IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

CASE NO. 3/94

In the matter between

WORKERS REPRESENTATIVE COUNCIL Appellant

and

MANZINI TOWN COUNCIL Respondent

Coram:

Melamet P.

Schreiner JA.

Browde JA.

JUDGMENT

Browde JA:

In this matter the Appellant seeks to appeal against the decision of the High Court dismissing an appeal against the decision of the President of the Industrial Court delivered on 22nd December 1989. In the latter Court the Appellant sought an order restraining the Respondent from "preventing and obstructing the Respondent's employees, as represented in these proceedings by the Applicant in (sic) continuing their duties as usual or as normal".

The founding affidavit referred to a strike which commenced on the 9th of October 1989 and, according to the Appellant in its affidavit, ended on the 20th of October 1989 when notice was given to the Respondent that the workers would resume their duties on 23 October 1989. On the last-mentioned date, so it was alleged, the workers resumed their duties but at 11 a.m. the Respondent stopped them from working.

The application was opposed and one of the allegations in answer to the founding affidavit was that the Respondent and the Labour Department had previously drawn the attention of the Appellant to the fact that the latter's employees were engaged in rendering sanitary services which fell under the definition of "essential services" for which strike action was prohibited by section 65(2) of the Industrial Relations Act No. 4 of 1980. It was further stated in the answering affidavit that despite this information the Appellant proceeded with the strike action and the Respondent, acting in terms of section 62(1)(c) of the Act, treated the strike as a breach of contract and summarily terminated the services of the employees. The matter came before the Industrial Court and the President of that Court found that as a matter of fact all the employees who went on strike were indeed engaged in an essential service and were therefore prohibited from engaging in strike action by the provisions of section

65(2) of the Act. On this basis the application was dismissed.

The Appellant being dissatisfied with the judgment in the Industrial Court appealed to the High Court on the following grounds:

(i) The Court a quo erred in law in holding that section 65(2) of the Industrial Relations Act 4 of 1980 applies to all members of the Appellant; and

(ii) The Court a quo erred in law in holding that the Applicant's members had voluntarily terminated their services.

The matter appears to have been fully argued in the High Court and Dunn J. came to the conclusion that the question as

to whether the persons who went on strike were involved in "essential services" was a matter of fact and that therefore the Appellant did not have the right to appeal from the Industrial Court on that point. That finding was based on the provisions of section 5 of the Industrial Relations Act and particularly sub-sections 5(2) and 5(4) which respectively read as follows:-

Sub-section (2) reads:-

"Any matter of law arising for decision at a sitting of the Court and any question as to whether a matter for decision is a matter of law or a matter of fact shall be decided by the President."

And sub-section 5(4) reads:

"Save that the President's decision made in terms of sub-section (2) shall be appealable to the High Court and from there to the Court of Appeal, no decision or order of the Court shall be subject to appeal to any other Court, but the High Court shall, at the request of any interested party, be entitled to review the proceedings of the Court on grounds permissible at common law."

In my opinion the latter sub-section is capable of being read in two ways. The word "decision" in the sub-section is in the singular and could therefore refer only to a decision by the President as to whether or not a matter is one of fact or one of law. If it were to be interpreted in this way then a would-be appellant would be deprived of the right to appeal purely on a question of law. Consequently I would interpret the sub-section widely so as to encompass both the decision on a matter of law and a decision as to whether a matter is

one of law or fact. I intended to express the view in this judgment that sub-section (4) needs to be re-worded so as to make it clear that either decision is appealable. My attention has been drawn, however, to the Industrial Relations Bill 1995 and particularly section 11(1) thereof. This section deals with the right of appeal or review and reads as follows:

"There shall be a right of appeal against the decision of the Court on a question of law only to the High Court. "

Unfortunately this intended amendment is also, in my view, ambiguous. It is not clear whether the word "only" qualifies "a question of law" or "to the High Court". If it is intended to mean that the right of appeal should exist only in relation to a question of law then the word "only" should come after the word "Court" where it is first mentioned in the sub-section cited.

However one reads the sub-sections that I have referred to it is clear that no appeal exists on questions of fact and as both the question as to whether the strikers were employed in essential services and the question whether or not sanitary services are "essential services" are, in my opinion, clearly

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factual matters, I am of the view that Dunn J was correct in holding as he did in that regard.

No leave to appeal was sought from the Appeal Court nor was any certificate granting such leave obtained from the Judge who heard the appeal as required by Section 15 of the Court of Appeal Act 1954. This section deals with the right of appeal in matters where the High Court has exercised its civil appellate jurisdiction and the grounds of appeal involve a question of law and not a question of fact. If this had been the only section dealing with appeal from judgments of the High Court in the exercise of its civil jurisdiction the present appeal could have been struck off the roll. But section 16 is of general application and provides:-

"An appeal shall lie to the Court of Appeal where provision is expressly made in an act for such appeal".

Section 5(4) of the Industrial Relations Act, the terms of which are set out above, does indeed make express provision for an appeal to the Appeal Court. It states that an appeal from a decision of the President in terms of sub-section (2)

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"shall be appealable to the High Court and from there to the Court of Appeal". It does not say that the appeal to the Court of Appeal from a decision of the High Court on appeal shall be permissible only on leave to appeal being given by the Appeal Court or on a certificate being obtained from the Judge who heard the appeal and in our view there is no reason for reading this limitation into section 5(4). Section 16 of the Appeal Court Act applies and therefore an appeal as of right lies from the High Court to this Court on a question of law.

Mr Fine who appeared before us for the Appellant has argued, that it was incumbent upon the Respondent to show that each person who went on strike was involved in providing an essential service. It seems to me that this is also a question of fact and that it was sufficient for the Respondent in its answering affidavit to state as it did that:-

"The position taken by the senior Labour Officer is correct and that since all members of the Applicant were engaged in the essential services such a strike would be in contravention of section 65 of the Industrial Relations Act 4/1980."

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The reference to the senior Labour Officer is derived from a letter from that official which was part of the papers before the Industrial Court in which the official stated that the organisation i.e. the Appellant was "by virtue of its service to the nation (a) sanitary serving organisation." As these allegations were unchallenged I am of the view that the Industrial Court was justified in finding

that the strike was illegal and since this finding was based on a question of fact the Appellant had no right of appeal on this point to the High Court let alone to this Court.

Mr Fine has also argued that the notice given by the Respondent to all the employees of the council who were on strike and dated 9 October 1989 (Annexure "F" to the answering affidavit) was invalid since it was not directed to each employee individually. For this submission Mr Fine relied on the case of Tshabalala v The Minister of Health 1987 (1) SA 513 in which at p. 521 Goldstone J (as he then was) said:

"In my judgment, the notice to terminate was not given by the chief superintendent clearly or unambiguously to any of the students. The chief superintendent was not entitled to issue a general order terminating the employment of all the students and leave it to those who participated in strike action to determine for themselves whether the termination applied to them or not. The fact

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that the termination was stated to be retrospective to 13 November 1985 made it worse. None of the students failed to report for duty until the following day. Would the students not have been entitled to assume that the termination related to some conduct of which they were individually unaware, and which occurred, or was alleged to have occurred, on 13 November 1985?"

The learned judge went on to state that the notice of termination was invalid and ineffective in respect of all of the students. While I agree that generally speaking each employee is entitled to know the exact terms of the notice given to him/her and is also entitled to be heard as to whether he/she should be subjected to a disciplinary step of any kind whatsoever, it is my opinion that there is a basic distinction between Tshabalala's case and that of the Appellant before us. The notice given to the employees on strike in the present case was preceded by a letter from the Appellant to the senior labour officer of the Respondent Town Council dated 26th September 1989 in which the Respondent was given notice "on behalf of the Manzini Town Council workers" that the latter were intending to strike. As I understand the papers it appears that only those workers who went on strike were involved in the attempted return to work on the 23rd October 1989 and it was only in respect of those workers that the dismissal took place. In this regard Dunn J said that during the hearing he pointed out:

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"that the ruling of the Industrial Court was confined to members of the Applicant who went on strike. Mr Shabangu then applied to amend ground No. 1 by adding the words 'who went on strike' after the word 'Appellant'. I allowed the application".

The effect of this is clearly to make the ruling of the Industrial Court applicable to those members of the Appellant who went on strike and not to others. In any event the whole basis of the application by the Appellant was an allegation that the employees were wrongly stopped from working when they attempted to return and not that they did not know whether or not the notice applied to them or that they had not been given a proper hearing. Nor as I read the judgment of Dunn J was this point argued in the High Court. If that is so, then apart from my view that the submission falls to be rejected on the grounds already stated, I think that section 5(2) read with section 5(4) provides for an appeal to this Court only on a question of law that has arisen for decision and been decided by the President of the Industrial Court and on my reading of that judgment the point now raised by Mr Fine does not appear to have been referred to at all.

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A further point raised by Mr Fine requires to be considered. He has submitted that there is no evidence that the Respondent terminated the contract between it and the workers. The relevant portion of the notice given by the Respondent to the Appellant (Annexure "F") to which I have already referred (reads as follows):

"You are hereby informed that you must return to work by 2.00p.m. on Monday the 9th October 1989 as the strike in which you are participating is an unlawful strike, failing which you will be deemed to have voluntarily terminated your employment with council, the automatic result of which will be your forfeiture of all your internal benefits."

That notice was disregarded by the workers and consequently the Industrial Court found that the workers had voluntarily terminated their own employment. This was the only termination of the contract relied on by the Respondent.

In Tshabalala's case (supra) the learned judge referred with approval to the judgment of Kotze J (as he then was) in Cloete v Smith 1971 (1) SA 453 (E) in which the learned judge said (what follows is my translation of the Afrikaans):

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"The termination of contractual relationships is not a trivial matter and the decision to terminate a contract changes the contractual relationship that the contracting parties have towards each other. This is a step which might cause serious material prejudice to the party against whom the cancellation is effective. This consideration is, in my view, extremely important and is a valid reason why the act of cancellation of an otherwise valid contract must be clear and unambiguous. . . .".

Having regard to the consequences which might ensue from a cancellation of an agreement I would respectfully agree without qualification with that dictum and consequently I regard the wording of Annexure "F" to be inappropriate if it was intended to terminate the agreement between the parties. To "deem" the act of the workers in continuing a strike to be a voluntary termination of their employment may well lead to a conclusion which is contrary to the facts. Indeed, in the instant case it is clear that the workers did not intend to terminate their employment and attempted to return to work on 23 October 1989. It seems clear to me, therefore, that the notice was not a termination of the agreement by the employer and in any event was not clear and unambiguous as it is required to be. Another reason why, in my view, Annexure "F" is inappropriately worded is that it places the onus on the employees to decide whether they wish to terminate their employment or not. To deem the continuation of a strike as evincing such intention could easily lead to abuse if the

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employer wished to reach a situation in which the employees, by simply continuing with the strike, forfeited the privileges which might accrue to them in the event of a proper termination of the agreement. The method adopted by the Respondent also led to a situation in which the Respondent purported to terminate the agreement without giving the employees a proper hearing as, in the circumstances, it was the duty of the Respondent to do. For these reasons I am of the view that the purported termination of the agreement between the parties was invalid.

Mr Fine has also stressed the need for fairness in industrial relations. In that regard I agree with respect with everything that was said by Hannah CJ regarding the fair treatment to which an employee is entitled in Swaziland United Transport Ltd v John Mgodlola (Industrial Court case 50/87). In discussing the question of warning an employee concerning alleged neglect of duties the learned chief Justice said:

"The main purpose of a warning is, of course, to give the employee the opportunity to mend his ways and in the same way that sufficient time should be given for him to do so. Normally it would be unfair to dismiss him for wrong-doing or poor performance which has taken place prior to the warning having been given".

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If one extrapolates the views of the learned Chief Justice to the facts of,the present case it can hardly be argued that a notice which gives the workers less than a day in which to decide their future fulfils the requirement of "sufficient time", if one bears in mind that it is the Respondent's case that on the very day of the strike the letter (exhibit "F") was distributed to all members of the Appellant who were on strike ordering them to cease their illegal strike and return to work by 2.00p.m. on that day failing which they would be deemed to have voluntarily terminated their employment.

In this regard I would respectfully endorse what Amissah JP said in the Appeal Court of Botswana in National Amalgamated Local & Central Government & Parastatal Manual Workers Union v The Attorney General in Civil Appeal 26/93 concerning industrial legislation:-

"The Act is specially designed to ensure that trade disputes are, as far as possible settled peacefully and amicably. It provides the appropriate machinery for the resolutions of a dispute like the one which led to the workers going on strike. It is not, in my view, made to enable one side with the power to settle a dispute to its advantage. In any case, the Act does not contemplate wholesale dismissal of workers who take part in an illegal strike."

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I think this applies to the Industrial Relations Act in this Kingdom and it follows that the dismissal was in my opinion both invalid and unfair.

The sole question which remains is what this Court should do about the dismissal of the workers which occurred as set out above. The events leading up to the dismissal of the employees occurred in 1989 and it would therefore be unrealistic in my view to treat the contract between the parties as still being in force. In section 7 of the Industrial Relations Act 1980 the Industrial Court is given the power, inter alia, to issue an order providing for the termination of a contract of service upon such terms as to the payment of compensation and otherwise as it thinks fit. The Act is obviously designed to do justice between employer and employee and having regard to the circumstances and the views expressed above I think the contract should be declared to be terminated as from the date of the purported dismissal by the Respondent of the employees concerned but that they should not forfeit such privileges as might have accrued to them at that date. Whether the workers are entitled to other compensation or any other benefit is best left for the Industrial Court to decide.

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I would therefore uphold the appeal with costs and order that the contract is terminated from the 23rd October 1989, that the employees are not to forfeit such privileges which may have accrued to them by 9 October 1989 (the date of the purported dismissal) and that the matter be referred back to the Industrial Court to enable that Court to make an order as to payment of compensation and otherwise as it thinks fit.

BROWDE J.A.

I agree and it is so ordered

MELAMET P.

I agree

SCHREINER JA

DATED THIS 16TH DAY OF JUNE 1995.