SWAZILAND INDUSTRIAL

COURT OF APPEAL

Tibiyo Taka Ngwane

Appellant

v

Paul Siba Simelane

Respondent

Case No. 4/99

Coram	Sapire, P
	Matsebula, J
	Maphalala, J
For Appellant	P. Flyn
For Respondent	A. Shabangu

Sapire P

JUDGMENT

(16/06/2000)

In 1985, the Appellant employed the Respondent as an artisan. He was transferred later to Gege. While in the Appellants service and stationed at Gege, he claims to have developed stomach or other abdominal disorders for which he blames the local conditions under which he was required to live. Consultation with doctors in Manzini failed to confirm the cause of, remedy to his illness. He then turned to an inyanga (traditional healer) practising in Maputo for help. He says that in December 1996 his supervisor gave him leave of absence for what he understood to be on full pay for an indefinite period, until his condition improved. The Respondent accordingly absented himself from his employment to be under the care of the traditional healer until mid April 1997 when his condition improved and he was discharged to return home.

After his return, but before he presented himself to resume his service, he was summoned to a meeting of the management of the Appellant. The meeting took place on 13th orl5th May 1997. The exact date is not material in these proceedings. There is a divergence of fact on what led up to, and what took place at, the meeting with management. The Appellant's version of the proceedings is that the Respondent did not there raise the question of the Respondent having been granted leave of absence, The Respondent maintains that he did proffer this as his explanation and that the Appellant refused to call the officer who the Respondent says granted him leave of absence. The Appellant contends that as a result of the enquiry which took place the Respondent was told that his prolonged absence was tantamount to desertion, and informed him there and then of his dismissal. The Respondent seems to maintain that the first intimation to him of the termination of his contract was when he received a letter dated 27th May 1997. This issue does not have to be decided by this court.

On the 7th July 1998 the Respondent laid a complaint with the Labour Commissioner in terms of Section

41 of the Employment Act 1980. There is no mention in the founding papers of what transpired in the fourteen months between the receipt of the letter and the lodging of the complaint. More particularly there is no allegation by the Respondent that he resumed his service with the Appellant or that the Appellant rejected or otherwise refused to avail itself of services tendered by the Respondent.

It is significant that the Respondent's complaint to the Labour Commissioner was one of "unfair dismissal" and was made after receipt of his cheque relating to his full withdrawal benefit from Tibiyo Taka Ngwane Pension Fund.

The Labour Commissioner investigated the complaint and his report is annexed to the founding affidavit. The contents of the report are a recital of the contentions of the opposing parties. With these we are not directly concerned. The report ends as follows "RESULTS.

The case remains unresolved and any further attempts prove futile. FINAL ISSUES IN DISPUTE.

1 Re-instatement or alternatively.

2 Additional notice.

3 Severance allowance.

4 Compensation for unfair dismissal. "

What is meant by "any further attempts prove futile" is difficult to fathom. The report does not reveal any dispute as to whether the Respondent was dismissed and his contract terminated. On the contrary one of the remaining issues is said to be the question of re-instatement, which of necessity implies such a termination having taken place. Nowhere in the proceedings before the Labour Commissioner was there any complaint that the letter of the 27th May 1997 was unclear in its terms or that there was any doubt that the contract had been terminated. Respondent's case was that the dismissal was unfair. It also appears from the report that the Respondent was aware of, but failed to exercise his right of appeal to the General Manager for what may be thought to be unconvincing reasons.

The report was not dealt with in the manner contemplated in Section 41 of the Employment Act. Instead the Respondent himself instituted motion proceedings in the court a quo.

The Respondent as Applicant in the court below claimed relief in the following terms.

1. The Respondent is ordered to reinstate the applicant to his job as artisan mechanic with the Respondent together with all benefits including salary from January 1997 to date of judgement;

2. Interest on the monthly salary accruing to the applicant from time to time at 9% per annum from the end of each month for which it is payable to date of payment. Alternatively;

3. The Respondent is ordered to pay the Applicant his monthly salary for the months of January 1997 to the date of judgement and;

4. An order declaring the employment terminated from the date of judgement and payment of each statutory compensation and termination benefits as the court may deem just as follows;

4.1 E118 800(0ne hundred and eighteen thousand eight hundred Emalangeni) being maximum statutory compensation;

4.2 E15 000 (fifteen thousand Emalangeni) being severance allowance.

4.3 E9 500 (nine thousand five hundred Emaelangeni), being notice pay

5. Further and alternative relief.

The form of relief is significant. The relief claimed in prayers 1 and 2 is in its nature inconsistent with the relief claimed in 3 and 4. The premise for the grant of relief in terms of 1 and 2 is that the Appellant terminated Respondent's employment and that such amounted to an unfair dismissal. The relief in terms of 3 and 4 postulates that no termination had taken place. By making his claims in the alternative the Respondent has indicated appreciation that if there has not been a termination of his service contract there cannot be an unfair dismissal.

The outcome of the proceedings before the court a quo was a finding in Respondents favour that the Appellant had not terminated the Respondent's employment. The relative portion of the judgement reads as follows.

"For the reasons advanced the Applicants Application must succeed and we hereby find that the letter dated the 27th May, 1997 did not constitute a termination of the employment of the Applicant by the Respondent. Accordingly the Applicant remains in lawful employment by the respondent and is entitled to his wages and benefits to date. The applicant continues to tender his services and until such time he is lawfully terminated from the employ of the Respondent he shall continue to be entitled to his full wages and benefits. The respondent is to pay the applicant his salary together with all benefits from January, 1997 to date plus interest at 9% on the monthly salary from when it became due and payable."

The appellant has appealed against this decision, its notice of appeal reading.

1. "The court a quo erred in finding that the respondent's employment had not been terminated by the appellant in that.

1.1 The court a quo based its finding on the letter of the 27th May and misdirected itself in law by finding that the further evidence of dismissal relied on by the appellant in its answering affidavit could be disregarded on the basis that the appellant was required to show that such termination was fair.

1.1.1 In so doing, the court a quo misconstrued the issues and erroneously applied the law with regard to unfair dismissal to the issue before it. The question for determination by the Court a quo was whether there had been a termination of the employment and not whether there had been a fair termination. The court a quo erred in law by invoking section 42 of the Employment Act 1980 which was irrelevant to the issue for determination.

1.2 The letter of the 27th May 1997 in itself constituted a clear termination of the Respondent's employment."

The respondent in limine argued that the appeal was not properly before the court because the notice of appeal did not specify a question of law as the ground of appeal. On his behalf it was also argued that this was if anything a case not for appeal but for review. These objections were without merit. There is ample authority that the interpretation of a document is a matter of law. There are decided cases on the method

The notice of appeal raises the issue of the meaning to be attached to the letter of the 27th May 1997.

The court a quo regarded what it considered to be lack of clarity and ambiguity in the letter to be decisive. I do not share the view that the letter is unclear or ambiguous. The letter conveys to the Respondent that his contract is at an end and that he is no longer employed by the Appellant. The letter further makes it clear that the reason for the termination is what was found to be the Respondent's long period of

unexplained and unauthorised absence.

This view is fortified by the following considerations.

1. The letter is intended to be confirmatory of what had already taken place, and must be read in the light of the evidence of the events which are recorded therein.

2. The Respondent's own reaction to the letter. After receipt thereof he as appears from the report of the Labour Commissioner did not exercise his rights of appeal. He did not answer or seek to contradict the letter. He chose to lie low for a period of about fourteen months without presenting himself for

5

work. He then, perhaps prompted by the financial straits in which he found himself, reported a case of unfair termination. In his complaint he says that his services were terminated in writing on the 27th May 1997 (see page 19 of the record).

The court a quo therefore misdirected itself on a question of law in interpreting the letter in such a way as to find that it was not an acceptably clear intimation to the Respondent that his employment with the Appellant was at an end.

The question of law in which the court a quo erred is not confined to a misinterpretation of the wording of the letter. The dismissal of the Respondent was not by the letter alone. There is evidence that the Respondent was actually advised of his dismissal at the conclusion of the dsciplinary hearing. The court a quo made no factual finding whether this was so. The court excluded this evidence from consideration in concluding that there had been no dismissal or termination of Respondent's services. It did so on this basis.

" Even though in its Answering Affidavit at paragraph 14.3, the Respondent asserts that the Applicant was dismissed in terms of Section 36(f) of the Employment Act no evidence was called to prove that indeed that such termination was fair. In terms of Section 42 the onus lies with the Respondent to do so."

The reason why no evidence was led appears at page 51 of the record. The Respondent's attorney, despite the disputes of fact on the affidavits pointed out by Appellant's attorney, announced his intention of arguing the case without leading oral evidence on the issues. In doing so, he proceeded on the basis of dicta in Workers Representative Council v Manzini Town Council 1 ,to demonstrate that Respondent had not been dismissed. Mr Shabangu's submission was that there were two issues for determination which he identified as.

i) whether there was a lawful termination of the Applicant's employment;

ii) whether the applicant deserted work and by so doing terminated his employment;
See page 50 of the record.

1 (Case No 3/94)

6

The basis of Mr Shabangu's argument was that only an employer may terminate a contract of employment in terms of section 36(f) of the employment Act. It was therefor fatally inaccurate, and ambiguous for the Appellant to have stated in the letter that the Respondent by his desertion or prolonged absence without leave had terminated his employment. It is obvious that what was meant was that the Respondent by his actions had caused the Appellant to terminate the employment. This is the only interpretation which could, having regard to the circumstances in which the letter was written, be placed thereon. The termination of respondent's employment was effected not only by the letter but also by the decision of the Appellant communicated to the Respondent at the conclusion of the enquiry. The court

erred in finding as a matter of law, having regard to the language of the letter and all the surrounding circumstances described in the affidavits that there had been no termination.

This judgement is limited to the one aspect of the case with which it deals, namely whether or not the court a quo was correct or in error as a matter of law in concluding on the facts before it that the applicant had not been dismissed and his service contract terminated. All other issues, including the propriety of the application remain alive for determination of the court a quo.

The order of the court a quo is set aside and the case is remitted to the court a quo to deal with the application on the basis that the Appellant terminated the Respondent's employment in May 1997.

Sapire P

Matsebula J	Maphalala, J
I Agree	I Agree