IN THE INDUSTRIAL COURT OF APPEAL

JUDGMENT

In the matter Between: Case No.02/2019

CENTRAL BANK OF SWAZILAND Appellant

And

THULANI DLAMINI 1st Respondent

DUDUZILE DLAMINI 2nd Respondent

ZINHLE MABUZA- TEMBE 3rd Respondent

Neutral citation: ***Central Bank of Swaziland v Thulani Dlamini and Another (02/2019) [2019] SZICA 01 (2nd May, 2019)***

Coram : **M. Dlamini AJA, D. Tshabalala AJA and N. Maseko AJA**

Heard : **11th April, 2019**

Delivered : **2nd May, 2019**

Appeal **:** ***Court a quo correctly finding that appellant effected restructuring exercise – further correctly finding that respondents were subject of restructuring – it follows that restructuring agreement governs the process and not promotion policy – first set of three letters were therefore written in error as they refer to 15% adjustment which is under the promotion policy instead of 5% or minimum wage whichever is higher as per restructuring agreement.***

Summary: The appellant is displeased with the decision of the court below that it is bound by its first offer of 15% salary adjustment instead of 5%. Appellant pleads i*ustus error*. Respondents submit that common law principles of offer and acceptance are applicable. Appellant cannot renege from such contract.

The parties

[1] The appellant is the creature of statute. Its core mandate is to issue and monitor the flow of currency, supervise banking and financial institutions in the Kingdom. Its principal place of business is at Mbabane City, region of Hhohho.

[2] The 1st, 2nd and 3rd respondents are employees of appellant. 1st respondent is a male adult while 2nd and 3rd respondents are female adults. They are all residing in Mbabane.

Brief synopsis

[3] The matter came before the *court a quo* at the instance of the respondents. They asserted that about 30th April 2015, the appellant wrote letters to each one of them appointing them to certain specific positions. However, on 19th May 2015 appellant again wrote letters to each of them, changing terms and conditions of their employment. These changes were less beneficial to them.

[4] They challenged the appellant's unilateral decision to change their terms and conditions of their employment without their prior consultation and consent. They point out that it was unlawful for the appellant to change their terms and conditions of employment more so as these were disadvantageous to them. They maintain that there was nothing wrong with the first offer as it was in accordance with the appellant's Promotion Policy. They contend that they were not part of the restructuring agreement which appellant sought to impose upon them by the second offer.

The appellant

[5] The appellant who was respondent in the court below, averred that the respondents were members of Swaziland Union of Financial Institution and Allied Workers (SUFIAW). SUFIAW represented respondents' interest.

[6] Appellant intended to undertake restructuring. It engaged a consultancy which prepared a report. In order to implement the report, appellant engaged SUFIAW and Swaziland Staff Association for Financial Institution

(SSAFI). The result was a memorandum of agreement (MoU) concluded and signed by appellant, SUFIAW and SSAFI.

[7] As a result of the MoU, the appellant authored the two sets of three correspondences which forms the subject of this litigation. The first set of letters adjusted their salaries by 15% increase. This was an error as the MoU allowed a 5% adjustment and where less than the minimum pay in that particular position, the minimum pay.

The decision of the Court below

[8] The learned Justice in his judgment, acknowledged that appellant took a decision to restructure in early 2013 and that it engaged a consultancy. The learned Judge stated;

> *"The consultancy firm began its work and partnered and or collaborated with 3 (three) institutions that represented the stakeholders. The purpose of the partnership or collaboration was to ensure representation of employees at all levels in the deliberations, especially those employees who would be affected by the restructuring exercise."*

[9] The learned Judge further accepted that the employees of appellant were represented by SUFIAW and SSAFI. The MoU was concluded and signed on 19th May 2014.

Ground of appeal

[10] The appellant raised about seven grounds of appeal. The last two grounds were on costs. The main grounds were that the *court a quo* misconstrued the law in determining what formed an unfair labour practice. It misdirected itself by holding that appellant had no right in law to correct its error as the 5% had been consented to by the parties.

Common cause

[11] As correctly analysed by the learned Judge in the *court a quo*, it is not in issue that the respondents are members of SUFIAW and SSAFI. It is common cause that the two unions negotiated the terms of restructuring on behalf of appellant's employees including respondents.

Respondents

[12] Learned Counsel on behalf of respondent ferociously submitted that the letters dated 30th April, 2015 conveyed a promotion to the appellant. She contended that before the letters were authored, a series of meeting took place between appellant and respondents. The best person to attest to this were the authors of the letters of 30th April, 2014, namely, **D.G. Zwane** and **P. Mthupha.** The deponent to the answering affidavit, **Refiloe Mamogobo** could not dispute the assertion that the respondents were promoted to

higher positions by the letters of 30th April 2014. This is because **Refiloe Mamogobo** was not part of the consultation team that engaged the respondents.

[13] Further, it was so contended on behalf of respondents, that the 15% increment was in line with the Promotion Policy of appellant. The promotion offer of 15% was accepted by the respondents as the learned judge correctly found. This court was referred to the excerpt of the judgement which reads:

> "*11. In the papers filed before court there is no written acceptance of the offers dated 16th April 2015 (annexure TD5, TD1© and CBS 3). The respondent's counsel informed the court that each of the applicants accepted the offer and submitted written acceptance to the respondent's management. The acceptance forms were kept by the respondent's Deputy Governor in his office at the respondent's workplace. The Deputy Governor is out of the country and his return date is not known.*
>
> *His office is inaccessible to other members of staff. Consequently the respondent's counsel was unable to produce the signed acceptance forms. The respondent's counsel further mentioned that it was not in dispute that the respondent's offer as contained in annexures TD 5, TD 1 © and CBD 3 was accepted in writing, on the 16th April 2015, by each of the 3 (three) applicants. The respondent's counsel added that, in the circumstances – proof of acceptance of the offer would not be necessary. The court was asked to dispense with the need to prove*

acceptance of the offer. The court is accordingly relying on the concession made by the respondent's counsel."[1]

Case Law

[14] The appellant has pleaded *justus error*. *R*espondents however, insist on the common law principle that once an offer is accepted, a contract becomes binding to both parties. The mistake so pleaded is a unilateral error at the instance of appellant. Appellant did not plead that the respondents contributed to the error. The question is therefore does our law allow for the rescission or setting aside of a contract where one party pleads error at his own hands.

[15] **Schoeman AJA**[2] was once faced with a similar case where the Gauteng Department of Transport and Public Works concluded three contracts of tender with the appellant on the mistaken basis that it was dealing with another company named African Bridge. The honourable Justice clarified and then referred to **L.C. Hofmann**:

"*One of the primary requirements of any contract is that there must be a meeting of the minds regarding the essentials of the contract that the parties intend concluding. As a result: 'Mistake, whether caused by*

[1] Page 108 paragraph 11

[2] African Information Technology Bridge 1 v The MEC for Infrastructure Development Gauteng Province (134/2014) [2015] ZASCA 104 (2 July 2015) at paras 21-25

misrepresentation or not … is generally regarded as a defect of the will, thus vitiating the consent or assent of the parties… [F]or the formation of a valid agreement the concurrence of the will of the parties is necessary and essential, and the will can be vitiated by defects as e.g. mistake, misrepresentation, fraud and duress.' "

[16] The learned Judge proceeded to hold that the case before him was based on a "*unilateral error in persona*". He then quoted from **National and Overseas Distribution Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473** at 479F-H as follows:

"*Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (justus) and it would have to be pleaded.*

[17] **Jones J**[3] hit the nail on the head as he explained:

[3] *See para 25 of Schoemann* (*supra)*

> "*[H]e is not bound by his apparent acceptance of it if he was genuinely mistaken, even though his mistake is unilateral, provided that he acted reasonably, in the circumstances and his mistake was justus.*"

Issue

[18] Before one can ascertain in terms of the legal principle on whether the appellant has established *iustus error* as per the case law, the first question for determination which is crisp is, "What do the letters dated 30th April 2015 import? A promotion or restructuring?"

Determination

[19] On the poser as to whether the correspondence of 30th April 2014 were a promotion or restructuring, the answer lies in the letters themselves. A copy of the letter addressed to 1st respondent reads:

> "*30th April 2015*
>
> *Our ref: CBS/PF 714*
>
> *Mr Thulani Dlamini*
> *Central Bank of Swaziland*
> *Banking Division*
> *Mbabane*
>
> *Dear Sir,*
>
> *APPOINTMENT TO THE POSITION OF BACK OFFICE CLERK*
>
> *Following the Restructuring Exercise you are hereby appointed to the position of Back Office Clerk on the following terms and conditions.*
>
> 1. *Your appointment is with effect from 1st May 2015*

2. *Your salary job grade is B4 on Paterson System which gives you a salary of E12, 138.00 per month*

3. *Your other benefits and conditions of employment remain unchanged.*

May I take this opportunity to congratulate you on this assignment and reaffirm that the Bank continues to bank on your input for success.

Yours faithfully

D.G. Zwane
ACTING MANAGER HUMAN RESOURCE

cc. Governor
Acting Deputy Governor
G.M. Operations
Manager Banking
Manger Internal Finance
Manager ID
Salary & Loans Accountant
Staff Benefits Accountant"[4]

[20] Similarly the correspondence to 2nd respondent reflects:

"*16th April 2015*

Our ref: CBS/227

Ms. Duduzile Dlamini
C/o Central Bank of Swaziland
Banking Division
Mbabane

Dear Sir,

YOURSELF/CBS RESTRUCTURING, 2015

1. *Following our meeting and consultation on the above mentioned on the 15th April 2015and related processes, we wish to confirm the following:-*

1.1 You are an affected staff member in terms of the process, with a change in your current job title from Stores Clerk to Store keeper

[4] Page 17

1.2 The effective date of the change is 1st May 2015

1.3 Your new salary job grade on the Paterson Scale is C2. Your monthly gross salary will be E19,626

1.4 Your annual leave entitlement will be 30 working days per annum

1.5 Your other benefits and conditions of employment remain unchanged.

2. Accordingly therefore and by this letter, you are invited to make written submissions, if any, with regards to your acceptance of the recommendations above or feedback for consideration by the bank.

3. The afore-stated invitation for submission is availed to be made by close of business of Tuesday, 21st April 2015 and is returnable to the Acting Manager HR

4. You are therefore requested to indicate your acceptance/rejection of the restructuring by signing the attached form

5. May I take this opportunity to congratulate you on this assignment and re-affirm that the Bank continues to bank on your input for success.

Yours faithfully

M T NKAMBULE
ACTING GENERAL MANAGER CORPORATE SERVICES

cc. Governor
Acting Deputy Governor
Acting Assistant Governor
Acting G M Finance & Financial Markets
Manger Internal Finance
Manager ID
Salary & Loans Accountant
Staff Benefits Accountant"[5]

[21] 3rd respondent's letter states:

"*30th April 2015*

[5] Page 87

Our ref: CBS/PF 822

Ms. Zinhle Mabuza
Central Bank of Swaziland
Banking Division
Mbabane

Dear Sir,

APPOINTMENT TO THE POSITION OF BACK OFFICE CLERK

Following the Restructuring Exercise you are hereby appointed to the position of Back Office Clerk on the following terms and conditions.

1. *Your appointment is with effect from 1st May 2015*
2. *Your salary job grade is B4 on Paterson System which gives you a salary of E11, 444.00 per month*
3. *Your other benefits and conditions of employment remain unchanged.*

May I take this opportunity to congratulate you on this assignment and reaffirm that the Bank continues to bank on your input for success.

Yours faithfully

D.G. Zwane
ACTING MANAGER HUMAN RESOURCE
cc. Governor
Acting Deputy Governor
Acting Assistant Governor
G.M. Operations
Manager Banking
Manger Internal Finance
Manager ID
Salary & Loans Accountant
Staff Benefits Accountant"[6]

[22] Glaring from the face of the letters is that they each refer to restructuring exercise as two of them read: *"Following the restructuring exercise…"* The third one reads, *"following our meeting and consultation on the above*

[6] Page 18

mentioned on the 15th April 2015 and related process…." The above mentioned is *"CBS (*Appellant) *Restructuring 2015"*

[23] From the above, *ex facie*, the letters point that the respondents were subjected to a restructuring and certainly not a promotion. I must hasten to point out that if the respondents were promoted, the letters would have clearly stated the respondent's current position and the new one. For instance it would have read: *"This serves to advise you that you are promoted from messenger to position of clerk."* In the letters serving before court, no previous positions were mentioned. The letter directed to 2nd respondent is clear that it was on restructuring as it reads: *"you are an affected staff member in terms of the process* (i.e restructuring*) with a change in your current job title from Stores Clerk to Store Keeper."* Now the restructuring came with changes in the name of the positions. Letters addressed to 1st and 3rd respondents show a position *"back office clerk."* This is consistent with restructuring and not promotion.

[24] The learned Judge took a similar view as he observed:

> *"6. The restructuring exercise involved the process of* ***job grading***. ***The applicants were among the employees who were affected by the restructuring.*** *On the 16th April 2015 the respondent wrote the 1st applicant a letter which is annexure TD5 to the founding affidavit. The letter (TD5) is hereby reproduced;"*[7]

[7] Paragraph 6 page 103

[25] Now, once the honourable Justice found that the respondents were affected by the restructuring exercise and the letters of 30th April 2015 were written to give efficacy to the restructuring exercise, it followed that the terms of the MoU were applicable. This is because the MoU contained the parties (applicant and respondents representatives being SUFIAW and SSAFI) terms and conditions pertaining to restructuring. Clause 5 of the MoU read:

> *"5 That on conversion to a higher grade employees should receive an increase that enhances their salary by 5% or to at least the minimum of the grade whichever is higher."* [8]

[26] The MoU recognised a 5% adjustment in salary or the minimum wage if it was higher than the 5%. It is clear that the 15% adjustment mentioned in the letters of 30th April 2015 was not in terms of the restructuring exercise or MoU. Once the *court a quo* established that the letters were written in order to effect the restructuring, this was tantamount to saying that they were not written pursuant to promotion. The natural consequence was that the promotion policy was excluded. It was therefore erroneous of the court to import the terms of the Promotion Policy. It ought to have accepted that the appellant made an error in adjusting the salaries by 15% which is provided under the Promotion Policy and not under the MoU which governs the restructuring exercise.

[8] Page 102 paragraph 5

[27] What justifies this error? As already alluded to, the 15% reflected by the appellant in its first set of three letters was provided under the Promotion Policy and not under the MoU. The MoU provided for a 5% increment or minimum wage scale, whichever was greater. Once therefore it became clear that the first letters were written pursuant to the restructuring exercise, it ought to have been apparent that the offer of 15% increment was a *justus error* as it was not provided for under the very exercise sought to be implemented. Further, by the appellant indicating from the onset in the first letters that it was effecting restructuring, it so acted reasonably in terms of the requirements for *iustus error*.

Costs

[28] Learned Counsel for appellant lamented the court's decision to mulct appellant with a costs order. He referred to the reason by the *court a quo* which reads:

> "*58 The applicants have done a considerable amount of work in prosecuting their claim and in the process have incurred costs. It would be fair that the Applicants be compensated for the costs incurred.*"[9]

[29] **Mr. M. J. Manzini** pointed out that there was nothing peculiar about the reasons mentioned by the court on slapping appellant with costs. In fact the same reasoning could be imputed to appellant "*that it too had done a considerable amount of work in defending the matter*." I agree with **Mr. M. J. Manzini** in this regard. However, **Mr. M. J. Manzini** applied that

[9] Page 138 paragraph 58

this court should order respondent to pay costs of suit. When the court called for exceptional circumstances warranting such an order following the acceptable practice that as a court of equity, costs orders should not be taken against a litigant, **Mr. M. J. Manzini** withdrew the application. He took a wise decision in that regard.

Orders

[30] In the final analysis, I enter the following orders:

30.1 Appellant's appeal is upheld;

30.2 The orders of the *court a quo* are set aside;

30.3 The second set of correspondences adjusting respondents' salaries by 5% or minimum wage scale, whichever is greater, are declared valid;

31.4 Each party to bear its own costs.

_____

M. DLAMINI AJA

We agree;

_____

D. TSHABALALA AJA

_____

N. MASEKO AJA

For the Appellant	**:**	M.J. Manzini of M. J. Manzini and Associates
For the Respondent	**:**	H. Mkhabela of Mkhabela Attorneys