THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

STANDARD BANK SWAZILAND LIMITED

Appellant

And

NOMBULELO MATSEBULA

1st Respondent

SANELISIWE VILANE

2nd Respondent

Appeal Case No. 24/2002

Coram ANNANDALE - J P

MATSEBULA - J A MAPHALALA - J A

For the Appellant MR. P. FLYNN (Instructed by Millin & Currie)

For the Respondents MR. P. DUNSEITH

JUDGEMENT

Maphalala J A

This is an appeal from a judgment of the President of the Industrial Court. The Appellant was the unsuccessful Respondent in the court a quo. In the court a quo, the Applicant who is now Respondents in this Appeal were claiming for the following relief;

1.1 Reinstatement alternatively compensation for unfair dismissal;

1.2 Notice pay;

1.3 Annual leave.

A written statement signed by the parties was handed in to the court a quo from the bar setting out certain agreed facts and questions of law arising. The said statement was tendered in terms of Rule 33 (1) of the High Court Rules as read with Rule 10 of the Industrial Court Rules. The agreement basically stipulated the dates of employment of the two Applicants, that they were employed in terms of contracts which were renewed on a monthly basis and that the last contract was signed by the Respondents on the 2nd May 2000.

The parties in the court a quo set out the questions for determination as follows:

2.1. Are the monthly fixed term contract unlawful?

2.2. Are the terms of the monthly fixed term contract less favourable than those provided under the

Employment Act as contemplated by Section 27 thereof?

2.3. Both parties contention are based upon common law jurisprudence and labour legislation.

In addition, before the President of the Industrial Court, evidence was led by both parties and the 2nd Applicant.

After hearing the parties, the learned Judge a court a quo ruled in favour of the Applicants in a judgment dated the 29th November 2002. The following order was accordingly recorded:
1st Applicant Nombulelo Matsebula

1. 19 days salary in lieu of leave (amount to be calculated)

2. One-month salary in lieu of notice (El, 600).

3. 12 months salary as compensation for unfair dismissal (E19,200).
2nd Applicant Sanelisiwe Vilane

1. 9 days salary in lieu of leave (amount to be calculated).

2. One-month salary in lieu of notice (E1, 600),

3. 8 months salary as compensation for unfair dismissal (El2, 800) The Appellant, being dissatisfied with the judgment of the Industrial Court herein now appeals against the said judgment on the following grounds:

1. That the court a quo erred in law in that despite the parties having submitted an agreed statement of facts and a list of the legal issues to be decided, the court exceeded its parameters and made its finding that the Respondent had placed the Applicants on an unlawful probation, an issue not in the Respondent's application before court not raised in the Appellant's reply nor one raised by the Respondents in their evidence before the court and not an issue to be decided by the court in accordance with the Rule 33 (1) of the High Court Rules. In so doing the court did not decide:

1.1. Whether the fixed term contracts entered into by the Respondents in the Appellant's employ were contrary to the spirit of Section 27 of the Employment Act;

1.2. Whether the terms of the fixed term contracts were such that they provided lesser terms and conditions of employment than those guaranteed by the Employment Act and whether the fixed term contracts were unlawful, but in fact went on to decide that because of the Respondent's motivation in entering into the fixed term contracts, which was not an issue before court, the fixed term contracts were unlawful and the termination of the Applicant's services were unfair.

2. The court erred in law in finding that despite the parties having entered into the fixed term contracts by mutual consent, the contracts are rendered unlawful by reason of the Respondent's consideration of the Respondent's work performance as a motivation for not offering the Applicant permanent employment.

The essence of the Appellant's case on appeal appears to be that the Industrial Court was bound by the four comers of the "written statement in terms of Rule 33 (1) of the High Court Rules as read with Rule 10 of the Industrial Court Rules" which appears at page 22 of the record.

Substantial facts of the matter are that a written statement "ST1" dated the 27th November 2001 was filed by the parties and includes agreed facts and sets out the questions of law for determination of the court a quo. Counsel for Appellant proposed that there be a "special adjudication" and requested time to draft an

agreement. The President asked the following question at page 3 of the record;

"Nothing turns on the evidence is there?"

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The Respondents' representative stated that "...when this matter started that was my proposal ... that if we agree this matter on that point of law so that anyone who succeeds there determines the future of the matter. So as of now if it arises at this stage I still have no objection".

The matter was postponed for argument after the agreement "ST1" was handed in and accepted by the court a quo.

Having agreed to argue the matter on the basis of "ST1" and the court having accepted the agreement and postponed the matter for argument, the Respondents' representative thereafter sought to deviate from the agreement and lead evidence.

It was contended on behalf of the Appellant that the President following Rule 10 of the Industrial Court Rules, 1984, applied the High Court Rule and allowed the parties to adjourn the matter for argument. The said Rule provides that the High Court rules shall apply to proceedings before the court with such qualifications, modifications and adaptations as the President may determine where the Industrial Court Rules do not make provision for the procedure to be followed. In casu the agreement was signed by the Respondents' representative who had been authorised to represent the parties. The court a quo was clearly aware that the Respondents' representative was neither an advocate nor an attorney and it was argued that by implication the President modified or adapted the rule to that extent.

The submission in this regard is that the Respondents were bound by the agreement after the President had applied Rule 33 of the High Court Rules with the adaptation. The court a quo was indeed obliged to confine a party to the stated case once the court a quo had applied Rule 33.

It was contended further for the Appellant that the President was bound to follow the High Court Rules once he had already applied it and postponed the matter for argument. Rule 33 does not give the Presiding Officer the discretion to disregard the agreement entirely and allow them to take a normal course. Rule 33 (5) and (6) merely provides that the court may give directions on "other issues" and to admit and record facts without hearing of evidence. He cannot allow one party to simply proceed to trial as if no written statement had been agreed upon.

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Furthermore, it was contended on behalf of the Appellant that the Respondents' sought a declaratory order and prayed that the court rule that the contracts signed after the initial dates of employment were invalid in terms of Section 27 of the Employment Act. The court a quo erred in finding that the Appellant had placed the Respondents on an unlawful probation as this was not an issue before the court. The court a quo found that the contracts provided for less favourable conditions than is required by the Employment Act and in particular Section 32 (1) (2) and (3), in that they were subjected to probationary periods longer than six months. The court a quo held that it was unlawful to subject Applicant's to "a probationary period of sixteen months under the guise of monthly contracts" (per page 32 of the record). The court a quo found that the contract of employment was for a continuous period and that the employees were employees to whom Section 35 (2) of the Act applied. The Appellant contends in this regard that its motivation in entering the fixed term contracts was not an issue before the court in terms of the agreed statements of fact.

It was argued au contraire on behalf of the Respondents that the issue now raised by the Appellant on appeal was canvassed and decided before commencement of the trial when the Respondents' representative indicated that he wished to lead evidence supplementing the facts agreed upon in the statement. It is the view of the Respondents that the President of the Industrial Court correctly held that

the Industrial Court is not obliged to confine a party to a stated case if such party wishes the matter to go to trial in the normal way.

In my respectful view, the Respondents' contentions are correct. The President of the Industrial Court correctly held that the Industrial Court is not obliged to confine a party to a stated case. Rule 33 of the High Court rules gives a wide discretion to the presiding officer. He may admit and record the agreed facts at the trial, he may make such decision under the rules, as he deems appropriate; and he may give directions for hearing of evidence on other issues necessary for the final disposal of the proceedings. It is clear from Rule 33 itself that the presiding officer retains a wide discretion to ensure that justice is done.

Rule 10 of the Industrial Court rales states that the High Court rules shall apply to proceedings before the Industrial Court "with such qualification, modifications and adaptations as the

President may determine" and where, in the opinion of the President, the High Court rules cannot be applied in such manner, then the court may determine its own procedure.

Further Rule 33 of the High Court rules requires a stated case to be signed by counsel for the parties, or the parties themselves. It is common cause that in the present ease the representative of the Respondents the late Mr. Sipho Motsa who signed the written statement case was neither an attorney nor an advocate, nor a party to the proceeding.

In this regard I agree with the submissions made on behalf of the Respondent that the Industrial Court is a court of equity. It makes allowances for unsophisticated representation by persons who are not legally trained. It is also not bound by rules of evidence or procedure which apply in civil proceedings and may disregard any technical irregularity which is not likely to result in a
miscarriage of justice.

The argument by the Appellant that the court a quo was bound by the written statement because it agreed to postpone the matter for argument cannot succeed on a number of grounds. Firstly, it ignores that the written statement was handed in from the bar. Secondly, no formal application for determination of the matter piecemeal was made. Thirdly, this argument ignores that the court's attention was not drawn to the fact that the written statement only dealt with one question of law and failed to address a number of other issues arising for determination. Fourthly, it ignores that the court had no opportunity to consider the matter, did not in fact consider the matter, and merely postponed the case "for argument" on the postponed date, the court a quo then applied its mind to the written statement and decided, after hearing argument, that the matter should go to trial. It is noteworthy that the Appellant's counsel himself conceded that it would be "unjustificiable" to shut the Respondent out if they wanted to raise relevant issues outside the written statement. The exchange in this regard is found at page 6 of the record and runs as follows;

"Judge: Well that is correct that we need to know whether the issues which are sought to be added or whatsoever he wants to do are relevant issues in terms of these proceedings, if they are then we will deal with them.

RC: I will leave it at that my Lord because maybe then that is what we need from the Applicant. If they are relevant then it would be unjustifiable to shut them out...".

Therefore the Appellant cannot succeed in this ground of appeal as it has been shown that the court a quo had a discretion whether to proceed to determine one issue of law separate from the others,

and whether to prevent the Respondents from going to trial merely because their counsel had ill-advisedly signed the written statement. The court exercised its discretion fairly and at the proper time, and the Appellant was not in any way prejudiced or taken by surprise

The appeal is grounded on a formalistic approach which seeks to impose more rigid constraints on the Industrial Court than even apply to the High Court in terms of Rule 33,

As regards ground of appeal 1.1 and 1.2 the Respondents contended in their Particulars of Claim that the requirement that they enter into these monthly contracts was unlawful, and invalid in terms of Section 27 of the Employment Act. It is clear that the issues which the court defined and thereafter determined are the very issues raised in the Respondent's Particulars of Claim. In this regard, I agree with the submission made on behalf of the Respondents that the court's categorization of the monthly contracts, as disguised probation was a conclusion based on the material facts pleaded and proved. The Respondents were not required to plead the conclusions and cannot be said to arise from an issue not contained in the pleadings. On the contrary, in casu it arose from the very facts and averments set out in the Particulars of Claim, Therefore the Appellant cannot succeed in this ground of appeal.

In paragraph 2 of the notice of appeal, the Appellant states that the court a quo erred in law in finding that the monthly contracts "are rendered unlawful by reason of the Respondents' consideration of the Respondents' work performance as a motivation for not offering the Applicant permanent employment".

In this regard I agree with the submissions on behalf of the Respondents that this is not a correct description of the reason why the contracts were held to be unlawful the court found as a matter of fact that the intention of the Respondent was to scrutinize the performance of the Respondents with a view to confirming their employment if they met the mark. Therefore, this finding of fact is not open to appeal. The court went on to hold that the Respondents are protected from this kind of abuse by the Employment Act, in particular Section 32 (1), (2) and (3).

In our view the judgment of the court a quo was therefore fully consistent with the court's duty to promote fairness and equity in labour relations as envisaged by Section 8 (4) as read with Section 4 (1) (b) of the Industrial Relations Act, 2000.

The court accordingly ordered as follows:

1. The appeal in this case must be dismissed.

2. We make no order as to costs.

MAPHALALA J A

I agree ANNANDALE J P

I agree MATSEBULA J A

Delivered on ....December 2003.