IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 56/2018

In the matter between:

UNIFOODS (PTY) LIMITED	**Appellant**
and	
MARK DLAMINI	**1st Respondent**
SAMUEL MSIBI	**2nd Respondent**
MNCEDISI MMEMA	**3rd Respondent**
VINCENT NTSHANGASE	**4th Respondent**
MFANZILE MATSENJWA	**5th Respondent**
COMMISSIONER V.Z. DLAMINI N.O.	**6th Respondent**
CONCILIATION MEDIATION AND ARBITRATION COMMISSION	**7th Respondent**

Neutral Citation : *Unifoods (Pty) Limited vs Mark Dlamini and 6 Others* (56/2018) [2019] *SZSC* 12 (08/05/2019)

Coram : M.J. DLAMINI JA, S. B. MAPHALALA JA AND J.M. CURRIE AJA.

Heard : 14th FEBRUARY, 2019.

Delivered : 8th MAY, 2019.

SUMMARY: *Civil Procedure – Appeal against Review of High Court*

seeking setting aside of Arbitration award – Principles of review re-stated; fixed term contracts of employment – Employer/employee relationship compensation for unfair dismissal of employees – Held that mere mistake or error of law or erroneous conclusion not supported by weight of evidence not a ground for review – Held further that employees on continuous fixed term contracts of employment considered permanent employees, entitled to compensation on termination of their employment.

CURRIE AJA

CONDONATON

[1] The Appellant lodged an Application for Condonation for the late filing of its Heads of Argument and Bundle of Authorities. The Founding Affidavit of the Appellant, having complied with the provisions of the law and numerous authorities, and the Respondent not having opposed the application, the late filing of the said Heads of Argument and Bundle of Authorities was condoned.

INTRODUCTION

[2] This is an appeal from a decision of the High Court where the Appellant ("the Applicant in the court *a quo)* sought the review of an award issued by the 6th Respondent ("the Arbitrator) sitting as an Arbitrator in a dispute referred to the 7th Respondent (the Conciliation, Mediation and Arbitration Commission or "CMAC") in terms of Section 84 of the Industrial Relations Act 2000 as amended ("The Act"). The matter arose out of a claim brought by the 1st to 4th Respondents ("The Respondents") seeking, *inter alia*, compensation for unfair dismissal upon the alleged termination of their employment with the Applicant.

[3] The Appellant denied the existence of any such contracts of employment between itself and the Respondents and maintained that the Respondents were employed by a labour broker known as SIMAVSHEQ (Pty) Ltd ("SIMAVSHEQ"). It emerged from the papers filed of record that SIMAVSHEQ acted as an intermediary between the Appellant and the Respondents and was instrumental in their recruitment. It is common cause that upon their engagement the Respondents were placed at the Appellant's premises where they

worked for an extended period from 2014 until their services terminated in June 2016.

[4] There was no written contract of employment setting out the terms and conditions of their employment with either the Appellant or with SIMAVSHEQ. Due to their unsatisfactory conditions the Respondents remonstrated against their precarious engagement and requested written contracts of employment.

[5] It was the Respondents' case that the Appellant then offered them fixed term contracts of employment, which they declined to accept. Due to their refusal to agree to the offer of fixed term contracts the Appellant summarily dismissed them on the 28th June 2016.

[6] On the other hand the Appellant contended that it never employed the Respondents but they were employed by SIMAVSHEQ, as a labour broker, on a contractual basis. The issue for determination before the Arbitrator was whether the Appellant was the employer of the Respondents against which liability lay for the claim of the Respondents.

[7] The Arbitrator found that the Appellant was the employer and the Respondents were permanently employed because they were employees to whom Section 35 of the Employment Act 1980 applied. He found that the Appellant dismissed the Respondents, that their dismissals were substantively and procedurally unfair and he awarded compensation accordingly.

[8] The Appellant took the matter on review to the court *a quo* and the learned Judge dismissed the review stating that he found no support for the contention that the Arbitrator failed to apply his mind to the issues in that he reached an unreasonable conclusion.

[9] The Appellant was dissatisfied with the judgment of the court *a quo* and noted an Appeal, hence the present proceedings before this Court. The Appellant's grounds of Appeal are as follows:

1. "*The Court a quo erred in law and in fact in holding that even if there were errors of law in the arbitration award issued by the 6th*

Respondent, that such errors were not grave so as to warrant the setting aside of the reward.

2. *The Court a quo erred in law and in fact in holding that the 6th Respondent's decision of concluding that the case before him was one of "unfair labour practice" whereas the 1st to 5th Respondents had reported a case of "unfair dismissal" was an immaterial (sic) error that did not warrant the setting aside of the award.*

3. *The Court a quo erred in law and in fact in holding that there was nothing wrong in the 6th Respondent's award of ordering compensation in a case of unfair labour practice as compensation can only be awarded in a proven case of unfair dismissal.*

4. *The Court a quo erred in law and in fact in holding that the Honourable Arbitrator was correct in concluding that the 1st to 5th*

   Respondents were unfairly terminated as there was clear evidence that they in fact resigned their employment after being offered fixed term contacts of employment by the Appellant which they refused to sign and elected to walk away.

5. *The Court a quo erred in law and in fact in holding that the Appellant was the employer of the 1st to 5th Respondents when all the evidence showed that they were in fact employed by the Labour Broker known as SIMAVSHEQ.*

APPELLANT'S ARGUMENT

[10] The Appellant contended that the crisp issue to be decided is who employed the Respondents. There is a dispute as to who was the employer. The Respondents were recruited to work for the Appellant pursuant to an agreement between the Appellant and the Labour Broker, SIMAVSHEQ and the employer was to all intents and purposes the Labour Broker although labour broking is not permissible in this country. The Respondents' pay slips reflected that they were paid by the SIMAVSHEQ. SIMAVSHEQ has sued the Appellant for obligations arising out of the purported labour broking agreement and the matter is still pending in the court *a quo.* If SIMVSHEQ were to succeed in the court *a quo* this would mean that the Appellant would have to pay the Respondents twice i.e. on the

pending summons as well as the Arbitrator's award. All the evidence thus points to the fact that the Appellant was not the employer.

[11] The Appellant submitted that there is no evidence of a dismissal of the Respondents by the Applicant. The evidence shows that in or around June 2016 the Respondents were offered fixed term contracts of employment by the Appellant but the Respondents refused these contracts and walked away. The fact that they declined the offers of engagements meant that there was no dismissal by the Appellant. He submitted that they could have left and claimed constructive dismissal in terms of Section 37 of the Employment Act 1980 if they had been offered less favourable terms of employment.

[12] The Appellant submitted that the Arbitrator misdirected himself in finding that the offer of fixed term contracts of employment by the Applicant to the Respondents was "unfair labour practice" and contended that the Arbitrator did not understand and appreciate the case before him. The Arbitrator awarded compensation whilst he should have ordered that the Respondents be employed by the Appellant on a permanent basis as opposed to ordering compensation.

Compensation is only payable in terms of Section 16 of the Industrial Relations Act 2000 in a case of unfair dismissal or in a case of constructive dismissal.

RESPONDENTS' ARGUMENT

[13] Counsel for the Respondents contended that the evidence clearly showed that the Respondents were employed by the Appellant. He relied on:

(a) A letter dated 5th August 2016 from the Commissioner of Labour addressed to the Managing Director of the Appellant claiming that the Respondents had been employed by the Appellant for over a year on temporary contracts and they were now being offered fixed term contacts of employment.

(b) A clause in the same letter stating that Mr. Sigwane of SIMAVSHEQ advised them that they were employed by the Appellant although the pay slips reflect that they were paid by SIMAVSHEQ. Further that Mr. Sigwane alleged that he parted

ways with Appellant as they would not take his advice regarding the Respondents' complaints and that no written contracts had been entered into. During the arbitration proceedings the contents of this letter were not challenged and its contents were not refuted.

[14] No proper employment forms were completed despite the provisions of Section 22 of the Employment Act. Although the forms bore the logo of SIMAVSHEQ there was no space for signature of the employer and the forms were not signed.

[15] The Particulars of Claim filed in the court *a quo* reflect that there was an oral agreement entered into between the Appellant and SIMAVSHEQ in terms of which SIMAVSHEQ would formulate and keep a pay roll register <u>of the Appellant's employees</u>, being the Respondents herein. This evidence influenced the decision of the Arbitrator in coming to the conclusion that the Appellant was the employer. (My underlining)

[16] The employees wore uniforms of the Appellant and whilst their pay slips bore the logo of SIMAVSHEQ they did not reflect any tax or SNPF deductions, which evidence was carefully considered by the Arbitrator.

[17] The employees were at all material times under the supervision and control of the Appellant. The right of control is an important indication of a contract of service and the greater the degree of supervision or control, the stronger the likelihood that the contract is one of service to prove the existence of a contract of employment between the parties - see **Percy Lokotfwako v Swaziland Television Broadcasting Corporation t/a Swati TV – Industrial Court Case No. 151/2007 at paragraph 17.**

[18] In March 2016 Mr. Sigwane of SIMAVSHEQ was no longer on the scene but the Respondents continued to work until June 2016 under the control and supervision of the Appellant. In terms of Section 32 of the Employment Act 1980 (as amended), having completed a probation period of three months the Respondents were impliedly regarded as permanent employees. In refusing to sign the fixed term

contracts offered by the Appellant the Respondents were exercising their right not to be subjected to unfair labour practice. The learned judge in the court *a quo* confirmed the finding of the Arbitrator that the recurring theme in the findings of the Arbitrator was that on the balance of all the evidential material considered and the facts of the matter, the Appellant was the employer.

FINDINGS OF THE COURT

[19] In the first ground of Appeal the Applicant contends that the Court *a quo* misdirected itself in holding that even if there were errors of law in the Arbitration award, that such errors were not grave so as to warrant the setting aside of the award.

[20] Section 19 (5) of the Industrial Relations Act provides as follows:-

"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''.

[21] The Arbitration Act 1904 does not prescribe the parameters of review but the common law grounds of review were applied in the High Court Case No. 459/2016 **Unicorn Concepts (Pty) Ltd and Another v Simelane** where it was stated as follows:

"……in order for the Applicant to succeed with common law review, he must put forth facts that show and/or prove them. These are that:

5.1.1 The Arbitrator's (sic) decision was arrived at arbitrarily or capriciously or mala fide;

5.1.2 The Arbitrators misdirected themselves in order to further an ulterior or improper purpose;

5.1.3 The Arbitrators misconceived the nature of the discretion conferred upon them and took into account irrelevant considerations or ignored relevant ones;

5.1.4 The Arbitrators' decision was grossly unreasonable as to warrant the inference that he failed to apply his mind."

[22] In **Goldfields Investments Ltd and another v City Council of Johannesburg and Another 1938 TPD at 551** it was held that a mistake of law *per se* is not an irregularity but its consequences may amount to a gross irregularity where a judicial officer although *bona fide* does not direct his mind to the issue before him and so prevents the aggrieved party from having his case fairly adjudicated upon.

[23] Neither in the first ground of appeal, nor in argument did the Appellant state in which respect the Court *a quo* erred in holding that even if there were errors of law, that such errors were not grave enough to warrant setting aside of the award of the Arbitrator.

[24] *In casu* I can find no fault in the finding of the Arbitrator or the learned Judge in the Court *a quo*. There is no instance where the Arbitrator misdirected himself on a fundamental matter of law so as to warrant an inference of gross irregularity where the aggrieved party did not have his case fairly adjudicated upon as will appear more fully from the discussion below.

[25] The second and third grounds of appeal relate to the decision of the Arbitrator that the matter before him was one of "unfair labour

practice" whereas the Respondents had reported a case of "unfair dismissal" and the award of the Arbitrator of compensation in respect of unfair dismissal. The Appellant contends that the Court *a quo* erred in holding that the Arbitrator's decision in concluding that the case before him was one of "unfair labour practice" whereas Respondents had reported a case of "unfair dismissal", was an immaterial error and did not warrant the setting aside of the award.

[26] In my view the Respondents were found to be employees of the Appellant. They had been employed for a period exceeding three months and were deemed to be permanent employees. In refusing to sign fixed term contracts of employment they were exercising their right not to be subjected to an unfair labour practice. They were not given a hearing by the Appellant and the Respondents are entitled to compensation and it is immaterial whether there was a mischaracterization of the award when the Arbitrator awarded compensation for "unfair labour practice". In substance, the Arbitrator made the correct finding with the correct result.

[27] In the fourth ground of appeal the Appellant contended that the Court a *quo* erred in holding that the Arbitrator was correct in concluding

that the Respondents' employment was unfairly terminated when they in fact resigned.

[28] I see no merit in this ground of appeal. There is no evidence that the Respondents resigned. The Court *a quo* correctly found that the Respondents were unfairly dismissed. The Respondents did not resign but remonstrated against being offered fixed term contracts of employment when they considered themselves permanent employees. The Respondents were not given an opportunity to be heard on the issue as required by Section 35 (2) of the Employment Act 1980 (as amended). – **Swaziland Revenue Authority v Ruth Mkhaliphi (43/2017.**

[29] The Appellant contended in the fifth ground of appeal that the Court *a quo* erred in holding that the Appellant was the employer of the Respondents.

[30] On perusal of the founding affidavit of the Appellant filed in the court *a quo* the Appellant relies on the fact that the Arbitrator found that Eswatini does not have legislation governing labour broking and

ultimately concluding in his award that the Appellant was the employer.

[31] In arriving at the conclusion that the Appellant was the employer the Arbitrator carefully considered all the evidence placed before him, including, *inter alia*, the letter from the Labour Commissioner, the Employment forms, the Particulars of Claim filed in the Court *a quo*, and uniforms bearing the emblem of the Applicant. In addition the fact that the Respondents were at all material times under the supervision and control of the Appellant, is a strong indication of an employer-employee relationship. The right of control is an important indication of a contract of service and the greater the degree of supervision or control the stronger the likelihood that there is a contract of employment between the parties - ***Percy Lokotfwako v Swaziland Television Broadcasting Corporation t/a Swati TV – Industrial Court Case No. 151/2007 at paragraph 17.***

[32] The Arbitrator considered the Respondents period of service from March 2016 to June 2016 when their employment status automatically transferred to the Appellant. It appears from the Arbitrator's award that the Labour Broker disappeared from the scene in March 2016 but

the Respondents continued to work until June 2016. In terms of Section 32 of the Employment Act of 1980 (as amended) having completed their three months probation period, the Respondents would be regarded as permanent employees.

[33] Having considered the above and all the evidence before him the Arbitrator came to the conclusion that the Respondents were employees of the Appellant and I can find no fault with this finding.

COSTS

[34] It appears from the papers filed of record that the Appellant has been attempting throughout the proceedings to refuse to honour its legal obligations to pay the Respondents their compensation in terms of the Arbitrator's award and has been abusing the court process to achieve this end. The Appellant was served with the Arbitrator's award which was issued in January 2018. The Appellant did not challenge the award until 29th June 2018 when the approached the Court *a quo* under a Certificate it of Urgency. Dissatisfied with the judgment of the Court *a quo* it filed an Appeal on the 26th July 2018. There were

no valid reasons given for the delay in challenging the award (see page 66 of the Appeal Record.)

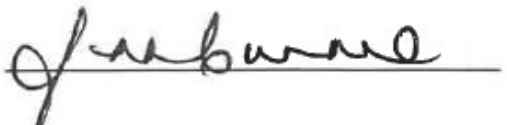
[35] I am of the view that there was no merit in taking the matter on review to the Court *a quo*, nor is there any merit in the grounds of appeal filed by the Appellant. The Respondents may no longer have any form of employment and are unable to fund litigation. I am of the view that the Respondents have had to engage in unnecessary litigation and should be compensated accordingly.

[36] I accordingly make the following order:

ORDER

1. The Appeal is dismissed.

2. The Appellant is ordered to pay the Respondents' costs.



J.M. CURRIE

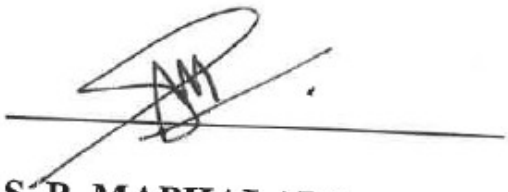
ACTING JUSTICE OF APPEAL

I agree

M.J. DLAMINI

JUSTICE OF APPEAL

I agree



S. B. MAPHALALA

JUSTICE OF APPEAL

For the Appellant : B. S. DLAMINI

For the Respondent : B. L. DUBE