Gundane & Sons (Pty) Ltd v Ntombifuthi Ndlangamanlda Dlamini and Another [2023] (9/2022) SZICA 12 (5 May 2023)

JUDGMENT BY J.M. VAN DER WALT JA, NSIBANDE JP CONCURRING

Summary

Application for Determination of Unresolved Dispute in Industrial Court - requirements for Statements of Claim and Replies in the Industrial Court – restated that ***Rules 7(4)*** *and* ***8(2)*** *of the Rules of the Industrial Court require inter alia clear and concise statement of the material facts and legal issues – as regards a respondent, in addition, clear and concise statement of any preliminary legal issue, and of material facts and legal issues upon which respondent relies in its defence.*

Appeal Record – ***Rule 21(4)*** *in terms of which appeal deemed abandoned for want of timeous filing of record or filing of incomplete*

record potentially holds serious consequences for appellant – Court's approach to be careful and meticulous

Appeal Record - assumed to be complete unless a party avers to the contrary, or where patent ex facie what has been filed that there was an omission of a relevant document or documents – in casu judgment a quo based on prescription but no reference to prescription in pleadings contained in Appeal Record and no suggestion by any party on appeal that Appeal Record incomplete – parties not called on to address Court on the issue at hearing of appeal - insufficient grounds to hold that appeal deemed to have been abandoned for want of filing complete record in terms of ***Rule 21(4)***

Appeal to Industrial Court of Appeal – confined to questions of law - ground of appeal relied on in casu not identifying any misdirection as to the true law – appeal dismissed

JUDGMENT

Cur adv Vult

(Postea: 5 May 2023)

VAN DER WALT, JA

[1] I have read the judgment penned by my brother Mazibuku JA herein and although I arrived at the same result, i.e., dismissal of the appeal, I arrived thence *via* a different route.

1.1 Where our views diverge is on the question whether the appeal should be deemed abandoned for failure to file a complete record.

1.2 **Rule 21(4)** of the Rules of this Court stipulates that:

" (4)Subject to Rule 16(1)[1], if an appellant fails to note an appeal or to submit or resubmit the record for certification within the time provided by this Rule, the appeal shall be deemed to have been abandoned."

1.3 This Sub-Rule potentially holds serious consequences for an appellant, where either no record or an incomplete record was filed, and it goes without saying that this Court has to approach it with meticulous care.

1.4 In my humble opinion an appeal record is assumed to be complete unless the respondent avers to the contrary, or where it is patent *ex facie* what has been filed that there was an omission of a relevant document or documents. This issue will be reverted to later hereunder.

[2] The factual matrix of this case concerned salary deductions by the Appellant Employer. The affected Respondent Employees maintained that these deductions were unlawful and unfair and as Applicants, sued the Employer as Respondent in the Court *a quo* for payment thereof. The cases were consolidated and the

[1] i.e., application for extension – no such application had been made *in casu*

Court *a quo*, after dismissing points *in limine* raised by the Employer including a point as to prescription,[2] directed that the manner be referred to trial with costs being costs in the cause.

[3] **Section 76(2)** of the Industrial Relations Act No 1 of 2000 (as amended) stipulates that:

> ***"A dispute may not be reported to the Commission[3] if more than eighteen (18) months has elapsed since the issue giving rise to the dispute arose."***

[4] It appears to be common cause between the parties that the deductions in question were made during the period July 2012 to October 2014 and that the disputes were reported to the Conciliation, Mediation and Arbitration Commission ("CMAC") on or about the 19th November 2014. On the 9th December 2014 CMAC issued Certificates of unresolved Dispute in respect of the claims pursued in the Court *a quo*.

[5] The Employees in their papers averred that: "***Subsequent to the unfair and unlawful deductions and after numerous engagements of the***

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[2] In the Appeal Record before Court no written points *in limine* or a defence of prescription are contained

[3] i.e. **CMAC**

Respondent by the Applicant, to no avail, the latter reported a dispute to CMAC." The Employer, save to deny any unlawfulness or unfairness, agreed with this statement.

[6] The Court *a quo,* citing authorities to the effect that that the running of prescription is interrupted when the claim or the dispute between parties is subject of litigation, as held in *inter alia* ***John Kunene v The Attorney General*** [4] or when the employer acknowledges liability or the employee challenges the employer *inter alia* by filing an internal appeal at the workplace or by initiating court process against the employer,[5] held that:

> ***"The prescription was therefore interrupted when the employees engaged the employer internally pointing out their dissatisfaction. Whether or not they were successful in that internal engagement is not a determining factor."***

[7] The Employer, being dissatisfied by the outcome, filed the instant appeal. When the matter eventually came before us, the Employer's Counsel confined the ambit of the appeal to the first ground of appeal which reads:

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[4] **(02/16) 2016 SZICA 08 (14 October 2016)**
[5] **Volkskas Bpk v The Master and Others 1975 (1) SA 69 (T)** cited with approval in ***Phumelele Dlamini v Lobenguni Manyatsi N.O., Conciliation Mediation and Arbitration Commission: NERCHA***

"1. The Court a quo erred in law by holding that the prescription on late filing of Respondents' dispute at the Conciliation, Mediation and Arbitration Commission was interrupted."

[8] The Respondents sought condonation for late filing of their Heads of Argument. Appeals to this Court are confined to questions of law only and it may not entertain questions of fact. In considering the condonation application and for purposes of that application only, it was assumed that this stated ground constitutes a question of law. Condonation was granted and the parties proceeded to present submissions on this ground.

A SUBMISSIONS ON BEHALF OF THE PARTIES

A.1 ON BEHALF OF APPELLANT

[11] With reference to the same authorities cited by the Court *a quo*, the Employer's Counsel Mr Dlamini submitted that a strict interpretation as to when the issue arose should be applied and i*n casu*, that the operative date would be when the underpayment

first had been made i.e., July 2012, which was more than eighteen months prior to the reporting of the dispute to **CMAC.**

[12] There was no documentation as to any negotiations and in any event, as appears for instance in the case in ***Mandlenkosi Mamba and Another v The King's Office and Another,***[6] documentation relied on in support of interruption should predate the eighteen months' deadline.

[13] The gist of Mr Dlamini' argument, as I understood it, was that the papers disclosed none of the recognised instances of interruption i.e., acknowledgement of liability, internal appeal or litigation and as such, that the Employees' claims had prescribed.

A.2 ON BEHALF OF RESPONDENT

[14] Mr Kunene for the Employees referred the Court to two additional authorities:

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[6] *(199/19) [2020] SZIC 99 (14 August 2020)*

14.1 In ***Jameson Twala v NEOPAC Swaziland Limited***[7] it was held that the term "***issue giving rise to the dispute***" in the aforesaid **section 76(2)** bears the same meaning in legal context as "***cause of action***" which in turn means:

> "*... every fact which it would be necessary for the Plaintiff to prove if traversed in order to support his right to the judgment of the Court. It does not comprise of every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved.*"

14.2 In **Monday Dlamini v Industrial Development Company of Swaziland**[8] it was held, with reference to the facts of that matter, that the cause of action had arisen after the employer had communicated a final stance that it would not pay a severance allowance.

[15] Mr Kunene proceeded to argue, by analogy, that the cause of action in the case now before us had arisen when the Employer neglected to respond to the Employees' final demand to pay the deductions, which according to the Heads of Argument was in March 2015. I must pause here to state that I could find no

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[7] *Industrial Court Case No 18/98*
[8] *(102/2020) [2020] SZIC 159 (24 November 2020)*

reference to this date in the papers contained in the Appeal Record.

[16] Mr Kunene also submitted that the stated ground of appeal does not clearly demonstrate where in the conclusion of the Court *a quo* the supposed error of law lies and as such no error of law has been shown.

B ANALYSIS, CONCLUSIONS AND ORDER

[17] From the outset it is noted that none of the parties before us averred, or even suggested, that the Appeal Record placed before us is incomplete in any respect and what is to follow is confined to the four corners of what was placed before this Court.

[18] **Rules 7(4)** and **8(2)** of the Rules of the Industrial Court require *inter alia* that the applicant's Statement of Claim and the respondent's Reply *shall* contain a clear and concise statement of the material facts on which the party relies and a clear and

concise statement of the legal issues that arise from the material facts.

18.1 As regards a respondent and in addition, a clear and concise statement of any preliminary legal issue which the Respondent requires to be determined before the matter proceeds to trial on the merits and a clear and concise statement of the material facts and legal issues upon which the Respondent relies in its defence, are required.

18.2 These Sub-Rules are couched in peremptory terms and should be adhered to by all parties; meticulous pleading is called for.

[19] *In casu*, there are no particulars alleged in the Statements of Claim as to the date or dates, or the nature or contents of the *"numerous engagements of the Respondent"* prior to reporting the matters to CMAC.

[20] The defence of prescription renders a right unenforceable due to lapse of time. This defence usually is raised *in limine* by way of

a special plea. Prescription never was referred in the papers contained in the Appeal Record, or in the relevant Certificates of Dispute.

[21] Whether prescription is interrupted for instance by litigation, is a *legal question i.e., a matter to determined by authoritative legal principles*. When in a given case the answer to the legal question is that litigation in law does indeed interrupt prescription, the next sequence in the exercise would be to enquire and establish firstly, whether there had been litigation and secondly, whether the date on which the litigation commenced fell within the deadline period.

21.1 The latter two enquiries constitute *questions of fact* i.e. *matters capable of proof and the subject of evidence adduced for that purpose.* [9]

[9] Compare ***Trevor Shongwe v Machawe Sithtole and Another (08/2020) [2021] SZICA 1 (10 August 2021)*** Paragraph 13.1, extracts from ***Swaziland Electricity Board v Collie Dlamini Appeal Case 2/2007*** and the cases cited therein

21.2 The Legislature excluded of a right of appeal to this Court on a question of fact. As was held for instance in **Attorney-General, Transvaal v Kader,** [10] where an appeal on the facts is not available to it, the aggrieved party accordingly also is not entitled to question the manner in which the Court *a quo* reached its decisions on the facts.

[22] It unclear how the prescription defence was placed before the Court *a quo*.

22.1 An alternative scenario to an incomplete Appeal Record easily could be that this defence had been raised and dealt with during the course of argument, with reference to the contents of the papers filed of record, in which case, arguably, the Court *a quo* should not have entertained it on the basis that it had not been pleaded properly in the papers filed.

[10] **1991 (4) SA 727 (A)** at 740

22.2 Short of hearing evidence, which this Court is not empowered to do, it will have to remain a mystery as to how and when the defence materialised.

22.3 This therefore is not an instance wherein it is patent *ex facie* what has been filed, that there had been an omission of a relevant document or documents.

22.4 To assume, in the absence of mention of prescription other than in the judgment, that any of the parties had filed something not included in the Appeal Record, in my respectful opinion is to go too far more so since none of the parties at the appeal hearing even hinted that the Record may be incomplete, and this Court at the hearing of the appeal did not call on the parties to make submissions on the Record and/or on the applicability or not of **Rule 21(4)**.

22.5 As observed *supra*, this Sub-Rule should be applied with meticulous care. In all the circumstances, I am not persuaded that

there is sufficient grounds or justification to hold that an incomplete Appeal Record had been filed.

[23] On a conspectus of this matter as a whole it is my considered view that:

23.1 The conclusion of the Court *a quo* that the "*internal processes*" or *"engagements"* resorted under the recognised circumstances interrupting prescription, and commenced on a date prior to the eighteen months' deadline thereby interrupting prescription, presuppose findings of fact, which fall beyond the purview of this Court.

23.2 The core issue to be established, therefore, is what question of law, if any, falls to be determined by this Court.

23.2 The ground of appeal advanced before us, as formulated in the Notice of Appeal, is ambiguous as to whether the Employer's complaint is in respect of the facts or of the law.

23.3 In argument, the challenge by the Employer was not that the Court *a quo* erred as to correct legal position; the challenge was that the papers disclosed none of these recognised instances of interruption.

23.3 These constitute questions of fact, which are not justiciable by this Court and in the result, no question of law is properly before this Court.

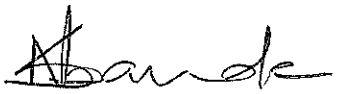
[25] Accordingly, it is ordered that:

1. The appeal is dismissed.

2. No order as to costs.

J.M. VAN DER WALT
JUSTICE OF APPEAL

I agree



S. NSIBANDE
JUDGE PRESIDENT

For the Appellant: Mr A Dlamini of B.S. Dlamini & Associates Robinson Bertram Attorneys

For the Respondent: Mr S Kunene of Henwood & Company Attorneys