THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

HAVELOCK ASBESTOS SWAZILAND LIMITED

(Appellant)

V

DAVID SCHOLES

(Respondent)

Coram	Sapire P. Matsebula and Maphalala J J
For Appellant	Mr Patrick Flynn
For Respondent	Mr Peter Dunseith

JUDGEMENT

(16/04/99)

In the Industrial Court the Respondent sought compensation from the appellant for unfair dismissal. It was common cause that the Applicant employed the Respondent as a maintenance foreman on 4 May 1992 for a period of two years. On 1 October 1993, the Appellant terminated the services of the Respondent on the grounds that the Immigration authorities had refused to renew his residence permit. Appellant gave the Respondent one month's notice stating that it was no longer able to employ him.

The relevant facts found by the President of the Court a quo are that, in April 1993 the Appellant applied for the extension of the necessary permit for the Respondent's sojourn in Swaziland. On 16 July 1993 the Immigration authorities granted the extension for a period of two years, and informed the Appellant accordingly. Two months later the extension of the permit was withdrawn at the express request of the Appellant, which informed the authorities that the post occupied by the Respondent was to be localised. There is some doubt as to the truth of this as the evidence strongly suggests that the person who replaced Respondent was not a local

The Appellant terminated the Respondent's employment on the ground that that the authorities had refused to extend the permit, and that further continuation of their relationship as employer and employee would on this account be illegal. This without informing that Respondent that the permit had been granted but withdrawn at its own instance.

The Respondent claimed that this amounted to an unfair dismissal. The Appellant argued in the court a quo as it has done, on appeal, in this court that the provisions of section 36(1) of the Employment Act1 which reads

"36. It shall be fair for an employer to terminate the services of an employee for any of the following reasons –

(i) because the employee is unable to continue in employment without contravening this Act or any other law"

have the effect of excluding the dismissal in the present instance from being unfair. The argument rejected by the court a quo is that, however it came about, and notwithstanding that the Appellant purposefully contrived the withdrawal of the permit, the Respondent's continued employment would have been illegal, as he did not have the necessary permit.

The Appellant's contentions are untenable. The unfair absurdities to which this line of reasoning leads

means that the argument must fail on two grounds.

When the Appellant determined to terminate the Respondent's employment, continued employment would not have been illegal, as the permit had in fact been extended. The court a quo found as fact that such extension had been granted on the Appellant's application and withdrawn at its subsequent request. Not only are we bound to this finding of fact, but we are satisfied that the court a quo justifiably came to this conclusion. The termination of employment and Appellants search for justification therefor, were the causes not the consequence of the illegality. The contrived withdrawal of the permit and consequent illegality of continued employment was merely a pretext to dismiss the Respondent.

The same conclusion is reached on reasoning analogous to that which was applied in Gawan v Bowern2. The so-called legality of the employment was conditional

on the successful application by the Appellant for the necessary permit Appellant by its own act, designedly and calculatedly prevented the fulfillment of the condition for the legality of the employment. The court a quo was correct not to countenance reliance upon such non fulfillment to justify the Respondent's dismissal. The first point of law raised must thus be answered in favour of the Respondent.

The second and third points of law relate to the compensation award, made by the court a quo consequent on the finding that the dismissal was unfair.

At the time of the unfair dismissal, the Industrial Relations Act of 19803 was in force. Thereafter and while the case was still pending that Act was repealed and replaced with the Industrial Relations Act 19963 In terms of the earlier act the compensation, which the court a quo could award was limited to an amount equivalent to six months salary. Its successor provides for increased awards, up to the equivalent of twenty four months salary. When the later Act was promulgated the court a quo permitted the Respondent to amend his claim for compensation, so to claim the larger amount now provided for in the new Act. In this, the court a quo erred. The error resulted in a further error when the award was made. The court awarded an amount equivalent to eight months salary, notwithstanding that the provisions of the statute in force t the time of the unfair dismissal limited the award to the equivalent of six months salary.

The Respondent's claim arose at the time of the unfair dismissal. The appropriate remedy was that prescribed by the statute in force at the time. The provisions of the new act as far as they affected matters other than procedure are not retrospective. (See Bell v Voorsitter van die Rasklassifikasieraad) 4

The court did not give reasons for the exercise of its discretion and it is not possible to relate the award to the considerations prescribed In. Section 13(3) of the 1980 Act, which the court is obliged to take into account. In making awards the court a quo should In order to avoid justifiable criticism that the award is arbitrary, indicate the factors upon which the amount of the award is determined. Failure to do so constitutes an

1 Act No.5 of l980
2 1924 AD at 566
3
4 1968 (2) SA 678 (A)

irregularity. In the present case the court a quo not only misdirected itself on a matter of law regarding the provisions of which act to apply, but also failed to set out its reasons in determining the award and relating the same to the provisions of the relevant section.

It is open to this court therefor to fix the amount of the award. In so doing we have regard to the provisions of section 13 of the 1980 Act. The actual financial loss likely to have been suffered by the

Respondent included the remuneration he would have received for the remaining period of his contract. He was at the time already of an age when it is difficult to find alternative employment. The prospect of obtaining other employment must have been slim, especially in view of his status as an expatriate and the prevailing conditions in the labour market. The circumstances of his dismissal must count heavily against the Appellant having regard to the facts found by the court a quo, which indicate deviousness if not deceit on the part of the Appellant. The question of reinstatement did not arise. Having regard to the aforegoing we consider that an award of the maximum limited in section 15(4) to be appropriate. Accordingly the amount is reduced to the equivalent of six month's salary i.e E52 584 x 6/8 = E39 438

The third point raised related to an award made by the court a quo of an amount of E 39 348 as "relocation" expenses. The argument was that the Employment Act 1980 Section 43 provides for a "repatriation" allowance to be paid by employers on the termination of a contract of employment by them. For the Appellant it Mr Flynn argued that the wording of the act and by the use of the word "repatriation" the provision was intended to apply only to employees who were brought into Swaziland for the purpose of employment For the respondent Mr Dunseith argued that the word "repatriation" had a wider meaning which should be applied in the present case.

As the Respondent was an expatriate, and he was dismissed on the very ground that he could not legally take up employment in Swaziland, even on the narrow meaning of the word the provision applied to him. Although there is evidence that he continued to live and work in Swaziland after his dismissal this must have been because of circumstances irrelevant to his dismissal. On his dismissal, unless a further application for a residence permit was successful he would have been obliged to return to his place of

origin outside Swaziland. We are not persuaded that the court a quo erred in making this award.

In the result the Appeal succeeds only to this extent, that the award of E52 584 is reduced to E39 348.