Court a quo sought compensation for unfair dismissal. Respondent was previously an employee of the appellant but had been dismissed after a domestic enquiry, on the grounds of misconduct. The appellant applied for relief in the Court a quo on the grounds that the enquiry into his alleged misconduct was unfair, and that evidence placed before the tribunal did not justify his dismissal.

The Industrial Court found that this was indeed so, and that it had not been established before the disciplinary hearing that any misconduct on the part of the appellant had taken place, justifying his dismissal.. Accordingly it found that the Respondent was entitled by way of compensation to be paid 11 months salary in the sum of E25 663.

In the Industrial Court the appellant had been able to lead the evidence of a further witness who did not testify before the disciplinary hearing.. This witness, worked at the Mbabane

Government Hospital at the material time. He confirms that the receipts, the discrepancies in which were the basis of the Appellant's charge of dishonesty against the Respondent, in the amounts of E2.50 and E100 were in his handwriting and signed by him. He said that he had been approached by the respondent to issue a receipt of E100.00 whereas only a sum of E2.50 was paid by him. He went on to say that this was to be used by the respondent to claim reimbursement from the respondent's medical scheme. This witness was not available to give evidence before the disciplinary hearing but was only approached by someone from the appellant late in 1994 or early 1995 concerning the receipts.

The President of the Industrial Court observed that it was a task of his Court to evaluate the evidence which was placed before the Disciplinary hearing and concluded as the two witnesses who I will refer to as DW2 & DW3 did not testify before the disciplinary hearing that evidence could not be taken into account by the Industrial Court in its assessment of the situation He observed that.

"..... the evidence of DW2 would have a fatal blow on the applicant's case on the charge of fabricating and falsifying a document".

The judgment also indicates that because the judge found that there was no evidence before the disciplinary hearing on which it could rely on to properly arrive at the finding that the applicant (respondent) was guilty of dishonesty, the Appellant t had failed to discharge the onus resting on it to demonstrate that the dismissal was fair. The Court therefore found that the respondent (now appellant) unfairly terminated the services of the applicant without cause.

This indicates a grave misdirection of the court a quo. The court a quo does not sit as a court of appeal to decide whether or not a disciplinary hearing came to a correct finding on the evidence before it. It is the duty of the Industrial Court to enquire on the evidence placed before it, as to whether the provisions of the Industrial Relations Act and the Employment Act have been complied with, and to make a fair award having regard to all the circumstances of the case. Even if the court were to find that the dismissal was unfair because of some technical defect in the application of procedures prescribed, before an award or compensation were to be made all the circumstances of the case are to be investigated.

See section 36 of Employment Amendment Act 1997 and the proviso to section 15(4) of the Industrial Relations Act of 1996.

This is the substance of the point of law on which the Appellant has come to this court.
The misdirection of the court a quo has led to this anomalous situation that an employee who is proved to have been guilty of dishonesty is to be found to have been unfairly dismissed and

compensated for his misdeeds notwithstanding that there was evidence before the Industrial Court, if not the disciplinary enquiry, that the Respondent was guilty of the dishonesty which was one of the grounds for his dismissal. This does not accord with anyone's ideas of fairness and is not what was intended by the act.

The provisions of the act require the industrial court to take into account all the circumstances of the case in deciding whether there has been an unfair dismissal in the first place and secondly where such unfair dismissal arises from a defect in the procedures, the court is obliged to enquire whether in all the circumstances of the case are such that the employee is entitled to compensation at all and if so in what amount. By excluding the evidence of DW2 from its consideration, important circumstances have not been taken into account, and the court precluded itself from coming to a proper decision.

The question now arises as to whether the case ought to be remitted to the court a quo to reconsider the matter taking into account the evidence it excluded? This we consider to be both impracticable and unnecessary as the judgement clearly indicates that the excluded evidence would have been fatal to the Respondent's case.

It follows that the appeal must succeed on the point of law raised and the decision of the court a quo be set aside.

SAPIRE, J P

MATSEBULA. J A

MAPHALALA, J A