THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Case No. 77/12

In the matter between:

O.K. BAZAARS SWAZILAND (PTY) LTD t/a SHOPRITE	**Appellant**
And	
HAPPINESS DLUDLU N.O.	**1st Respondent**
MAKHOSAZANA TAYLOR	**2nd Respondent**
CONCILIATION MEDIATION AND ARBITRATION COMMISSION (CMAC)	**3rd Respondent**

Neutral citation : *O.K. Bazaars Swaziland (Pty) Ltd t/a Shoprite v Happiness Dludlu N.O. Makhosazana Taylor and Another (77/12) [2013] SZSC 22 (31 May 2013).*

Coram : **S.A. MOORE JA,**
P. LEVINSOHN JA,
B.J. ODOKI JA

Heard : **14 May 2013**

Delivered : **31 May 2013**

Summary: ***Arbitration in terms of the Industrial Relations Act 2000 — common law review of arbitrator's decision — relevant tests-finding that arbitrators decision not reviewable.***

JUDGMENT

P. LEVINSOHN, JA

[1] For ease of reference and for convenience I shall refer to the parties to this appeal as follows: Appellant ("the Employer"), First respondent ("the Arbitrator"), Second respondent (the "Employee").

[2] The Employee was employed by the Employer from 1984 to 2009. She started off as a cashier. By 2009 she was promoted to the position of administration manager. In this capacity she was required to take care of the company's finances and various administrative duties connected to staff matters. Her office was at Mbabane. Prior to 2008 she was not subjected to any disciplinary action by the Employer.

[3] The picture changed in 2009. A series of incidents occurred in the workplace. The first one was early in 2009. She was instructed to vacate her office on the basis that the space was required for a liquor storeroom. No alternative accommodation was made available to her nor was she consulted about this move. She found herself doing her work in a make-shift office at one of the store's till points. The employee found this situation to be humiliating.

[4] From June 2009 to the date of her resignation she was on the receiving end of a number of disciplinary actions taken against her by the Employer. On the 1st June 2009 she was handed a written warning based on her alleged failure to "read and action emails and following simple instructions of analyzing the ledger for any equipment which was sold on the previous financial year to date."

[5] On 2nd June a notice calling upon on her to attend a disciplinary hearing on 9th June was served on her. The notice alleged that she had been guilty of gross misconduct in relation to so-called faulty pin

pads. This hearing took place over two days. However, the employer never informed her about its outcome.

[6] On 10th of September 2009 a further written warning was handed to the employee. This document alleged that she had been guilty of gross dereliction of duty. Further written warnings were issued on 19th September and 21st of 2009 respectively.

[7] Given the manner and pattern in which these warning were issued the Employee concluded that in reality she was being given no opportunity to improve her performance and her employer simply did not want her any longer. Her resignation then followed.

[8] The Employee thereupon instituted proceedings in the Industrial Court claiming 1. Notice pay 2. Additional notice 3. Severance allowance 4. Certificate of service 5. Leave pay 6. Compensation for unfair dismissal. These claims were founded on a cause of action based on Section 37 of the Employment Act 5 of 1980 which provides:

> *" When the conduct of an employer to an employee is proved by that employee to have been such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves his employment, whether with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by his employer."*

[9] Subsequently the Employee withdrew her action before the Industrial Court and both parties submitted the dispute to arbitration under the auspices of the Conciliation Mediation and Arbitration Commission established in terms of Section 62 of the Industrial Relations Act 1 of 2000.

[10] The arbitration hearing commenced before the arbitrator on 25th February 2010. The Employee testified in support of her case. The employer called two witnesses in rebuttal. After hearing the evidence the arbitrator issued her award. She made the following findings and I quote:

> *"The respondent's conduct fell short of meeting the objective or purpose of discipline. The purpose of discipline is a corrective measure it gives an employee a chance to correct or improve areas of concern. In applicant's case four warnings were issued within June-September, 2009 without due*

process of law being followed. Though respondent argued that the offences were different; all of them bordered on performance or failure to follow company procedures.

The period within which they were issued did not give the applicant a chance to improve her performance. As to why all of a sudden an employee who has been in respondent's employ for twenty six (26) years was suddenly treated in this manner leaves a lot to be desired. It shows that respondent intended to make applicant's life miserable. She was frustrated not knowing what next would happen more especially because in all these instances but one there was no formal or informal enquiry. The warnings ended up not serving their lawful intended purpose that is to give an employee a chance to correct her mistakes. Respondent abused the warnings to further her own motives.

In the light of the above I find that the respondent's conduct forced the employee to resign."

[11] The Arbitrator thereupon ordered the Employer to pay the Employee an amount of E169893.43.

[12] On 11 March 2011 the Employer instituted review proceedings before the court *a quo*. In its notice of motion the Employer sought an order setting aside the arbitration award and that it be replaced by an order dismissing the Employee's application. The review application was

opposed and in due course affidavits were filed by both parties. *Mabuza J* presiding in the court *a quo* dismissed the application with costs. The Employer now appeals against that decision to this court.

[13] Section 19(5) of the Industrial Relations Act 1 of 2000('the Act') provides:

> *"A decision or order of the Court or arbitrator shall at the request of any interested party be subject to review by the High Court on grounds permissible at common law."*

[14] At this point it is necessary to highlight that in the very same Section 19 provision is made for appeals from the Industrial Court [subsection (1) (2) and (3)]. It follows from this that the legislature was astute to recognize that there is a fundamental distinction between the appeal and review procedures.

[15] At the outset it is necessary to consider the ambit of these common law grounds of review. The issue is not res nova in this jurisdiction. The case of *Takhona Dlamini* v *President of the Industrial Court* and *Another (Swaziland Supreme* Court unreported case no 23/1997) is the leading case on the topic and clearly binds us. *Tebbut JA* who

delivered the judgment of the court expressly approved the following dicta of *Corbett JA* in the case of *Johannesburg Stock Exchange* v *Witwatersrand Nigel Ltd* 1988 (3)SA 132(AD) at 152 A-E.:

> *"Broadly in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice'……..Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated……..Some of these grounds tend to overlap."*

[16] *Tebbut JA* went on also to adopt the dicta of Corbett CJ in the case of *Hira and Another* v *Booysen and Another* 1992 (4) SA 69 (AD) especially at 93. In that case the learned Chief Justice set forth in summary form the necessary criteria for common law review. These are quoted in full by *Tebbut JA* at page 13 of the typed judgment in the *Takhona Dlamini case*. For purposes of the present case I wish to highlight (2) and (3) of the quoted passages;

> *"Where the duty /power is essentially a decision-making one and the person or body concerned (I shall call it 'the tribunal') has taken a decision, the grounds upon which the Court may, in the exercise of its common – law review jurisdiction, interfere with the decision are limited. These grounds are set forth in the Johannesburg Stock Exchange case supra at 152A-E.*
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> *"Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend basically, upon whether or not the Legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision."*

[17] The forerunner of Section 19 (5) supra was Section 11 (5) which provided that a decision of the Industrial Court should likewise be subject to review on grounds permissible at common law. As indicated the subsequent Act introduced into the equivalent section the notion of an arbitrator's decision being subject to review on common law grounds. This was of course as a result of the establishment in terms of Section 62 of a new statutory institution

namely the Conciliation Mediation and Arbitration Commission ("CMAC"). The Act conferred the power on the CMAC to arbitrate unresolved labour disputes particularly where both parties to the dispute have requested same.

[18] Certain self evident consequences flow from a decision to go to arbitration. Firstly, the parties consciously decide not to take their dispute to the Industrial Court, secondly they in effect choose their own judge and agree that he/she will be the sole arbiter of fact and law and of course his/her decision would be final unless the submission to arbitration contains an appeal mechanism.

[19] It seems to me that the ambit of common law review in arbitration proceedings is very limited. Certainly a decision on a question of law such as the interpretation of a collective agreement or indeed a statutory provision would not be susceptible to review. Where the arbitrator is called upon to decide disputes of fact and draw inferences from these and other surrounding circumstances, there too his/her decision whether it is right or wrong cannot form the subject matter of a common law review. When then, and it what circumstances did the

legislature contemplate an arbitrator being taken on review and whether *in casu* the arbitrator failed to meet these criteria?

[20] In my opinion an application of the principles enunciated in *Johannesburg Stock Exchange case* (supra) to the facts of this case will provide the answer. Firstly, I am satisfied that the arbitrator clearly applied her mind to the relevant issues in this dispute. As indicated above, the Employee alleged that she had been constructively dismissed and she testified in regard to various incidents in the workplace culminating in her resignation. The arbitrator had to determined whether the cumulative effect of all these justified the inference contended for by the Employee. In my view she clearly made this determination. Both parties were represented at the hearing and no question arises as to whether the tenets of natural justice were adhered to. Secondly, it is simply not possible to brand her decision as having been arrived at arbitrarily or capriciously. Certainly also, on the papers before us there is not the slightest suggestion that she acted *mala fide* in any way. Thirdly, can we say that the arbitrator's decision in the matter was so grossly unreasonable

as to warrant the inference that she had failed to apply her mind to the issues that arose? I am satisfied that the latter characterisation of her award would be simply untenable and without any substance whatsoever.

[21] Counsel for the Employer has pointed to various aspects of the case and criticised the arbitrator's approach to these averring that she had misdirected herself in several respects. Firstly, it is said that since the Employee did not exercise her right to appeal against the 1st June warning the arbitrator should have considered that the employee waived her right to challenge that warning. Counsel submitted that the arbitrator "deliberately ignored" a relevant feature. Secondly, the Employer suggested that the evidence in regard to the Employee's eviction from her office was inadmissible since it was not pleaded in the statement of claim. It is submitted that this constituted an irregularity in the proceeding susceptible to review. Finally the Employer argued strenuously that the evidence before the arbitrator fell short of establishing that a constructive dismissal had occurred.

[22] In my opinion there is no substance in these submissions. Counsel looks at the relevant facts piecemeal when he ought to view them cumulatively as the arbitrator did. All incidents including the warnings issued and disciplinary proceedings instituted gave rise to an untenable environment in the workplace resulting in the Employee's resignation. One has to view the whole picture and eschew piecemeal reasoning. In any event these points are ones which are appropriate to an appeal and not review. Having regard to the intention of the legislature as mentioned above this Court ought not to countenance any attempt to use the present review procedure to introduce appeals through the back door as it were.

[23] In the premises it follows that this appeal cannot succeed and is dismissed with costs.

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P. LEVINSOHN
JUDGE OF APPEAL

I agree

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S.A. MOORE

JUDGE OF APPEAL

I agree

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B.J. ODOKI
JUDGE OF APPEAL

For the Appellant	:	Attorney Mr. Ngcamphalala
For 1st & 2nd, 3rd Respondents:		Attorney Mr. S.K. Dlamini

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