

IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

BAGSHAW HARRIS & ASSOCIATES (PTY) LTD

Appellant

Vs

THOMAS LAWLAR ANDREWS

Respondent

Appeal Case No. 24/2001

Coram	Sapire, JP
	Matsebula, JA
	Maphalala, JA
For Appellant	M.SIBANDE
For Respondent	P.R. DUNSEITH

JUDGMENT

29-10-2003

The appellant conducts the business variously known as claims adjuster or insurance assessor. It is a private company in which at the relevant times Mr. Brian Bagshaw was the majority shareholder and his wife a minority shareholder. It appears that it was Mr. Bagshaw who because of his experience and qualifications on behalf of the company performed the professional services, which required his expertise, while his wife was largely responsible for administration.

A time came when Mr. Bagshaw foresaw to ease himself out of the business and to this end sought a younger person to introduce to the business who, as an employee would initially take over and perform part of his duties. At a later stage this person if he proved suitable would acquire equity in the company, and eventually succeed to the entire business.

2

The appellant advertised for such a person. Respondent, who was resident in Ireland, saw the advertisement, responded thereto, and consequent upon which discussions took place and correspondence passed between the parties. This culminated in the respondent coming to Swaziland to join the appellant as an employee, with a view to eventually receiving equity in the company, and thereafter taking over the business for him.

Before respondent left his home for Swaziland, he was offered a written contract that dealt with his terms of employment but did not mention the respondent's entitlement to shares in the company. Some of the benefits that he had been offered and indeed received were also not provided for in the contract. The parties signed the employment agreement in this form without amendment.

The respondent commenced employment with the applicant on and continued in employment until he left. Differences between Mr. Bagshaw and the respondent caused the severance. The respondent then commenced proceedings in terms of the Labour Legislation and the application in the court a quo was initiated on a certificate of non-resolution of a dispute.

The respondent's case was that the conduct of the employer towards him was such that he could not reasonably be expected to continue in such employment. Accordingly in terms of Section 37 of the Employment Act<sup>1</sup> which reads.

Termination of services due to employer's conduct.

37. When the conduct of an employer towards an employee is proved by that employee to have been such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves his employment, whether with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by his employer. Because he left for this reason he was to be deemed to have been unfairly dismissed.

<sup>1</sup> Act 5 of 1980

3

The respondent complained that.

- a) In breach of the contract between the parties Mr. Bagshaw had refused to transfer to him shares representing 20% of the capital of the company.
- b) The appellant had, to the respondent's detriment miscalculated the respondent's entitlement to a bonus provided for in the agreement.
- c) Mr. Bagshaw had made a scarring attack on the respondent's work performance, character and integrity.

The court a quo found on the facts that the appellant was in breach of its contract with respondent in one or more or all of these respects and on this basis held that the appellant was to be deemed to have dismissed the respondent unfairly. The correctness of this finding is a cardinal point of issue in this appeal. I will consider the complaints both seriatim and conjunctively.

The court a quo found that three documents read together contain the terms upon which the respondent took up his employment with the appellant. The documents are the formal employment agreement read with two letters that preceded it. While the appellant contended that only the formal employment agreement was relevant. I am satisfied that the court a quo properly treated all three documents as contractual. In these documents the court found a positive consensus binding on the parties that the respondent would after two years service be as of right entitled to have 20% of the issued shares in the company transferred to him. Is this, as a question of law supportable on a proper construction of the documents?

Portion of the letter containing the offer reads.

"I would suggest that initially we enter into a two year employer/employee type contract, with the option of a minority partnership thereafter, on a 20/30/50% basis as between you, my wife, and myself, if we both feel that our association should continue, with the further guarantee that on the occasion of my retirement you will take over the practice, subject to minor provision for my wife.

4

My wife and I would retain 60% shareholding in the business for life, thereafter you would take over the company completely."

Respondent's acceptance of this suggestion did not give rise to a contract binding on the parties. The words "with the option of a minority partnership thereafter, on a 20/30/50% basis as between you, my

wife, and myself, if we both feel that our association should continue."

are contrary to any intention on the part of the offeror to be bound . What is in contemplation is that if after two years of trial the parties wished to continue their association, 20% of the shares would be conferred on the Respondent. An undertaking or promise, such as this which remains in the discretion of the parties or either of them, cannot be binding.

The very structure of the arrangement indicates that the initial two-year employment contract was to be a probationary period, and that the shares would be transferred only if the parties were then agreed that the respondent would be admitted as a shareholder. Clearly the parties were at that stage, that is, at the end of the two years, not in agreement that they suited each other. Bagshaw's letter that gave rise to complaint "c" is clear indication of his negative assessment of the situation. This being so he was not obliged at that stage to admit the respondent as a shareholder and his failure to do so does not constitute a breach of contract.

It must also be born in mind that any contract for the transfer of shares to the respondent whether for consideration or not, involved the shareholders, Bagshaw and his wife, and did not create any obligation on the part of the appellant. Even though Bagshaw controlled and was the alter ego of the company, the difference and separation between the company and its shareholders cannot be completely overlooked. Any breach of contract that there may have been would have given the respondent rights against the Bagshaws personally, but not against the appellant. It follows that any such breach would not have been conduct on the part of the appellant as employer that made continued employment impossible.

5

The court correctly found that complaint "b" justified and that the appellant had indeed miscalculated the bonus to the disadvantage of respondent. The court also found that if anything this was a genuine mistake based on a misreading or misinterpretation of the contract. This mistake is capable of monetary adjustment and cannot be construed as repudiation of the contract or in itself, or as conduct on the part of the employer, leaving the respondent with no other course but to sever his relationship so as to constitute an unfair dismissal.

Complaint "c" came as an afterthought. The strictures and criticism of respondent and what were said to be his shortcomings may have been harshly expressed. On the other hand Bagshaw's letter, is on the whole conciliatory. This complaint even if the strictures were not fully justified does not constitute in itself, or taken in conjunction with the other complaints, constitute conduct contemplated in Section 37.

For these reasons the court a quo misdirected itself in regard to the application of Section 37 and its judgment in this respect is to be reversed. This does not affect the judgment or order of the court a quo as far as order 4 and 5 is concerned. To this extent the appeal succeeds and orders 1, 2 and 3 are set aside.

SAPIRE, JP

I agree

MATSEBULA, JA

I agree

MAPHALALA, JA