IN THE COURT OF APPEAL OF SWAZILAND

CIVIL APPEAL 17/2005

FIKILE NKAMBULE **APPELLANT**

and

1ST RESPONDENT 2ND RESPONDENT

DUDUZILE NTSHANGASE t/a NHLANGANO RECORD BAR ARBITRATOR

MADUDUZA ZWANE N.O.

L. SIMELANE FOR APPELLANT B. MAGAGULA

FOR FIRST RESPONDENT

CORAM: BROWDE J.A.

STEYN J.A.

BECK J.A.

JUDGMENT

Beck J.A.

This is an appeal against the dismissal by Annandale A.C.J, of an application to set aside, on review, a decision of an arbitrator. The manner in which the issue has arisen is as follows:

The appellant was formerly employed by the first respondent. In January 2001 her employment was terminated. She contended that she was unfairly dismissed, which the first respondent disputed, and the dispute was submitted to arbitration before the second respondent. Evidence was heard and the arbitrator's determination was that:

> "1. The application is dismissed in that there is no convincing proof of unfair dismissal.
>
> 2. The applicant if she so wishes can institute a dispute of constructive dismissal."

The appellant thereupon sought an order from the High Court setting aside the above-mentioned determination. She contended that it was apparent from the written reasons Chat the arbitrator gave for his determination that he had gone so far as to find in fact that she had been constructively dismissed, and that she should accordingly have been awarded compensation.

That application came before Sapire C.J., as he then was, and he made the following order:

> "1. The award is set aside.
>
> 2. (a) The matter is referred back to the Arbitrator with a direction that if his findings amount to that there has been a constructive dismissal in terms of the evidence and the provisions of Section 37 of the Employment Act he is to make an award accordingly.
>
> (b) He may hear further evidence on the question of the amount of the award.
>
> 3. The first respondent is to pay costs of these proceedings".

Pursuant to that order the dispute was once again brought before the arbitrator and argued by the legal representatives of the appellant and the

first respondent. The arbitrator gave further consideration to the evidence that had previously been given before him and he came to the following conclusion:

> "It is therefore my carefully considered view that the evidence before me at arbitration fails to prove a case of constructive dismissal.
>
> The applicant can therefore not be compensated for unfair constructive dismissal."

That determination by the arbitrator gave rise to another application to the High Court by the appellant for an order setting aside, on review, the above-mentioned decision. This application came before Annandale A.C.J., who dismissed it with costs and, as indicated at the commencement of this judgment, it is his decision which is now appealed against before us.

It is the appellant's submission that the arbitrator made a finding, on the evidence he heard in the initial arbitration proceedings, that the appellant had been constructively dismissed by reason of her employer, the first respondent, having made the prospect of continued employment intolerable for her. In relation to that alleged finding the arbitrator became ***functus officio,*** and it was therefore grossly irregular on his nqr* tg 1° ave reconsidered the self-same evidence in t'ns second arbitration proceedings, resulting in him coming to a different and diametrically opposite finding.

In order to hold that the arbitrator acted grossly irregularly in giving further consideration to the evidence that he had previously considered, and in making different findings in relation thereto, it would have to be held that the order that Sapire C.J. made could not reasonably have been understood by the arbitrator to be a direction to him to consider afresh whether or not that evidence sufficed to prove that there had been a constructive dismissal of the appellant.

It has to be said that paragraph 2 (a) of the order that Sapire C.J. made is not well framed. Nor is it helpful, in an attempt to ascertain what the learned Chief Justice had in mind, to have regard to the transcript of the dialogue

between counsel and the Bench during argument, and of the short ***ex tempore*** reasons that the Chief Justice gave before formulating the order. Both during that dialogue, and again in his brief reasons for judgment, comments by the Chief Justice were made which point to different meanings to be ascribed to paragraph 2 (a) of his orders.

We are informed that at the second proceedings the arbitrator was furnished, not only with the order itself, but also with the transcript of the proceedings that took place before Sapire C.J. Armed with such confused light as may be gleaned from that transcript the legal representatives of the parties each submitted before the arbitrator, before Annandale A.C.J., and again before us , different meanings to be attributed to paragraph 2 (a) of the order made by Sapire C.J.

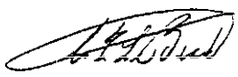
There is, as a matter of logic, a consideration which strongly favours the meaning that the arbitrator understood paragraph 2 (a) to bear. If Sapire C.J. intended that the arbitrator was not to be free to come to a conclusion that no construction dismissal was proved by the evidence that he had previously heard, there was no purpose whatsoever to be served by making any direction to the arbitrator other than a direction to determine the quantum of compensation to be awarded to the appellant.

Accordingly I find it impossible to hold that the arbitrator was unreasonable, let alone grossly unreasonable, in understanding the court's direction to him as requiring him to consider anew whether the evidence that he had already heard sufficed to enable him to determine that the appellant had been constructively dismissed by the first respondent's conduct. Annandale A.C.J, went even further and took the view that paragraph 2(a) of Sapire A.C.J.'s order in fact does mean exactly what the arbitrator understood it to mean.

In the result the appeal is dismissed with costs and the order of the court ***a quo*** is confirmed.

I feel constrained to express regret and concern that an order of the High Court should have been so lacking in clarity that the parties affected by it have been put to the expense of further litigation that should never have been necessary.

I agree



C.E.L. BECK JUDGE
of APPEAL
J. BROWDE JUDGE
OF APPEAL

I agree

J.H. STEYN

JUDGE OF APPEAL

Delivered on the 11day of November2005