



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No: 66/2014

In the appeal between:

KENNETH B. NGCAMPHALALA

APPELLANT

VS

THE CENTRAL BANK OF SWAZILAND

RESPONDENT

Neutral citation: *Kenneth Ngcamphalala vs The Central Bank of Swaziland (66/2014) [2014] SZSC08 (29th July 2015)*

CORAM: **M.C.B. MAPHALALA, ACJ**
M.D. MAMBA, AJA
S.A. NKOSI, AJA

Heard : 08 July 2015
Delivered : 29th July 2015

Summary

Civil Appeal – delict – appellant instituted proceedings claiming damages against respondent for inducing employer to cancel contract of employment – it is common cause that the respondent exercised management control over appellant’s employer – court *a quo* dismissed action on the basis that appellant was duly compensated for the unlawful dismissal – on appeal held that evidence shows appellant’s contract was terminated by employer at its discretion – held further that there was no evidence that respondent induced the appellant’s employer to terminate his contract of employment – held further that the appellant has failed to establish the requisites of the Aquilian action and in particular the nexus between the alleged patrimonial loss and the respondent – appeal accordingly dismissed with costs.

JUDGMENT

M.C.B. MAPHALALA, ACJ

[1] The appellant instituted action proceedings against the respondent in the court *a quo* seeking delictual damages in the sum of E49 858 157.57 (forty nine million eight hundred and fifty eight thousand one hundred and fifty seven emalangeneni fifty seven cents). The basis of the claim is that the respondent had used its management position wrongfully, intentionally or negligently to induce the appellant's employer, the Swaziland Development and Savings Bank, to breach its contract of employment with the appellant. He contended that as a result of the said action by the respondent, his employer breached the contract of his employment and terminated his services; hence, his employer stopped paying his salary and benefits.

[2] It is common cause that the appellant was employed by the Swaziland Development and Savings Bank on the 1st January 1997 as the Personal Assistant to the Managing Director. Subsequently, the bank experienced financial problems and AMSCOR Consultants were engaged to try and resuscitate the financial position of the bank. In March 1999 the Minister for Finance appointed the respondent to take over the management of the bank following the expiry of AMSCOR's contract. It is not disputed that the respondent, upon taking over the management of the bank, introduced a new organizational chart after consultation with Mrs Vinah Nkambule, who was the Acting Managing Director of the bank. It is further not disputed that the chart excluded the appellant's position, and, he was not offered a specific position.

However, he remained within the employ of the bank, and, his salary and financial benefits were not affected. The appellant disclosed under cross-examination in the court *a quo*, that pursuant to the introduction of the respondent's chart, he applied for leave of absence in December 2000, and, the application was approved by the Acting Managing Director of the bank Mrs Vinah Nkambule.

[3] The respondent's mandate to manage the bank lapsed in 2001 when a new Managing Director Mr. Stanley Matsebula was appointed to take over the management of the bank. Mr. Matsebula then drew up his own organizational chart which also excluded the appellant's position of Personal Assistant to the Managing Director.

[4] It is apparent from the evidence, and, the appellant conceded under cross-examination, that upon his appointment, Mr. Matsebula declared the appellant's position redundant. Pursuant thereto on the 9th March 2001 Mr. Matsebula communicated this decision to the appellant. The appellant has conceded that he did receive correspondence in this regard from Mr. Matsebula.

[5] There is no evidence before this Court that the respondent played any role in the dismissal of the appellant from the bank. It is not disputed that the respondent was lawfully appointed by the Minister for Finance in consultation

with the Board of Directors of the bank; and, that its mandate was to resuscitate the financial capacity of the bank. It is further not disputed that the respondent plays a regulatory role over all financial institutions in the country. To that extent the respondent introduced an organizational chart in consultation with Mrs Vinah Nkambule, the Acting Managing Director of the bank. The appointment of the respondent to manage the bank followed the expiry of a similar mandate to AMSCOR.

[6] Notwithstanding the proposed structure by the respondent which excluded the appellant, he remained an employee of the bank with his salary and benefits intact. It was not until the takeover of the bank by Mr. Matsebula that the appellant was dismissed after his position was declared redundant. Mr. Matsebula failed to consult the appellant before he declared the appellant's position redundant. It is against this background that the Industrial Court, in a subsequent case instituted by the appellant against the bank for unlawful dismissal under case No. 26/2003, had found that the appellant had been unlawfully dismissed. The appellant had claimed reinstatement subsequent to his dismissal on the 9th March 2001. In the alternative, he sought compensation calculated at twenty-four months. However, the court granted the alternative order at twelve months compensation. The basis for compensation was the failure by the bank to consult the appellant before declaring his position redundant. In coming to this conclusion the Industrial Court made a finding that the bank was responsible for unlawfully dismissing the appellant.

[7] The court *a quo* dismissed the appellant's claim on the basis that he was duly compensated by the Industrial Court for the unlawful dismissal, and, that he cannot be compensated again for the same wrongful act. We agree with the judgment of the court *a quo* but on a different basis. The cause of action in the present matter is a claim for damages based on delict and not unlawful dismissal. The court *a quo* misdirected itself by treating this claim as one of unlawful dismissal. The issue for determination by the court *a quo* was whether the respondent was the cause of the alleged patrimonial loss by the appellant.

[8] The appellant's claim is delictual in nature. A delict is an unlawful, blameworthy act or omission which causes another person damage to his person or property or injury to personality and for which a civil remedy for recovery of damages is available.¹

There are two delictual actions recognised by our law, being the "*actio legis aquiliae*" or the aquiliation action and the "*actio injuriarum*". The aquiliation action is the general remedy for wrongs involving harm to a person's bodily integrity including a person's well-being and susceptibility to pain and suffering as well as property including a person's financial sphere and goodwill; damages under this action are for calculable pecuniary loss.² On the

¹ Principles of Delict, Jonathan Burchell, fifth edition, Juta & Co., Ltd 1993, page 10

² Ibid p. 19

other hand the *actio injuriarum* provides the general remedy for wrongs to personality including physical integrity, dignity, privacy and reputation; damages under this action are for sentimental loss.³

[9] The present appeal relates to Aquilian action, and, it is based on a voluntary conduct on the part of a defendant which is unlawful or wrongful. The defendant should have the capacity to appreciate the wrongfulness of his conduct and to act in accordance with that appreciation. The plaintiff should prove on a balance of probabilities that the defendant was at fault in the sense that his conduct was either intentional or negligent. The unlawful conduct should cause the plaintiff patrimonial loss.⁴

[10] Having found that there is no evidence that the respondent induced the bank to breach the appellant's contract of employment, the appeal is bound to fail. It is apparent from the evidence that the managing director of the Swazi Bank, Mr. Matsebula, upon taking over the management of the bank, introduced his own organizational chart which excluded the appellant's position. Subsequently, Mr. Matsebula decided to declare the appellant's position redundant; hence, he wrote a letter to the appellant terminating his employment. In the circumstances the respondent is not delictually liable for the alleged loss suffered by the appellant. There is no nexus between the alleged patrimonial

³ Ibid p. 19

⁴ Ibid p. 32

loss suffered by the appellant and the respondent. See *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 AD at 80 H.

[11] Corbett CJ in the case of *International Shipping Co. (Pty) Ltd v Bently* 1990 (1) SA 680 AD at 700 had this to say:

“As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant’s wrongful act was a cause of plaintiff’s loss. This has been referred to as ‘factual causation’. The enquiry as to factual causation is generally conducted by applying the so-called ‘but-for’ test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff’s loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff’s loss; *aliter*, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called ‘legal causation’. See generally *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34E – 35A, 43E-44B; *Standard Bank of South Africa Ltd v*

Coetsee 1981 (1) SA 1131 (A) at 1138H-1139C; S v Daniels en ‘n Ander 1983 (3) SA 275 (A) at 331B-332A; Siman & Co (Pty) Ltd v Barclays National Bank Ltd 1984 (2).”

See *Minister of Police v Skosana* 1977 (1) SA 31 AD at 34.

[12] *Van Den Heever JA in Trotman and Another v Edwick* 1951 (SA) 443 (A) at 449 where he said:

“The litigant who sues on delict sues to recover the loss he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him.”

See also the judgement of Miller JA in *Standard Bank of South Africa Ltd v Coetzee* 1981 (1) SA 1131 AD at 1138. For the litigant to succeed in a delictual action of this nature, all the requisites of the aquilian action should be satisfied. He should not only establish that he has suffered a loss but that the defendant is the cause of the loss by his unlawful and blameworthy conduct.

[13] Corbett JA in *Siman & Co. v Barclays National Bank* 1984 (2) SA 888 AD at 914 had this to say:

“As was pointed out by this court in *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34 F – 35 D, 43 D – 44 F, causation in the law of delict involves two distinct enquiries: (i) whether the defendant’s wrongful act was a cause in fact of the plaintiff’s loss; and (ii) if so, whether and to what extent defendant should be held liable for the loss sustained by the plaintiff. . . .

The enquiry as to factual causation generally results in the application of the so-called ‘but-for’ test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. The test is applied by asking whether but for the wrongful act or omission of the defendant the event giving rise to the loss sustained by the plaintiff would have occurred.”

[14] The other issue which requires the attention of this Court is the costs of suit of this appeal. The record of proceedings shows that the appellant has been litigating around his dismissal for quite some time between the Industrial Court, the High Court and the Supreme Court. It is trite that litigation in respect of the same cause of action should at some stage be finalized; the law requires that there should be an end to litigation. However, I am not persuaded that this is a proper case where this court should order costs at a punitive scale. An order for costs at the ordinary scale would suffice.

[15] Accordingly, the following order is made:

(1) The appeal is dismissed with costs in the ordinary scale.

(2) The judgment of the court *a quo* is hereby confirmed.

M.C.B. MAPHALALA
ACTING CHIEF JUSTICE

I agree

M.D. MAMBA
ACTING JUSTICE OF APPEAL

I agree

S.A. NKOSI
ACTING JUSTICE OF APPEAL

For Appellant

Attorney S.C. Dlamini

For Respondent

Attorney M.P. Simelane

DELIVERED IN OPEN COURT ON 29 JULY 2015