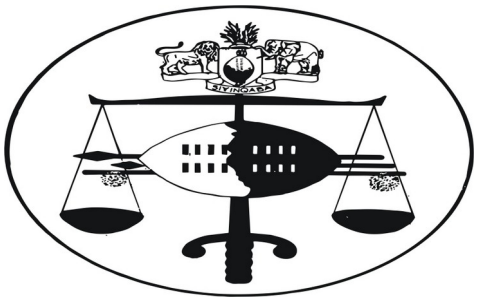

IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

JUDGMENT

HELD AT MBABANE **Case No. 4/2012**

In the matter between:

MDUDUZI ZWANE Appellant

and

SWAZILAND POSTS AND TELECOMMUNICATIONS CORPORATION First Respondent

MPHILISI MNTSHALI N.O. Second Respondent

MBUSO SIMELANE N.O. Third Respondent

Neutral citation: *Mduduzi Zwane v Swaziland Posts and Telecommunications Corporation & 2 Others (4/12) [2012] SZICA 2 (4 October 2012)*

Coram: **RAMODIBEDI JP, OTA AJA, AND ANNANDALE AJA**

Heard: 20 September 2012

Delivered: 4 October 2012

Summary: Appeal ─ Disregard of directive by Industrial Court ─ Procedural approaches under Rules 14 and 7 ─ Reasonable foreseeability of a factual dispute renders Rule 14 (motion proceedings) inappropriate ─ Enquiry by Industrial Court on hearing of evidence *viva voce* to determine if reinstatement or alternative relief appropriate ─ Rule 7 to be followed ─ Basis and *ratio decidendi* of Industrial Court judgment misconstrued ─ Powers of Review not yet ripe for pronouncement on appeal *qua* judicial activism.

THE COURT

[1] The Appellant is a former employee of the First Respondent, Swaziland Post and Telecommunications Corporation (S. P.T.C.) who was dismissed after having been found guilty of gross misconduct at a disciplinary hearing. Dissatisfied with his dismissal, his next port of call was to appeal the outcome of the disciplinary hearing which was outsourced by S.P.T.C. and chaired by the Second Respondent. The Third Respondent chaired the disciplinary appeal and confirmed the decision and recommendation of the Second Respondent.

The Appellant thereafter declared a dispute with the Conciliation Mediation and Arbitration Commission (C.M.A.C), which issued a certificate of unresolved dispute. He then went to the Industrial Court where he sought a review of the disciplinary process and the consequent termination of his employment to be set aside as being invalid. He also sought reinstatement to his former position and an order to be paid arrear salary and benefits.

[2] His application was dismissed by the Industrial Court, without an order as to costs, and he was directed to bring an application in terms of Rule 7, akin to action proceedings in the High Court, contrary to the procedure he followed, namely by way of a notice of motion, where no material dispute of fact is reasonably foreseen.

[3] In his Notice of Appeal, the Appellant (Mduduzi Zwane**)** sets out seven different grounds of appeal:

> "1. The Court *a quo* erred in law and in fact in holding that the Industrial Court does not have review powers once a decision of dismissal has been taken by an employer.

2. The Court *a quo* erred in law and in fact in holding that the Industrial Court does not sit as a Court of review as some decisions by employers may be subject to review on grounds permissable under the common law.

3. The Court *a quo* erred in law and in fact in holding that there is a dispute of fact in the matter which gives the impression that the Court accepted that it has jurisdiction over the matter and thus proceeded to analyse the merits of the matter.

4. The Court *a quo* erred in law and in fact in unilaterally picking certain paragraphs in the Court papers and holding that the papers showed a dispute of fact without inviting the parties to address it on those paragraphs and without dealing with the other grounds of review.

5. The Court *a quo* erred in law and in fact in not specifically dealing with the main ground of review,

namely the failure by the 2nd Respondent to grant a postponement of the disciplinary hearing due to the none availability (sic) of the Appellant's Attorney.

6. The Court *a quo* erred in law and in fact in holding that the 1st Respondent is a private company as opposed to a public company.

7. The Court *a quo* erred in law and in fact in holding that the Industrial Court only exercises powers of review under Rule 7 of the Industrial Court Rule or by only hearing oral evidence."

[4] The Appellant's counsel, in his heads of argument and during the hearing before us, narrowed the focus of the appeal to three of these seven grounds, attacking the judgment of the Industrial Court by having held the 1st Respondent to be a private and not a public entity, by holding that it does not have review powers once dismissal by an employer has taken place and by finding that the factual disputes were such that it could not be resolved on the papers before it. Suffice to

say that the Industrial Court did not hold that it is devoid of jurisdiction as argued by the Appellant.

[5] We will soon revert to some of these arguments *qua* grounds of appeal, as well as the superseding contentions raised by both counsel, as to whether or not dismissal by any decision maker, be it a private or public employer, is capable of being challenged on review in the Industrial Court. Also, whether it is indeed necessary and prudent to decide the issue on appeal and invoke judicial activism to create new legal precedent, as proposed by the Attorney-General *qua* potential *amicus curiae.*

[6] Somewhat belatedly, only to be disclosed in the heads of argument filed by the First Respondent a day before the hearing of this matter, two points *in limine* were canvassed.

[7] The Appellant would have been taken to task for firstly, not depositing or making acceptable arrangements for security of costs and secondly, for failing to file records certified as true and correct by the Industrial Court Registrar.

[8] Each of these points has ample precedent to render an intended appeal a nullity and cause it to be removed from the roll with adverse costs orders, without the hearing of argument and without deciding the merits of the matter.

[9] Rule 24 (1) of the Industrial Court of Appeal Rules requires of an appellant to deposit with the Registrar or to give security by bond to satisfy the potential adverse costs attendant to the prosecuting of an appeal. Failure to do so results in the invocation of Rule 25, an outright dismissal of the appeal, with or without costs.

[10] This was applied in *Vusi Ndzingane v Swaziland Building Society and Another* by the Industrial Court of Appeal in Case Number 4 of 2004, which potentially could well have been applied in this matter.

[11] The second preliminary legal point was to be that since the record was not certified by the Registrar as a true and correct version of the proceedings in the court below, as is required under Rule 21 (4), the appeal should be held to have been abandoned. This court has

previously invoked the sanction in *Andile Zikalala v Teaching Service Commission,* Case Number 5 of 2009.

[12] However, undisclosed as to how and when the Appellant at the last minute rectified these two potentially fatal flaws, the First Respondent abandoned its preliminary legal points, enabling the appeal to be heard. Carelessness and laxity to adhere to the rules of this court may readily cause a seriously aggrieved appellant to be deprived of having its matter heard and determined. Such lackadaisical conduct is adversely frowned upon.

[13] The dismissal of the Appellant which is the *raison d'etre*, the reason and justification for the existence of the ongoing dispute between the former employee and the S.P.T.C, is uncomplicated and straightforward. He was employed for almost nine years as technician before his services were terminated. He was also a union representative of co-employees, a capacity which he relied upon at the C.M.A.C dispute resolution process. His position is recorded in the certificate of unresolved dispute as being that `"…*he was unfairly*

dismissed by (S.P.T.C) for carrying out a union mandate" (Annexure LM 4 at page 38 of the Record).

[14] The conduct that invoked the ire of his employer was his appearance and utterances on a local television breakfast show. In the notice of charges preferred against the appellant for his disciplinary hearing (Annexure LM 1, page 33), the charges were formulated thus:

> ***"Charge No. 1***
>
> *You are charged with gross misconduct in that on the 15th July 2009 you appeared on Swazi Television Broadcast breakfast show and issued wrongful statements about the activities of S.P.T.C in public contrary to the provision in clause 21 of the Swaziland Posts and Telecommunications Code of Ethics.*
>
> ***Charge No. 2***
>
> *You are charged with gross misconduct in that on the 15th July 2009 at the same show you uttered derogatory statements against S.P.T.C Managing Director by using words such as "…. lihumusha" and ridiculing the management team, thus*

causing embarrassment to their integrity and bringing the name of the Corporation into disrepute."

[15] In the course of the disciplinary hearing, it was evident to the chairman, based on the evidence presented and which included reference to the Code of Ethics applicable to all employees of S.P.T.C., that the charges were properly substantiated.

Section 21 of the Code reads:

"MEDIA AND OTHER PUBLIC RELEASES

Any person, outside of the corporate communications relations and marketing department wishing to make any formal public announcement or contribution to any public press article or to make a press statement, comment on matters involving the Corporation must obtain written permission from their head of division. The issuing of press statement by stakeholders will be accordance to collective agreements (sic)."

[16] Section 23 of the Code clearly states that any employee who fails to comply with the Code of Ethics will be disciplined by the Corporation

in terms of the Disciplinary Code or that it may even result in criminal prosecution. Knowledge of the Code of Ethics and acquiescence thereto by the Appellant has never been in dispute.

[17] At the disciplinary hearing, a factual, uncontroversial and unchallenged finding was made that indeed the appellant appeared on the TV show and uttered the words attributed to him in the charges. It was common cause that he was not given permission to do so and that he was not exempted by virtue of being part of the corporate communications relations and marketing department.

[18] In his comprehensive recommendation, the chairman of the hearing concluded that it would be fair and reasonable to summarily terminate the services of the Appellant. The employer acted in accordance with the recommendation and dismissed him.

[19] The disciplinary hearing was outsourced by S.P.T.C. with the chairperson and prosecutor both being experienced attorneys of the High Court. So was the chairman who heard and dismissed the

subsequent appeal. The appellant was represented by his own attorney at the hearing, who also represented him in this Court.

[20] Dates and postponements of the hearing were mutually agreed upon by the different lawyers who were involved, save for a postponement *sine die* in order to await the outcome of a Court application to compel the Television Authority to produce a video recording which would serve to confirm the presence and utterances of the appellant on a television show.

[21] A date for continuation was then determined by the chairperson in liaison with the employer and the appellant was accordingly notified in writing on Monday the 30th November 2009.

[22] The hearing was to continue on Friday the 4th December 2009, well in excess of the required 48 period of notice. A factual dispute remains as to whether the employee was indeed notified on the 30th November, or as late as the 3rd December as alleged by the Appellant in his answering affidavit, filed at the Industrial Court.

[23] Nevertheless, the hearing proceeded on the 4th December, but only after both the Appellant and his attorney walked out of the venue. The transcript of the proceedings graphically illustrates an extremely vitriolic attack by attorney Dlamini on the chairperson, accusing him of all sorts of wrongdoing and "threatening" him with an appeal. The utterances by the attorney are wholly unworthy of an officer of the Court, in whatever proceedings. Whether the Appellant's attorney "advised" him to also walk out of the hearing or whether the appellant merely followed in his footsteps, the conduct of the attorney was *prima facie* unethical. Once he became aware of his multiple commitments or "double bookings" he made no attempt to secure the services of another attorney to stand in for him at either the disciplinary hearing, the High Court or the Industrial Court.

[24] Without leave of the chairperson and having had an application for postponement refused, the Appellant and his attorney abandoned the hearing which then continued in their absence. Soon thereafter it was finalised. No submissions on the merits of the matter were advanced by either the Appellant or his attorney as a result of their untoward behaviour and walking out of the hearing. In view of his conduct, the

Appellant would be very hard pressed to criticise and challenge the decision of the chairman to continue with the proceedings in his absence.

[25] When the matter came before the Industrial Court as an application to review and set aside the proceedings as well as to seek an order of reinstatement, the First Respondent successfully objected *in limine* that it could not be dealt with under Industrial Court Rule 14, which provides for proceedings on motion where there is no factual dispute and also that there could be no order of reinstatement without an enquiry as to its viability.

[26] The learned Judge *a quo* held that the legal position is that it does not sit as a Court of Appeal or to review decisions of employers and that Rule 14 was inappropriate. He further held that the Industrial Court must make its own enquiry on the evidence presented before it as to whether the dismissal was fair or not and thereafter, if it finds that the dismissal was unfair, to decide whether the proper remedy is reinstatement, re-engagement or compensation.

[27] Sub-Rule 14 (1) reads:

> *"Where a material dispute of fact is not reasonably foreseen a party may institute an application by way of Notice of Motion supported by affidavit."*

The Appellant is now at odds with the finding that the matter was fraught with factual disputes material to the issue and criticises the Court for so holding, without having been guided by counsel, reading the pleadings *mero motu.* We fully concur with the Court below in its finding that there are a phlethora of factual disputes which render proceedings on motion inappropriate.

[28] The parties were entirely at odds as to whether the outcome of the hearing was justified by the evidence. This is a factual dispute of the first order, to determine if indeed the evidence substantiated the outcome. The Court below also referred to a further eighteen paragraphs and sub-paragraphs in which factual allegations and submissions were disputed by the First Respondent.

[29] In the Industrial Court of Appeal Case No. 02/2011, *Lynette Felicity Groening v Standard Bank of Swaziland (Pty) Ltd and Tineyi Mawocha,* it was held in paragraph [22] that:

> *[22] "It would appear to me that the Industrial Court Rules permit the launching of matters on motion proceedings provided that no dispute of fact is reasonably foreseen. In this regard, the Applicant must fully consider the matter on the information available; its merits and demerits and cast his eyes ahead on the probabilities whether a dispute is likely, given all the facts at hand, to arise."*

[30] The Industrial Court cannot be castigated for finding that the factual disputes are such that the Appellant did not act in accordance with the above stated admonition. Nor can it be faulted for giving regard to the affidavits placed before the Court without having been guided through all of the material by counsel, before it could be able to determine the presence of a considerable number of factual disputes between the litigants which are material to the issue brought before it.

[31] The *ratio decidendi* for dismissal of the application is formulated in paragraphs [24] and [26] of the Judgment. It reads:

> *[24] "There is therefore no doubt that there is a dispute between the parties whether the dismissal of the applicant was fair or not. The existence of the certificate of unresolved dispute is also* prima facie *proof of the dispute between the parties which would require vidence to resolve.*
>
> .
> .
> .
>
> *[26] "The application is however fraught with material disputes of fact which render the matter not amenable to be resolved on Notice of Motion and the Applicant should be directed to approach the Industrial Court in terms of Rule 7."*

[32] It is our considered view that by giving effect to the above, in the order issued by the Court below, it suffices to dismiss the appeal. Nevertheless, a further issue requires brief mention.

[33] The Attorney-General got wind of the appeal that was noted and that the majority of stated grounds of appeal impact on the jurisdiction of the Industrial Court in relation to its powers of review. He thus wished to be admitted as *amicus curiae* in the Appeal Instead of distinguishing between private and public entities to determine the susceptibility to judicial review, as determined by legal precedent, the object of the argument to be advanced by the prospective *amicus curiae* would have been thus: That administrative and labour law are separate and distinct and that the fairness of all dismissals fall to be determined by the procedures provided for in the Industrial Relations Act of 2000. The argument was to be that common law review is not a competent remedy for unfair dismissal, founded on the distinctions between sections 32 and 33 of our Constitution and also by giving regard to comparative law from South Africa.

[34] The upshot of this argument would have been that the contemporary approach to determine whether a decision to dismiss an employee is subject to judicial review is that the courts are enjoined to look at the nature of the function and not at the functionary itself or the source of

the functionary's power. This proposal contrasts with present precedent, to decide susceptibility to judicial review by focusing on the identity of the functionary ─ private or government ─ instead of the nature of the function, dismissal, which presently features in our jurisprudence. The idea is that an aggrieved dismissed employee, whether from the Civil Service or other public body, or a private non-statutory body with or without exercising public power, all employees across the board shall follow the provisions of Part VIII of the Act and report a dispute to C.M.A.C. for conciliation and if unresolved, then arbitration or adjudication.

[35] As a consequence, common law review is not the competent relief or remedy for alleged unfair dismissal, instead section 16 (1) of the Act provides statutory provision for reinstatement, re-engagement or compensation, according to the intended proposition to have been advanced by the Attorney-General *qua amicus curiae*.

[36] At the outset of the appeal to be argued before us, the prospective *amicus* conceded that the issue is premature. The basis of this appeal

is not to determine the review powers of the Industrial Court, whichever way it was couched by the Appellant.

[37] Instead, the gripe of the Appellant is against the finding by the court below that a procedural defect rendered it unable to properly consider the issues brought before it.

[38] Where action proceedings under Industrial Court Rule 7, in the long form, would allow for the hearing of oral evidence to assess the matter and consider appropriate relief, the Appellant chose to litigate by way of motion proceedings as provided for under Rule 14. This rule, as is common cause, is only appropriate where no factual dispute is reasonably foreseen. It underlies the *ratio* of the decision by the Industrial Court.

[39] The question of reviewability is not central to the outcome of the matter in the court below and indeed, if it reasoned to the contrary, it would not have resulted in the order that was made but in an outright dismissal. The Appellant was explicitly told to re-approach the Court in the proper manner, if it so chose. It would only be then when the

claimed relief could be properly considered, on the evidence placed before it.

[40] Accordingly, the issue sought to be decided by the Attorney-General is premature for now. It must therefore await an opportune time in the future if such be the case. In fairness to him, when these difficulties were pointed out to him, Mr. Vilakati for the Attorney-General very wisely and properly withdrew the Application to admit the Attorney-General as *amicus curiae.*

[41] To a great extent, the appeal before us was motivated on a misconstrued reading of the judgment by the Court below. The *ratio* for the order which was made is clearly set out and the Industrial Court patently and unambiguously opened the door for the Appellant to return to Court but emphasised that he must utilise the correct form of procedure. The Appellant chose to rather ignore the invitation and elected to yet again note an appeal, disregarding the incantation of the Industrial Court. Again, it is obvious that the aim and purpose was directed against the refusal at the disciplinary hearing to accede to a

further postponement, which resulted in the Appellant and his attorney turning their backs and walking out of the ongoing hearing.

[42] The First Respondent was obliged to instruct its counsel to resist the appeal before us and the ably presented argument, heads of argument and supportive authorities to counter the seven grounds of appeal obviously comes at a cost.

[43] The appeal further ignited the Attorney-General to seek audience as *amicus curiae,* again with well researched preparations by Advocate Vilakati in anticipation that an opportunity exists to set new precedent by the Industrial Court of Appeal in respect of the jurisdiction on review that may be exercised by the Industrial Court *vis-à-vis* the identity of an employer, be it public, private or parastatal. The motion to seek audience was withdrawn at the very last minute, after the matter was called in court, as it transpired that it would be premature, with the issues to be decided excluding the jurisdictional and constitutional points that would otherwise have been raised. This Court appreciates the pro-active anticipatory approach adopted by the Attorney-General.

[44] It is for these reasons that we are in full agreement that the appeal shall be ordered to be dismissed, with costs.

Delivered in open Court at Mbabane on this the 4th day of October 2012.

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M.M. RAMODIBEDI

JUDGE PRESIDENT

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E.A. OTA

ACTING JUSTICE OF APPEAL

_____

J.P. ANNANDALE

ACTING JUSTICE OF APPEAL

For the Appellant : **Mr. B.S. Dlamini** of B.S Dlamini & Associates, Nhlangano.

For the First Respondent : **Mr. N.D Jele** of Robinson Bertram Attorneys, Mbabane

2nd and 3rd Respondents : No Appearance.