IN THE COURT OF APPEAL OF SWAZILAND

CIVIL APPEAL CASE NO.16/02

In the matter between:

THE UNIVERSITY OF SWAZILAND Applicant

VS

THE PRESIDENT OF THE INDUSTRIAL COURT 1st Respondent

VUSI HLATSHWAYO 2nd Respondent

CORAM: LEON J.P.

TEBBUTT J.A.

BECK J.A.

For Appellants: Adv. P. Flynn

For Respondent: Mr Shabangu

JUDGMENT

10/06/2002

BECK J.A.

The appellant in this matter is the University of Swaziland and the second respondent was in its employ as an assistant librarian. The second respondent was dismissed from his employment in February 1998 on the grounds of having contravened section 36 (f) of the Employment Act, 1980, which section reads as follows:

"36. It shall be fair for an employer to terminate the services of an employee for any of the following reasons -

(f) because the employee has absented himself from work for more than a total

of three working days in any period of thirty days without either the permission of the employer or a certificate signed by a medical practitioner certifying that he was unfit for work on those occasions."

The second respondent reported a dispute to the Labour Commissioner in terms of section 41 of the Employment Act but efforts to resolve the dispute came to nought. The second respondent then applied to the Industrial Court for reinstatement to his employment and payment of arrear salary, contending that his dismissal was both procedurally and substantively unfair. His application succeeded and he was granted an order reinstating him in his former employment and that he be paid arrear wages as from the date of his dismissal together with interest thereon

at 9% per annum.

The appellant thereupon applied to the High Court to set aside the judgment of the Industrial Court on review. That application was dismissed with costs by the learned Chief Justice and the appellant has now appealed to this court against that order.

The operation of section 36 (f) is qualified by the provisions of section 42 (2) (a) and (b) of the Employment Act. Those provisions read thus: "42 (2) The services of an employee shall not be considered as having been fairly terminated unless the employer proves -

(a) that the reason for the termination was one permitted by section 36; and

(b) that, taking into account all the circumstances of the case, it was reasonable to terminate the service of the employee."

The learned Chief Justice held that the provisions of section 42 (2) (a) and (b) are cumulative and Mr Flynn, who appears for the appellant, accepts that this is correct, as it undoubtedly is. Accordingly, the Industrial Court, when seized with an issue of whether or not an employee's service has been fairly terminated in accordance with the provisions of section 36 (f) and 42 (2) (a) and (b) of the Act, has the duty of applying its mind to whether or not it has been proved that the employee absented himself from work for more than three working days in any period of thirty days without either the permission of the employer or a medical certificate that he was unfit for work on the days he was absent. If satisfied that this has been proved, the Industrial Court must further apply its mind to whether or not,

taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee.

Having regard to the record of the proceedings in the Industrial Court the learned Chief Justice said ".....there seems to have been no issue or dispute as to whether the respondent had been absent for four days without leave or without producing the medical certificate referred to in the section." He then went on to say that "the President of the Court was at great pains to consider the circumstances of the dismissal. He concentrated his thoughts on this particular issue."

The evidence showed on the one hand that the second respondent's employment record at the University had not been uniformly satisfactory. On the other hand the evidence showed that the absenteeism on which the University relied for terminating his services was attended by a number of mitigating circumstances. The second respondent had not yet recovered from a severe dog bite and he had requested a fellow employee to explain to his superior that he was not yet fit to return to duty, but she had forgotten to do so. Moreover, his superior was not aware that the second respondent had in fact been to the University on the fourth day of his absenteeism in order to perform his shift of duty at the library, only to find that arrangements had been made for someone else to do that shift. The judgement reveals that the Industrial Court was alive to the circumstances of the second respondent's dismissal, as the learned Chief Justice said. Accordingly it was held that no reviewable irregularity was shown, and hence the application for review was dismissed.

Mr Flynn submits however that it is apparent from a proper analysis of the judgment of the Industrial Court that its mind was never directed to the provisions of section 42 (2) (b), which section is nowhere referred to in its judgment, so that there has been non-performance or wrong performance of a statutory duty cast upon it by that section, which establishes a ground for

review (see Hira and Another v Booysen and Another 1992 (4) S.A. 69 A.D. at 93 A). He argues that the judgment of the Industrial Court reveals that it addressed its mind only to whether the evidence sufficed to justify a fair dismissal in terms of section 36 of the Employment Act, That, he contends, is an erroneous approach which would constitute a ground for review by the Court because once it was established that the respondent had absented himself without the requisite permission or medical certificate for more than a total of three working days, a dismissal by the employer in terms of section 36

(f) was automatically to be regarded as fair and any consideration of fairness or otherwise under section 36 (f) was precluded and therefore irregular. The Industrial Court, in having embarked upon such consideration, had not only acted irregularly but had also denied itself the opportunity of applying its mind to the provisions of section 42 (2) (b), as in casu its judgment showed it had not done.

I am satisfied that this submission puts much too narrow a construction on the judgment of the Industrial Court, The mind of that court was unquestionably directed to the question of whether or not it was proved that the respondent had absented himself for more than three working days without permission and without the production of a medical certificate, so as to bring section 36 (f) into play. It is not clear whether the court was satisfied that an absence for more than three working days had been proved, because there was uncontroverted evidence that on the fourth working day the respondent had in fact arrived at the University library ready and willing to work, only to discover that someone else had been appointed to work on his shift that day. The correctness of whatever view the Industrial Court may have taken concerning that issue is of course irrelevant, the matter being brought on review and not on appeal. If the court was of the view that absence for more than three working days had not been proved, then caedii quaestio - section 36 (f) does not operate to render the termination of the respondent's services fair, and no further enquiry by the Industrial Court would have been called for. If, on the other hand, the court was of the view that absence for more than three working days had been proved, then the court was tasked with the further duty of taking into account all the circumstances of the case in order to decide whether, despite the provisions of section 36 (f), it was nevertheless reasonable to terminate the respondent's employment. As stated by the learned Chief Justice the court in fact adverted its mind to this task, whether or not it stated that it had section 42 (2) (b) in mind when doing so. As he put it "the court was at great pains to consider the circumstances of the dismissal."

Even if it were to be accepted that Mr Flynn is correct in submitting that the Industrial Court erroneously interpreted its statutory duties (and I do not accept that he is correct in that submission) the following passage in the judgment of Corbett C.J. at p.93 G - I of Hira's Case (supra) is applicable to this case:

" Whether or not an erroneous interpretation of a statutory criterion.....renders