



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 385/11

In the matter between:

KENNETH B. NGCAMPHALALA

APPLICANT

and

**SWAZILAND DEVELOPMENT &
SAVINGS BANK**

1ST RESPONDENT

**THE PRESIDING JUDGE OF THE
INDUSTRIAL COURT**

2ND RESPONDENT

Neutral citation : Kenneth B. Ngcamphalala and Swazi Bank, The Presiding Judge of the Industrial Court (385/11) [2012] SZHC 223 (28 SEPTEMBER 2012)

Coram : MABUZA J

Heard : 7, 8 AND 9 FEBRUARY 2012,

Delivered : 28 SEPTEMBER 2012

Summary : Labour Law - Review – Applicant seeks review of decision of Industrial Court – Review to High Court governed by section 19 (5) of the Industrial Relations Act No. 1/2000 (as amended) – Common law grounds for review applicable – Review granted.

- [1] The Applicant seeks to have an order of the Industrial Court in Case No. 186/2010 granted on the 2nd February 2011 to be reviewed, corrected or set aside, and costs.
- [2] In that case (i.e. Case No. 186/2010) the Applicant sought an order against the 1st Respondent to pay him his monthly salary plus full benefits from March 2001 to date of final payment; interest on the aforesaid amount from date of application to date of final judgment; further or alternative relief.
- [3] According to the papers filed off record the amount in respect of salary totaled the sum of E13,488,611.57 (Thirteen million four hundred and eighty eight thousand six hundred and eleven Emalangeni fifty seven cents) when the application was launched on the 20/4/2010 and calculated from March, 2001. The monthly salary of the Applicant having been the sum of E14,583.33 (Fourteen thousand five hundred and eighty three Emalangeni thirty three cents).
- [4] The date for which final payment is sought has not been disclosed nor how it is to be determined. The Applicant has left that date open ended.

[5] The Applicant also seeks his full benefits from March 2001 to date of final payment. The full benefits he claims are set out in paragraph 3 of his founding affidavit in the application launched in the court *a quo*. These are set out as follows:

- (a) Thirty working days annual holiday;
- (b) Personal use of employer's car;
- (c) Cost of servicing and repairs of vehicle;
- (d) Petrol;
- (e) Medical aid;
- (f) Pension benefits;
- (g) Housing loan at subsidized interest over twenty-five years;
- (h) Group life and disability insurance;
- (i) Funeral benefits;
- (j) Family club membership;
- (h) 24 Hour security guards.

[6] These benefits have not been quantified in monetary terms and have no cut-off date; they have been left open ended.

[7] The background hereto is that the Applicant was employed by the 1st Respondent as the managing director's personal assistant on the 1st January

1997 at a monthly salary of E14,583.33 (Fourteen thousand five hundred and eighty three Emalangeni thirty three cents) together with other benefits which I have set out in paragraph 5 above.

- [8] During March 1998 the 1st Respondent underwent a change of management. Due to disagreements with the new management, the applicant proposed to the 1st Respondent that instead of reporting for work each day he remain home with full pay plus benefits in a letter dated 11th January 2001. In the same letter to the 1st Respondent the Applicant proposed that he takes an exit package and set out the proposed package. The 1st Respondent's response to both these proposals is set out in its letter to the Applicant dated 22nd January 2001. In it the 1st Respondent rejected the Applicant's exit package proposal and made a counter offer which is set out on page 42 – 44 of the Book of Pleadings; I need not detail same. In response to the 1st Respondent's letter of 22nd January 2001, the Applicant sent to the 1st Respondent a draft memorandum of agreement wherein he wanted the 1st Respondent to bind itself in an agreement that he would remain at home with full pay plus benefits until the matter was resolved. The 1st Respondent declined to sign such an agreement and this is its response:

“My letter dated 22nd January, 2001 addressed to you and which was formally communicated and discussed with you today is sufficient whereby in paragraph “3” 1 indicated to you that the bank accepts your suggestion that you remain at home forthwith on full pay plus benefits whilst this matter is being finalized. That in my view fully covers the security you may be after”

[9] On the 9th March 2001, the 1st Respondent wrote to the Applicant terminating his services by reason of redundancy as his post was abolished. The terms of the exit package had not been agreed as negotiations failed. The 1st Respondent in that letter set out two options with regard to terminal benefits from which the Applicant could select but the Applicant rejected these.

[10] The 1st Respondent and the Applicant had a contract of employment which began on the 1st January 1997 and ended on the 9th March 2001. The termination of the Applicant’s services was successfully challenged by the Applicant in the Industrial Court. The Court did not make an order of reinstatement. It awarded the Applicant maximum compensation calculated at 12 months for unfair dismissal. The award was based only on monthly salary and no compensation in respect of benefits was awarded as it was not part of the Applicant’s cause of action at that time.

[11] The Applicant subsequently launched an application under Case No. 186/10 in the Court *a quo*. The 1st Respondent successfully opposed the application and the 2nd Respondent who was the sitting Judge dismissed the application with costs in a judgment dated 2nd February 2011. It is against the said judgment of the court *a quo* that the present application which seeks a review has been brought.

[12] This Court's jurisdiction to review any judgment of the Industrial Court is governed by section 19 (5) of the Industrial Relations Act No. 1/2000 (as amended) which provides that:

“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”.

[13] In **Takhona Dlamini v The President of the Industrial Court and Another** Case No. 23/1997 the Court set out some of the common law grounds for review thus:

“these grounds embrace, *inter alia*, the fact that the decision in question 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 Court took into account irrelevant considerations or ignored relevant ones, or that the decision was so grossly unreasonable as to warrant the inference that the Court had failed to apply its mind to the matter...”

[14] In his founding affidavit the Applicant sets out various complaints regarding the conduct of the court *a quo* in the proceedings before it, namely:

- (a) that the 2nd Respondent misconceived the Applicant’s cause of action and the relief sought;
- (b) that the decision of the 2nd Respondent was grossly unreasonable so as to warrant the inference that the court failed to apply its mind to the matter;
- (c) that the 2nd Respondent took into account irrelevant issues and ignored relevant ones;
- (d) that the plea of *judicata* was not applicable.

[15] With regard to the first complaint that the 2nd Respondent misconceived his cause of action and relief sought, the Applicant has set out the following examples from the judgment: That

- (i) “the Applicant has failed to prove that since March 2001 to the present day that he is an employee of the Respondent”.
- (ii) “the Applicant is fully aware that the agreement was terminated by the Respondent by letter dated 9th March, 2001”.
- (iii) when Applicant prayed to the Industrial Court for reinstatement, he was asking the Court to re-instate the employment contract which has since been terminated by the Respondent together with all his rights and benefits”.

[16] The Applicant’s response is that it was not necessary for him to prove an employment contract as his claim was not based on the employment contract but on the breach of the agreement to stay home on receipt of full pay and benefits.

It is apparent from the foregoing that indeed the 2nd Respondent ill-conceived the claim before it. Throughout the application the Applicant’s cause of action is for payment of his monthly salary plus full benefits from

March 2001 to date of final payment which claim is based on the arrangement of the 22nd of January 2001 that the Applicant remains home until an exit package had been negotiated.

[17] The examples in respect of the second complaint that the 2nd Respondent failed to apply his mind are that:

(i) “The Industrial Court award took into consideration the fact that the Applicant has suffered loss of salary through an unfair termination of employment.”

(ii) “The Court is satisfied that the agreement between the parties dated 22nd January, 2001 was terminated by the Respondent on the 9th March 2001. This is the agreement which authorized Applicant to remain at home pending finalization of an exit package.”

[18] The Applicant’s response to the above is that his claim has nothing to do with termination of employment but for specific performance of a contract or payment of damages for breach of contract specifically of the contract dated 22nd January 2001.

[19] The examples in respect of the third complaint that the 2nd Respondent took into account irrelevant issues and ignored relevant ones are that:

- (i) Even though the Applicant amended its claim to that the 2nd Respondent should pay him an equivalent of monthly salary, the 2nd Respondent granted the amendment but ignored it in his judgment.
- (ii) Even though the court *a quo* conceded that the litigation between the parties was concluded in September 2009 he should have used this benchmark to order payment of the Applicant up until this date, he failed to consider this relevant issue.
- (iii) The Applicant states that the 2nd Respondent took into account an irrelevant issue when it noted that the Applicant did not disclose in its founding affidavit that he was dismissed from work on the 9th March 2001 nor that he had sued for unfair dismissal for which he was awarded compensation.
- (iv) That the Applicant raised a fresh issue in his replying affidavit that the Respondent partially complied with the Industrial Court award was an irrelevant issue.
- (v) That it was an irrelevant issue that the Applicant failed to state that there was ongoing litigation pending and for what relief

and before which court but the 2nd Respondent took this into account.

[20] Finally the Applicant states that the court *a quo* committed an irregularity by taking into account the principle of *res judicata*. I agree with the Applicant that this principle is not applicable herein. The Applicant is not seeking the same order as that sought and obtained in any of the cases cited by the 1st and 2nd Respondent. And it is because of his reliance on this principle that led to his decision which warrants the court's interference. Because of all the foregoing, I am satisfied that the Applicant has properly invoked this Court's review jurisdiction.

[21] Turning to the merits of the matter, there is substance in respect of some of the concerns raised by the Applicant but this is due to the fact that the cause of action was not properly articulated. The arrangement to stay home on full pay and benefits was merely an arrangement for convenience of both parties and nothing more should be read into it. It was not a new contract nor was it a variation of the employment contract that existed between the parties. It merely served to remove the Applicant from the 2nd Respondent's premises to his own home because they could no longer tolerate nor work with one another. It did not create or give rise to any new obligations on the 1st

Respondent's part, it merely stated that the Applicant should stay at home with full pay. The arrangement merely changed venues, instead of reporting at the offices of the 1st Respondent he remained at home.

[22] Any claim for specific performance or payment of damages for breach of contract must flow from the breach of the contract of employment that existed between the parties from the 1st January 1997 to the date of the breach by the 1st Respondent on the 9th March 2001. The door for payment of any monthly salary plus full benefits was firmly (unlawfully) closed by the 1st Respondent on the 9th March 2001.

[23] In my view the Applicant is entitled to the payment of his full benefits. The difficulty is that these are not quantified in monetary terms. The open-ended period stated by the Applicant is unreasonable as there should be a cut off period as is provided by the law.

[24] Section 16 of the Industrial Relations Act No. 1/2000 sets out remedial powers of the Court in cases of dismissal, discipline or other unlawful disadvantage. The Industrial Court in its judgment dated 17/3/2005 (Annexure B) held that the Applicant's dismissal was unfair. It was not

caused by the Applicant's conduct but by the 2nd Respondent declaring his position redundant. The Court in that judgment followed the provisions of section 16 (6) and (7) in awarding the Applicant compensation.

[25] Section 16 (9) provides that:

“Compensation awarded under this section is *in addition to* and not in substitution for *any severance allowance or other payment payable to an employee under any law*, including any payment to which an employee is entitled under his or her contract of employment or an applicable collective agreement.” (emphasis mine)

[26] It seems to me therefore that from a reading of section 16 (9) that the compensation awarded to the Applicant should have been in addition to whatever benefits the Applicant was entitled to under his contract of employment for example severance pay, notice pay and additional notice pay. These are the only benefits that are in law due to the Applicant in the event the 1st Respondent did not pay him.

[27] I therefore find for the Applicant and the decision of the 2nd Respondent is hereby set aside and in its place I order that the Applicant's terminal benefits

comprising of severance pay, notice pay and additional notice pay as provided by law be fully paid out to him with costs. In the event that the 1st Respondent did pay the Applicant his terminal benefits then this order should be ignored and the matter remains dismissed as ordered by the court *a quo* with no order as to costs made.

Q.M. MABUZA
JUDGE OF THE HIGH COURT

For the Applicant : Mr. S.C. Dlamini

For the Respondents : Mr. M. Sibandze