IN THE COURT OF APPEAL OF SWAZILAND

CIVIL CASE NO.20/03

In the matter between:

MUSA GWEBU	**APPELLANT**
AND	
MANZINI CITY COUNCIL	**RESPONDENT**
CORAM	**LEON JP**
	TEBBUTT JA
	ZIETSMAN JA
FOR APPELLANT	**MR. M. SIMELANE**
FOR RESPONDENT	**ADV. P.E. FLYNN**

JUDGEMENT

Tebbutt JA:

The issue for decision in this appeal is whether a City Council official in carrying out certain of his duties in a manner which was incorrect had acted dishonestly, justifying his dismissal from his post with the Council, or had merely been negligent.

The appellant held the post of building inspector with the respondent, the Manzini City Council to which I shall for convenience refer as "the Council".

At the beginning of 2002 as part of his duties he stamped a building plan in respect of a certain Lot 1003, Ngwane Park with the council's approval stamp and signed the plan. The plans for this property on which a building was to be erected was for a block of shops and a restaurant. These had been approved by the Council. No approval, it appears, was given for any part of the building to be used for the sale of liquor owing to certain restrictions in this regard in the township in which the property is situated. In 2002 a copy of the plan was stamped by the appellant. On this copy the plan was for a restaurant "and bar".

On 28 February 2002 the City Planner had a discussion with the appellant in regard to the matter and on the same day wrote to the appellant in the following terms:

> "Following the investigations we have been making including yourself on the above matter and the subsequent conversation we had with you this morning 28th February 2002 on the matter, explanation on the matter. Please forward your written report by 12.00p.m on 1st March 2002."

To this the appellant responded as follows:

> "The original plan was approved written restaurant only. I (sic) copy of a similar plan was brought to me for a stamp which was needed by the owner for a loan to finish up the building. I stamped the copy not realizing that this copy was now written restaurant and bar.
>
> It is our procedure to stamp copies of plans which were approved if the owner happens to need other copies of the same plan. The major oversight I had was not to realize that it was written restaurant and bar on the second copy I stamped and signed."

On 14th March 2002 a "Notice of Disciplinary Hearing and Charges Preferred" dated 12th March 2002 was given to the appellant. This was not proceeded with but on 3rd April 2002 a similar notice dated 2nd April 2002 was given to the appellant, stating that a disciplinary hearing would be heard on 5th April 2002 in which he would be called upon to answer the following charge (I quote it verbatim):

> "The charge against you dishonest act of stamping plan on Lot 1003 Ngwane Park reference 81/93 with Council's approval stamp and signing it when you knew it had not gone through the Council's approval process".

I shall deal in due course with what happened at the disciplinary hearing but following it a letter from the Town Clerk of the Council dated 25th April 2002 was sent to the appellant reading thus:

> "At a Council meeting on the 24th April 2002, the Council decided that the offences of a "dishonest" act and detailed on your charge sheet dated 2nd April 2002, has been proven by the Inquiry held on the 5th April, 2002."

The Council had, as a result, decided that the appellant should be summarily dismissed from the Council's employ without notice, effective from 26th April, 2002.

The appellant thereupon, on 9th September 2002, brought in the High Court an application on notice of motion for an order "reviewing, correcting and setting aside the Council's proceedings and all acts of the Council leading to and incidental to" his dismissal and that he be reinstated in his post with back payment of his salary from the date of his dismissal. That application was dismissed with costs by Maphalala J. It is against that decision that the appellant now appeals to this court.

In the High Court there was much debate as to whether Regulation 21 of the Urban Government Act No.8 of 1969 applied to the disciplinary proceedings conducted against the appellant or whether they were governed by paragraph 6 of the Staff Standing Orders of the Council.

The learned Judge ***a quo*** found that the standing orders applied. In his very full and well-researched heads of argument Mr. Simelane for the appellant contended that the learned Judge was incorrect. Indeed he submitted that the standing orders were ***ultra vires*** the enabling legislation under which they were made and that the entire proceedings were in consequence vitiated. Mr. Simelane did not actively pursue this argument before this Court - and, in my view, wisely so. Nothing turns on which set of rules is the applicable one as there is no substantial difference between them and the steps that have to be taken in setting up disciplinary proceedings are couched in identical terms. It is convenient for the purposes of this judgment to follow the provisions of the standing orders, as the learned Judge ***a quo*** did, without deciding whether he was correct or not.

It is clear that there was not a strict compliance by the Council with the provisions of paragraph 6 of those orders, and in particular with paragraphs 6(1) and 6(2). Paragraph 6(1) provides that in any proposal to institute disciplinary proceedings

against an employee the charges against him must be specified and he must be invited to submit within 14 days any written representations in regard to them. Only then can a request for the taking of disciplinary action be made. These steps were not followed.

This formed one of the grounds relied upon for a review of the Council's proceedings, it being alleged that the non-compliance with the orders mentioned constituted a fatal irregularity. I cannot agree. **A** court required to review the proceedings of a disciplinary committee will not do so if any irregularities in those proceedings did not prejudice the employee concerned or result in a failure of justice (see **DAVIES V CHAIRMAN, COMMITTEE OF THE JOHANNESBURG STOCK EXCHANGE 1991(4) SA 43 (A) AT 48 -G)**

In my view, these irregularities did not result in any prejudice to the appellant nor was there a failure of justice resulting therefrom. The appellant knew what the charge was against him; he was informed of what his rights were to a fair hearing and of his right to be represented at it and to call witnesses; and that depending on the facts proved at the hearing, he could be disciplined. At the hearing he was represented by one of his colleagues and had full opportunity to put his case before the disciplinary tribunal.

The ground of appeal that was most strenuously advanced by Mr. Simelane was the third one in the notice of appeal viz that "the learned Judge erred in law and in fact by holding that there was no failure of justice in the disciplinary proceedings". Mr. Simelane submitted that a court can review a decision of a board or disciplinary inquiry tribunal when it is found to be unreasonable. In his comprehensive heads of argument he submitted that the courts of England, South Africa and this country have moved away from what he described as the "orthodox" approach in judicial review proceedings of requiring that the decision of the tribunal sought-to.be,reviewed, should be grossly unreasonable to one where a court can interfere with the decision where it is merely unreasonable and not necessarily grossly so. He referred in this regard to the writings of authors on administrative law such as Baxter and de Smith; to the decisions of the South African Court of Appeal in **THERON EN ANDERE V RING VAN WELLINGTON VAN DIE NG SENDINGKERK IN SUID-AFRIKA EN ANDERE 1976(2) SA 1 (AD);**

HIRA AND ANOTHER V BOOYSEN AND ANOTHER 1992(4) SA 69 (AD); and to a decision of this Court in **COUNCILLOR MANDLA DLAMINI AND ANOTHER VS MUSA NXUMALO: APPEAL CASE NO.10/2002.**

I am prepared to accept that this Court should follow its earlier decision in the **COUNCILLOR MANDLA DLAMINI** case. It is clear from a study of the judgment in that case and from the authorities cited in support of it that the fundamental principle which now underlies any question of an interference with the decision of a tribunal is a consideration of whether the latter acted fairly in coming to the decision that it did. In analysing what the Court referred to as the modern approach to judicial review, Leon JP, who gave the judgment of the Court in the **COUNCILLOR MANDLA DLAMINI** case cited what was said by Corbett CJ in the South African case of **ADMINISTRATOR**

at 761 A-D in relation to the evolution of the legal expectation principle. He said:

> "And it was evolved, as **I** read the cases, in the social context of the age in order to make the ground of interference with the decisions of public authorities which adversely affect individuals co-extensive with notions of what is fair and what is not fair in the particular circumstances of the case."

Reference was also made by Corbett CJ to an article by Professor Robert E. Riggs in (1988) 36 American Journal of Comparative Law, which he cited with approval, in which the author stated:

> "Since the landmark decision of **RIDGE V BALDWIN** handed down **form the ttanseof Lords in 1963 {see ~fltPGE V -BALDWIN -AND* OTHERS (1963) 2 ALL ER 66 (HL**)) the English courts have been in the process of imposing upon administrative decision-makers a general duty to act fairly."

In coming to the view that, in the light of the modern approach to judicial review, the time had arrived in Swaziland "to jettison the narrow approach of gross unreasonableness" this Court emphasized that in cases of judicial review what was required was a determination of whether the tribunal whose decision it is sought to review acted fairly in coming to its decision or whether there had been a failure of justice.

It is well established that a court will not interfere with such decision merely because it is one to which the Court would not have arrived (see **SOUTH AFRICAN RAILWAYS V SWANEPOEL 1930 A.D. 370** at 378; **LOXTON V KENHARDT LIQUOR LICENSING BOARD 1942 A.D. 272** at 314; **SCHOCH N.O. AND OTHERS V BHETTAY AND OTHERS 1974(4) SA 860 (A)** at 866 E-F; **Hjra**'s case supra at 93 B-C; **COUNCILLOR MANDLA DLAMINI** case supra; **STANDARD CHARTERED BANK SWAZILAND LIMITED V ISRAEL**

MAHLALELA 1994 APPEAL COURT, UNREPORTED). In the latter case Schreiner JA (at pages 11-12 of the judgment) stated:

> "There was in my view a basis for the Industrial Court (whose decision it was sought to review) to have decided as it did... It is not ....the function of this Court simply to substitute its own judgment for that of the Industrial Court."

One must therefore turn to a consideration of the proceedings and the evidence before the disciplinary inquiry to determine whether in arriving at its decision the tribunal acted fairly or not.

The inquiry was held before the Town Clerk as Chairperson and the Industrial Relations Officer of the Council. I shall refer to them as the tribunal.

The charge as set out above viz that he committed a "dishonest act" in stamping the plan Fn question, was put to the appellant who then made the following statement:

> " I plead guilty because I did stamp the plan which had prior been approved by Council at the request of the owner who needed to use it. It is procedural for an officer to check the file and stamp the plan on request. The case should be stamping a plan with BAR since it was an oversight on my part to stamp the plan with BAR because the original had already been approved".

Copies of the relevant plans were produced and appellant was asked if he had compared the plans before stamping the one he did. He said he had done so. He then said:-

> "I did take my time but the only thing that was different was the Bar, there is no other difference in the plan."

Other questions which related to the capacity of officials to stamp plans and to the failure to comply with paragraph 6(1) of the Standing Orders are not relevant to a consideration of what the germane evidence was before the tribunal. There was, however, also a question, which is germane, relating to a previous incident involving the appellant and reference to a letter from a former Town Clerk to him which appellant said "stated clearly never for Gwebu to deal with plans alone." (The appellant, of course, is Gwebu).

No store can be put on the appellants' having pleaded guilty to the charge as it is clear that he qualified that by saying that he was doing so because of what he said was an oversight on his part. Any reasonableness or otherwise of the decision that appellant acted dishonestly must be sought in the other evidence and in the tribunal's reasons for that decision.

In the tribunal's reasons the background of a bar not being permitted on the property on which the building, to which the relevant plans referred, was to be built, was set out and also that an application by the owner of the building for a liquor licence had been turned down.

Following a letter from the owner to the Council, a check of the plans register was made but no plan approving a Bar was found. A plan was then furnished by the appellant of which there was no entry in the plans register or copies in the file. The approval stamp on the plan was signed by the appellant alone while it had also to be signed by the City Engineer. The plan differed from the one properly approved in 1994. It contained plans for shops, a restaurant and bar and not just shops and a restaurant as on the original plans. The scrutiny by the tribunal of the plans also showed other differences between the original approved plans and the one reflecting a bar, the latter also, for example, including an office which was not on the former. Then, too, this was not the first incident involving the appellant acting outside the Council's rules.

It seems to me that having regard to all the above facts it cannot be said that the tribunal acted unfairly in rejecting the appellant's statement that what had occurred was merely an oversight on his part in regard to the bar. If he had scrutinised the plans, as he said he did, he should have noticed all the differences in thern. If follows that if they decided that there was not an oversight by appellant, it was not unfair or unreasonable of them to conclude

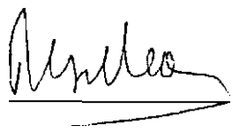
that in signing the plans with the various differences, he had done so deliberately and with knowledge of them.

The tribunal therefore had before it evidence of affixing an approval stamp to plans differing in several aspects from the plans originally approved and of the appellant's doing so both contrary to the Council's procedures and also to the admonition that he was not to deal alone with plans. The new plan also provided for a building with a bar which was not permitted. I can therefore not find that a tribunal consisting not of lawyers but of laymen came to an unfair or unreasonable decision when it concluded that what the appellant had done was, as it found, an "act of cheating", which undermined the Council's procedures and was therefore a dishonest act which is what the appellant was charged with. There was in my view, no failure of justice in this case.

It follows that the appeal must fail and it is dismissed, with costs, such costs to include the costs of counsel.

P.H. TEBBUTT

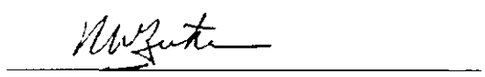
JUDGE OF APPEAL

I AGREE 

R.N. LEON

JUDGE PRESIDENT

I AGREE



N.W. ZIETSMAN

JUDGE OF APPEAL

DELIVERED IN OPEN COURT ON THIS DAY OF NOVEMBER 2005.