SWAZILAND INDUSTRIAL COURT OF APPEAL

Swaziland Television Authority

Appellant

v

Hlope Lwazi & others

Respondents

Case No 9/02

Coram	SAPIRE, JP
	MATSEBULA, JA
	MAPHALALA, JA
For Appellant	S. SHONGWE
For Respondents	MR. MKHWANAZI

Judgment

(09/08/2002)

The Appellant is a body corporate established by statute, which administers the television service in Swaziland.

The Respondents were all employees of the Appellant. They had, so it has been established, engaged in an illegal strike or work stoppage, on 26th and 27th October 1999, in connection with which broadcasting had been interrupted.

A disciplinary tribunal was established which sat on various dates between 02 02 10 and 02 03 01. The sole member of the tribunal was Mr Rudolf Matsenjwa. The terms of reference of the tribunal are a matter of dispute but only in so far as Matsenjwa maintained that he was mandated not to recommend suitable punishment but to impose it in the event that those charged or some of them were found guilty of one or more of the charges they faced. The Appellant maintains that his authority was limited to making findings on the facts and recommending punitive steps to the governing board in the event of findings of guilty.

The tribunal found that all the respondents had taken part in the illegal strike and it is clear that they acted in concert. It was not however found possible to hold all

responsible for the more outrageous behaviour of others, namely that is of invading the newsroom and interrupting the service.

The tribunal, having found all but four of those charged guilty, came to the conclusion that a first written warning be issued to the employees who were found guilty of participating in the illegal strike. Those found guilty of obstruction of the news service by invasion of the newsroom were to be given a final warning.

The report was delivered to management and to the union. The former considered that the treatment found appropriate by the tribunal equivalent to trivialising of the situation. The Appellant after considering the report dismissed all the Respondents. This gave rise to the proceedings in the court a quo the Respondents claiming an order

1. Declaring the Respondent's purported dismissal of the Applicants from their employment invalid and null and void ab initio and setting same aside

2. Re-instating the Applicants to their various posts with immediate effect

3. Directing the Respondent to pay to the Applicants their salaries from the date of their purported dismissal to date of judgement

4. Declaring the Respondent's purported dismissal as amounting to an unlawful lock-out against the Applicant (sic)

5. Costs on an attorney and client scale, but only in the event of this application being opposed

6. Further or alternative relief

The claim so formulated presents a number of difficulties. As the dismissal complained of is not described as "unfair" within the meaning of Section 35 of The Employment Act1 (the Employment Act).

The reference to ''Applicants' and ''Respondent" is of course to the parties as they were in the court a quo

In the founding affidavit which supports the application the First Respondent made it clear that the Respondents considered that the punishment prescribed by the tribunal was final and precluded any more serious steps being taken against the Applicants by the Appellant following the findings of guilty. In other words the Respondents were only to receive warnings effective for a limited period. The Appellant maintained that the mandate of the tribunal was to investigate the facts and to recommend what action should be taken in the event of the tribunal finding the Respondents guilty of some or all of the charges against them. The Appellant's management, considered the report of the Tribunal to be advisory, leaving it open to the governing board to differ there from and to act in accordance with its own assessment of the situation. This difference was decided in favour of the Respondents in the court a quo and is the. question of law upon which the Appellant has appealed to this court

The Respondents had every reason to be happy with the outcome of the disciplinary hearing. Their offences were serious if one bears in mind that at the time, the. service delivered by the Appellant, was considered "essential" in terms of section 73 of the Industrial Relations Act of 19962, which governed at the relevant time and the respondents' strike was in terms thereof a criminal offence.

In the judgment of the Court a quo reference is made to the cases, Swaziland United Bakeries v Armstrong Dlamini3 and The Central Bank of Swaziland v Memory Matiwane4 and these words are quoted.

1 ACT 5/1980

2 ACT NO. 1 OF 1996

3 Appeal Case No. 117/94

4 Case No 11/1993

'"It is clear from the provisions of Section 42 of the Employment Act that the court is bound to consider all the circumstances of the case when considering whether the employer has discharged the burden of proving that the discharge was fair and reasonable " The court does not appear to have given proper weight to these judgments

The purpose of the hearing in the court a quo, notwithstanding the wording in which the claim was couched, was to determine whether or not the Respondents had been unfairly dismissed. In order to do this the court had to take into consideration the provisions of sections 35, 36, 41, and 42. This the Court a quo has not done.

The Court a quo based its decision almost exclusively on the ground that the Appellant acting through its board of directors was bound by the decision of the tribunal. The action to be taken against the Respondents provided for in the report of the tribunal, was, so the court a quo found, not a recommendation to be accepted or rejected by management as it considered proper, but binding on the parties as if it were a court order. This decision may be seen as being based on mixed fact and law.

One may test the validity of this conclusion by considering the obverse. Had the tribunal found that dismissal of some or all of the Respondents was appropriate following on the factual findings, would that in itself have meant that the Respondents were automatically dismissed? Would it no longer have been open to the Appellant as employer to apply some lesser and more lenient sanction? The answer would appear to be "no".

Dismissal of an employee, or the imposition of some lesser sanction, is a juristic act performed by the company itself through its management constituted by the board of directors. Only in rare and special circumstances would it be proper to hold that a disciplinary tribunal has been delegated the power as its agent, to the exclusion of the principal, to perform this function.

In the instant case the court a quo seems to have accepted the say so of Mr Rudolf Matsenjwa as to the extent of the mandate. He, Matsenjwa, was the sole member of the tribunal. In this the court erred in law. An agent cannot by his own

evidence establish his authority and the extent thereof. Such evidence as there was coining from the employer was to the effect that the tribunal's decision was only to be advisory. There was no evidence at all that the Appellant had abdicated its powers in regard to the treatment its employees. The court should not have found it proved that the tribunal had been delegated the power of imposing its own punishment on those of the respondents. The court should have addressed the question of whether the dismissal was in all the circumstances fair.

In coming to its conclusion the court a quo relied heavily on Kohidh v Beier Wool (Pty) Ltd.5, which is authority for the proposition that if employees have been acquitted at a disciplinary enquiry or the Presiding Officer has imposed a penalty less severe than dismissal, they cannot be subjected to a second enquiry in respect of the offence. Nor may the employer, so the effect of that judgment is, ignore the decision of the chairman of a properly constituted disciplinary hearing and substitute its own decision. A dismissal in such circumstances, so the judgment holds, would invariably be unfair. This is a decision of a foreign court and the reasoning by which it came to its conclusion is not in accord with the provisions of the local statute. It cannot be reconciled with the decisions of Swazi courts to which reference has been made.

The conclusion to which I have come is that the point of law raised in the appeal must be answered in favour of the Appellant and the orders of the court a quo in respect of each and all of the Respondents set aside. This does not mean that those of them who have in fact been reinstated should now automatically be dismissed. The case will be remitted to the court a quo to determine whether in each case the

dismissal was fair or unfair in terms of the Employment Act.

SAPIRE, JP

I agree

MATSEBULA, JA

I agree

MAPHALALA, JA

5 (1997) 18 ILH 1104 LLMA