IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.8/98

IN THE MATTER BETWEEN:

THE ATTORNEY GENERAL

VS

NHLANHLA M.K. VILAKATI

CORAM : LEON A J P

: BROWDE A J

: TEBBUTT A J

FOR THE APPELLANT : MR R. WISE S C

FOR THE RESPONDENT : MR P. R. DUNSEITH

JUDGEMENT

Browde A J:

This matter comes before us on appeal from the Industrial Court, In that court the present Respondent brought an application based on what he alleged was an unlawful termination of his employment by his employer the present appellant.

The facts that were common cause in the pleadings were briefly the following: The respondent was a judicial officer employed by the Swaziland Government as a Magistrate with effect from 1st June 1988. With effect from 1st April 1991 the respondent was promoted to the office of Senior Magistrate for the Lubombo District. In February 1994 the respondent was suspended from duty pending his trial on a charge of theft of a motor vehicle. He was acquitted of the charge in September 1994. The respondent's

suspension was thereafter extended by the appellant pending the institution of a disciplinary enquiry by the Judicial Service Commission. This enquiry found the respondent to be innocent of any misconduct and dismissed the disciplinary charges against him. The respondent's interdiction was then revoked on 21st September 1994. Notwithstanding the finding of innocence the respondent was firstly assigned to work under the supervision of another Senior Magistrate in Manzini and thereafter was re-transferred on 8th February 1995 to Siteki to work under the supervision of another Senior Magistrate. On 7th November 1995 the respondent was again transferred, this time to Nhlangano on 10th January 1996. In view of the fact that these repeated transfers were a source of disruption to the respondent, who is a family man with a wife and children, he wrote a letter of protest on 6th December 1995. He dealt with the problems caused by the conduct of the Judicial Service Commission towards him in detail and pointed out how difficult it was being made for him diligently to carry out his duties as a Magistrate without "peace of mind". He recited how badly he had been treated since his interdiction was lifted and the ill-effects his repeated transfers had had on his wife and school-going children. He pleaded that the transfer to Nhlangano be suspended to enable him to make suitable arrangements for his family. It is an extraordinary feature of this case that despite the abject attitude of the respondent regarding his victimisation by the Judicial Service Commission, that the appellant Attorney-General, who represented the government in the matter from its inception, admitted in his plea that the respondent's protest in the letter I have referred to was "rejected out of hand". It is also common cause that on 21st December 1995 the Judicial Service Commission addressed a letter to the respondent cynically stating that notice of his pending transfer was given to him to enable him to "sort out your family problems and other hindrances". After pointing out to the respondent that he

would be deployed and re-deployed as the "interest of necessity arises" the Commission concluded with the information that the transfer to Nhlangano stood. Not content with what can only be described as a callous approach to the respondent's problems, the appellant on 28th December 1995 informed the respondent by letter that "the Government has varied your appointment to the post of Assistant Judicial Commissioner Grade 14 where your services are now required". The letter purported to withdraw the transfer to Nhlangano.

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In his particulars of claim the respondent alleged, and this was disputed, that the appointment as Assistant Judicial Commissioner was not a judicial appointment consistent with his qualifications and experience, that the variation of his appointment was made without consultation with him and that it was an act of victimisation calculated to remove him from the magistracy and to cause him hardship and inconvenience. The respondent then went on to aver that this conduct of the appellant towards him was such that he could no longer reasonably be expected to continue in his employment and he accordingly resigned without notice on 2nd January 1996. The respondent having concluded his recital of the facts which, as I have said, were largely common cause, then alleged that the appellant, "in the premises... unlawfully, unfairly and constructively terminated the services of the (respondent)".

In a strongly worded answer the appellant denied that its conduct amounted to a constructive dismissal of the respondent but that if he "suspected" it did, he "should have sought redress with the Labour Commissioner and subsequently with the Industrial Court before resigning since his prior resignation amounted to acquiescence and he is now estopped from pursuing this matter". I will later in this judgment return to the effect of this plea on the argument addressed to us by Mr. Wise S. C. who appeared before us on behalf of the appellant.

The pleadings concluded with claims by the respondent for payment of various sums of money under a miscellany of heads including severance allowance, leave pay, notice pay and "maximum compensation for unfair dismissal being 24 months salary". The appellant denied that the respondent was entitled to any terminal benefits.

It should be mentioned that in its answer to the respondent's particulars of claim the appellant raised, as a point in limine, that the Industrial Court did not have jurisdiction to hear the matter by virtue of the provisions of Section 8 of the Judicial Service Commission Act, 1982. The point was argued but, finding that it was at liberty to determine whether the purported variation of the respondent's appointment by the

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Judicial Service Commission was fair and whether it complied with Section 42 of the Employment Act of 1980, the Court dismissed the point raised in limine. No argument was addressed to us on this aspect of the matter. In his heads of argument, however, Mr. Wise sought to launch a different attack on the jurisdiction of the Industrial Court to have heard the matter at all. He sought to rely on Section 5(1) of the Industrial Relations Act, 1996. Before his argument was fully developed, however, Mr. Dunseith, who appeared on behalf of the respondent, raised an objection to Mr. Wise's attempt to introduce this different basis for his submission that the Industrial Court lacked the necessary jurisdiction to have heard the matter. Mr. Dunseith pointed out that this basis for an attack on the Court's jurisdiction had not been pleaded in limine, as it should have been, or at all; nor was it argued before the court a quo or raised as a point in the appellant's notice of appeal. When faced with Mr. Dunseith's objection, Mr. Wise requested that he be given time to consider the matter and that was, by consent, granted to him. It was agreed that he would proceed with his argument on other aspects of the case and that he would consider the issue of jurisdiction over the luncheon adjournment. Mr. Wise, after such adjournment, continued to present the appellant's case but concluded his argument without again alluding to the question of jurisdiction.

I should here interpolate that in the course of his submissions regarding jurisdiction Mr. Wise conceded that if the issue between the parties could properly be called "a dispute" within the meaning of that term as defined in the Act, then the court a quo would have had jurisdiction to hear the matter. Mr. Wise's silence on this point after the opportunity afforded him to consider it can, therefore, only be construed as an abandonment by him of the argument regarding the jurisdiction, or lack of it, of the

Industrial Court.

Having rejected the attack on its jurisdiction the Industrial Court considered the merits of the case. After carefully analysing the facts and all the various judicial decisions to which it was referred, the court came to the following conclusion:-

"We hold that upon the totality of the evidence presented to us the unjustified variation of the applicant's post from that of Senior Magistrate (a judicial office)

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to that of Assistant Judicial Commissioner was a demotion which resulted in a loss of status, loss of job satisfaction, and an entirely different kind of work".

The judgment then referred to the decision in HALGREEN VS NATAL BUILDING SOCIETY (1986) 7 ILJ T69(IC) in which it was held that an employer who employs a servant for a particular work, and gives him a particular status, is not entitled without the sanction of the employee to alter the character of the contract. "If he (the employer) does so" the judgment continued, "It is tantamount to breach of contract and to a dismissal, and the employer is then entitled to say, "I accept this dismissal and I will sue for damages". The court a quo found as a fact that the respondent was never consulted before his appointment was varied and went on to find that the Judicial Service Commission was so anxious to remove him "by hook or by crook, from his judicial office" that before obtaining the necessary authority to do so from the Civil Service Board it had already taken it upon itself, and without proper authority, to vary the appointment as already described. The court a quo then proceeded to award the respondent terminal benefits and other relief to which I return below.

Mr. Wise attacked the decision of the Industrial Court's finding that the respondent was "constructively dismissed". He cited, inter alia, the judgment in JOOSTE VS TRANSNET LIMITED, TRADING AS SOUTH AFRICAN AIRWAYS [1995] 5 BLLR 1 (LAC) in which the learned Judge, after posing the question "What is constructive dismissal" stated, "It is not a concept found in the Labour Relations Act or any South African Statute. It is not a concept known to common law." Although, as I shall show, nothing critical to the case turns on it, I think the statement in Jooste's case is not justified. In SMITH VS CYCLE AND MOTOR TRADE SUPPLY COMPANY 1922 TPD 324 the plaintiff was employed as a manager of defendant's business and was held justified in treating as a wrongful dismissal a direction to confine himself in the future to the duties of bookkeeper at the same salary. This appears to me to a recognition in the common law that the test is whether the work to which the plaintiff has been assigned by a unilateral decision of the employer is of a nature which was not contemplated in the contract or if it involves a reduction in salary or status. Mr. Wise's

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submission that in Swaziland "constructive dismissal" is purely a statutory concept and that since it was common cause that Part V of the Employment Act, 1980 (the Sections dealing with the termination of an employee's services are in Part V) is not applicable, a finding that respondent was "constructively dismissed" was not appropriate. Counsel argued that the common law does, of course, recognise that when one party repudiates a contract the other party is put to an election, either to accept the repudiation and so terminate the contract or to disregard it and keep the contract in force. By "repudiation", Mr. Wise submitted, was meant either the manifestation by conduct of one party of an intention to put an end to the contract or a fundamental breach by one party of the terms of the contract which goes to the root of the contract and which, objectively viewed, enables the other party to consider the contract as at an end. There can, I think be no quarrel with those submissions of Mr. Wise nor did Mr. Dunseith demur thereto. However, relying upon cases such as STEWART WRIGHTSON VS THORPE 1977(2) SA 3 (AD), Mr. Wise contended that if there was a repudiation by the appellant there was no acceptance of the repudiation by the respondent and that consequently there was no dismissal. I do not agree. The facts show that the treatment of the respondent was contemptuous and the variation of his job description involved a callous disregard for his status as a Magistrate. His forebearance during the months of his interdiction and thereafter can only be attributed to a desire to retain his employment. Ultimately the letter of the 28th December 1995 was "the last straw" and it is hardly surprising that the respondent resigned from his employment on 2nd January 1996.

Mr. Wise submitted that because he did not resign after any of the earlier incidents he waived his right to rely on them as a basis for alleging a repudiation by the appellant of the contract. There seems to me to be no substance in that submission. A person who suffers in silence over a period of time because he needs to retain his job for the sake of his family but who ultimately reaches the end of his tether and resigns because he can take no more humiliating treatment, cannot, in my judgment, be said to have waived his right to rely on the summation of all the acts of the employer as constituting a manifestation of an intention to end the contract. As far as concerns the question whether there was an acceptance by the respondent of the repudiation, I do not believe this

presents any difficulty to the respondent. It is common cause on the pleadings as I have shown above that the respondent resigned, the appellant having averred that his resignation "amounted to acquiescence". Quite apart from that, however, it is common cause that the respondent left his employment, did not return to work and reported the dispute to the Labour Commissioner. The report, which was served on the appellant gave express notice that the respondent regarded his employment as having been unlawfully terminated. Counsel sought to argue that the delay in reporting the dispute precluded the respondent from relying on it as an acceptance of the repudiation, Mr. Dunseith, correctly in my view, countered that submission by referring to CULVERWELL ANOR VS BROWN 1990(1) SA7 (AD) at page 17 f - j in which it was held that mere delay does not result in the right to accept the repudiation, unless the delay is such that justifies the inference that the party has waived his right to cancel the contract.

The delay in this case does not justify such an inference. Assuming therefore, without deciding, that the appellant's contention is correct and that "constructive dismissal" is a concept not applicable to a common law situation, and that, as contended for by Mr. Wise we are here dealing with a common law case, then the Industrial Court was justified on the facts in finding as it did that "the applicant (respondent) effectively cancelled the contract of employment for the breach or repudiation on the part of the Judicial Service Commission". So, it is my view, as I have said above, that nothing turns on whether there was a "constructive dismissal" or a repudiation of the contract. In either case the contract was at an end in circumstances entitling the respondent to damages.

The final submissions made by Mr. Wise against the judgment of the court a quo concerned the compensation awarded to the respondent. He submitted that the terms of Section 15 of the Industrial Act which govern the award of remedies to an employee whose services have been unlawfully or unfairly terminated, demand of the employee that he/she lead sufficient evidence of the actual and prospective loss to enable the Court to make an award which bears a rational relationship to actual loss suffered and the prospective loss likely to be suffered as a result of the wrongful termination of employment. This, it was submitted, the respondent failed to do. In this regard the main

complaint was that the evidence given by the respondent concerning his loss was not the best evidence available to him and was imprecise. After his resignation the respondent set up practice as an attorney. When asked to estimate what his present income was from his practice he said "I can place it around E3,000,G0". This he said was less than his salary with the government and was arrived at by taking into account each month "my overhead expenses, salaries for the staff and for my own self I remain with very little". Mr. Wise submitted that as the respondent is now an attorney in private practice he is bound to keep proper books of account and accounting records. There was, therefore, so the argument went, no reason why the respondent should not have led evidence of his actual earnings. No doubt this could have been done but the evidence given by the respondent was not challenged and consequently there was no reason for it not to be accepted by the Court. In any event the Act bestows a discretion on the Court in the assessment of damage and the procedure is less formal than that of the ordinary civil courts. There is a greater elasticity of approach permitted in the Industrial Court which is enjoined by the provisions of Section 15(1) of the Act to "make an order granting such remedy as it may deem just". This the court a quo did in the following terms:

"In applying the considerations and guidelines contained in Section 15(4) of the IRA and what we consider to be relevant factors, we have taken into account the following in determining the amount of

compensation: (a) the loss (financial and in terms of status) sustained by the applicant as a result of the unlawful and unfair dismissal; (b) the conduct of the J S C in the whole matter, in particular the fact that it had no authority whatsoever to vary the appointment of the applicant; (c) the fact that the J S C acted in blatant disregard for such a basic protective principle as natural justice when it took a decision to unlawfully remove the applicant from the post of senior magistrate; (d) the applicant is 37 years old now, and he is a qualified legal practitioner, an attorney, and has an ongoing private legal practice; (f) the applicant has done all he could to mitigate his losses; and (g) the applicant's post was pensionable."

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The court then made an order for twelve months compensation for wages lost, leave pay and notice pay. It also ordered the appellant to refund to the respondent his contributions in terms of Regulation 13 to the Public Services Pensions Order, 1993.

The Court stated that the award was considered by it to be just and equitable in all the circumstances. Mr. Wise's argument in no way persuades me that there was anything improper in the award or that it was based on any wrong principle.

The appeal is dismissed and there will be no order as to costs.

J. BROWDE A J

I AGREE : R. N. LEON A J P

AND SO DO I : P. H. TEBBUTT A J

Delivered on this.....day of June 1999

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