INDUSTRIAL COURT OF APPEAL OF SWAZILAND

CASE NO. 1/2000

In the matter between:

SWAZILAND BUILDING SOCIETY	APPELLANT
AND	
NTOMBI DLAMINI	RESPONDENT
CORAM	ANNANDALE J P
MATSEBULA	J A MAPHALALA J A
FOR APPELLANT	MR. FLYNN
FOR RESPONDENT	MR. DUNSEITH

JUDGMENT

5TH DECEMBER 2003

Matsebula J A:

The appellant who was the respondent in the court a quo and against whom the president made the following findings:-

"Accordingly the respondent is directed to award the applicant her meritorious increment with effect from the 1st April 1997".

There was no order as to costs.

It is common cause and this was the finding of the learned president in the court aquo, that the appellant had mero motu commenced a

review process of granting meritorious awards to its employees -granted on half yearly and annual basis. It is also common cause that the appellant was under no contractual obligation to award these meritorious awards. It did this purely on its own discretion. It is also common cause that the respondents' employees were aware of this process of granting the meritorious awards to employees.

The appellant advances the following grounds of appeal against the judgment of court a quo.

1. Any review of salaries whether for merit or other cause is at the discretion of the Managing Director of the respondent. The court a quo erred in law in finding that the Industrial Court could interfere with that discretion and itself order a salary review for merit.

1.1. The court a quo erred in law in finding that it was empowered to review the exercise of respondents discretion to refuse a merit increase on the basis that the discretion was not exercised judiciously or that respondent abused its discretion or acted arbitrary.

2. The court a quo erred in law in finding that the discretion could not be delegated by the Managing Director.

It is convenient to deal with paragraph 2 of appellant's grounds of appeal.

At page 5 paragraph 5 of the learned president of the Industrial Court's judgment, he states the following:-

"The respondent has vested the discretion to adjust salaries for "merit" or other cause solely on the Managing Director. There is no indication whatsoever from the rules provided to suggest that this discretion can be delegated to any other subordinate to the Managing Director."

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However, the reason for granting the final judgment by the learned court president is not based on the question that the discretion could not be delegated by the Managing Director. On the contrary the learned Court President deals with the merits of the Review Committee that exercised that discretion and the court a quo makes its findings thereon.

On behalf of the appellant, Mr. Flynn's main argument is that because the appellant's discretion is not based on any contractual right of an employee vis-a-vis the employer, the court erred in finding that it was at large to interfere with the appellant's exercise of its discretion. It was the appellant's prerogative to award meritorious services.

Mr. Flynn has referred us to COUNCILLOR MANDLA DLAMINI AND ANOTHER VS MUSA NXUMALO APPEAL CASE NO. 10/2002 and DU PREEZ AND ANTOHER VS TRUTH AND RECONCILIATION 1997(3) SA 204 (A) in support of his submission that the discretion on the part of the employer is similar to that of a court exercising a review jurisdiction. It was Mr. Flynn's submission that in such a situation all that the court is called upon to do is consider whether the action of the court whose judgment is being reviewed was fair and reasonable but not to enter into the merits of the decision.

Mr. Dunseith on behalf of the respondent on the other hand has referred us to the provisions of Section 8(4) of the Industrial Relations Act 2000 of the Act, which includes as its objects inter alia -

(a) promotion of harmonious industrial relations;

(b) promotion of fairness and equity in labour relations and also referred to us to NUM VS EAST RAND GOLD AND URANIUM COMPANY LTD 1991 12 I. L. J. 1221 (A) @ 1237 H where Goldstone J A said the following:

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"In the exercise of its powers and the discretion given to it, the Industrial Court is obliged to have regard not only or even primarily to the contractual or legal relationship between the parties to a labour dispute. It must have regard to the principles of fairness."

The question the court a quo was called upon to decide was whether the review committee delegated by the respondent exercised its discretion judiciously in all the circumstances of the case when it refused to grant the respondent her meritorious increment award.

1. Discretion is defined as "the power to decide, within the limits allowed by positive rules of law and generally to regulate matters of procedure and administration." THE SHORTER OXFORD DICTIONARY ON HISTORICAL PRINCIPLES.

2. An in VAN ASWEGEN VS ADMINISTRATOR OFS 1955 (iii) SA 71 (O).
Discretion is defeated as -

"a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance between equity and colourable glosses and pretenses not to do according to the

will and private affections."
According to the above decision, discretion is exercised on grounds based on facts, which the person exercising the discretion in one way or another obtained. Discretion is more than a simple feeling. Discretion means, when it is said that something is to be done within the discretion of the authorities that the something is to be done within the rules of reason and justice, and not according to private opinion; according to law and humour. It is to be not arbitrary, vague or fanciful, but legal and regular.

The above are excerpts quoted in Halsburg's statutes of England 2nd edition 1951 part 25 page 16.
The appellant's heads of argument - the 3rd paragraph, the appellant avers that it was the appellant's prerogative to award meritorious

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service; it was not a contractual right of an employee. The appellant further averred that the increment is earned by the employee through merit, which merit is assessed by the employer."

It seems to me that the appellant is losing sight of the fact that the Industrial Court is a court of equity. As a court of equity it will focus its attention on the purpose and objects of the act as applicable to the work situation. In this regard it will also of necessity deal with how the employer exercises its discretion in a work situation.

The appellant has also referred to certain Amended Staff Rules whose clause 3 thereof provides:-

"Any review of salaries whether for merit or other cause is at the discretion of the Managing Director."

The court a quo was alive to the fact that appellant had a discretion and that appellant delegated its discretion to the committee. At page 27 of the typed copy, paragraph 2, the court states:-

"The question that we must answer is whether the review committee of the Respondent exercised their discretion judiciously in all the circumstances of the case."

"Our simple answer to this question is that they did not. The respondent having chosen to rely on measurable criteria to grant meritorious award cannot have any reasonable justification in our view to deny the applicant a meritorious award in 1997, after having granted her the same in 1995 and 1996 when her score on the performance factors was considerable lower."

In the course of writing this judgment I had an occasion to consult some authorities where the doctrine of legitimate expectation was dealt with. One such case is the one which sought to differentiate between decision made by a purely administrative decision and where the doctrine of natural justice would the principle of audi alter am par tern principle. These incidences would include decisions made by quasi-judicial bodies where it would be held that such a decision is purely of an administrative nature. Such decisions were criticised by courts and academic writers alike. I do not propose to go into the

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ratio decidendi followed in those cases. One such case is LAUBSCHER VS NATIVE COMMISSIONER PIET RELIEF 1967 (1) SA 263 A and DEFENCE AND AID FUND VS MINISTER OF JUSTICE 1967(1) SA 263 A.

However in ADMINISTRATOR TRANSVAAL VS TRAND 1989 10 ILJ 823 A. The Appellate Division in the Republic of South Africa finally rejected the notion that the Rules of Natural Justice only have to be complied with where liberty, property or existing rights are affected. In the process the court also rejected the distinction between quasi-judicial acts and purely administrative ones and thereby extended the reach of the rules of natural justice to situations where a mere legitimate expectation of a hearing i.e. something short of a legally enforceable right to a hearing existed.

The application of the doctrine of legitimate expectation is that, if a decision maker, either through the application of a regular practice or through an express promise leads those affected legitimately to expect that he or she will decide in a particular way then that expectation is protected and the decision maker cannot ignore it when making the decision. The doctrine, it seems applies to both procedural and substantive expectations.

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I would in the circumstances find that the appeal has no merits at all and would dismiss it with costs.

J.M. MATSEBULA

Judge of Appeal

J.P. ANNANDALE

President

S.B. MAPHALALA

Judge of Appeal