INDUSTRIAL COURT OF APPEAL OF SWAZILAND

Appeal No. 4/2003

Appeal No. 5/2003

HELD AT MBABANE

In the matter between:

SWAZILAND GRANITE (PTY) LTD	Appellant
and	
MICHAEL VILAKATI AND 13 OTHERS	Respondents
Consolidated with the matter between:	
SWAZILAND TREATED POLES (PTY) LTD	Appellant
and	
PHUMZILE DLAMINI AND 29 OTHERS	Respondents
Coram	Annandale, J P
	Matsebula, J A
	Maphalala, J A
For Appellants Adv.	P.E. Flynn,
	Instructed by R. J. S.
	Perry attorneys
For Respondents	Mr. A. M. Lukhele

JUDGMENT

(5 December 2003)

Swaziland experienced widespread industrial protest action early in February 1997 when organised labour unions orchestrated mass stay-aways to accentuate certain

demands from Government. Two business concerns that were amongst those affected and which took countermeasures are Swaziland Treated Poles (Pty) Ltd (hereafter referred to as "Treated Poles") and Swaziland Granite (Pty) Ltd ("Granite.") The result was that the workers who stayed away from work were dismissed. The dismissed workers collectively had the matters decided by the Industrial court.

The factual findings made by the Court a quo are not in dispute. Essentially, it found that the evidence heard by it was that in both cases, the workers of the two companies participated in an unlawful strike,

which resulted in their dismissal. Regarding "Treated Poles," the learned Judge President of the Industrial Court found that:

"The Respondent (Treated Poles) acted reasonably in all the circumstances of the case in dismissing the applicants, especially because all had a previous warning not to engage in a wild cat strike. "

The court a quo went on to hold that:-

" ...The employees of (Treated Poles) were not dismissed in terms of Section 36 of the Employment act, but in terms of Section 69(l)(a) of the Industrial Relations Act. They are in the circumstances entitled to a severance allowance amounting to ten working days wages for each completed year in excess of one year that they have been continuously employed by the respondent. They too are entitled to other terminal benefits including payment in lieu of notice in terms of Section 33(l)(c) of the Employment Act, accumulated during their respective continuous service to the Respondent. "
It is this finding of law against which the appeal by Treated Poles lies. Its amended grounds of appeal read that:

"1. The Court a quo erred in law in finding that the respondents were not dismissed in terms of section 36 of the Employment Act, 1980 but in terms of Section 69(1) of the Industrial Relations Act, 1996 in that:

1.1 In terms of Section 42(2) of the Employment Act, the Court a quo shall not consider the services of an employee fairly terminated unless the employer proves that the reason for termination was one permitted by section 36.

1.2 Section 69(l)(c) permitted the employer to treat participation in a strike which took place otherwise than in conformity with Part VIII of the Industrial Relations Act, 1996, as a breach of contract and allowed the employer to dismiss summarily therefore.

1.3 The dismissal of the respondents for the said breach of contract by participation in the unlawful strike and which breach arises by operation of section 69(1)(c) constituted a fair reason for dismissal in terms of section 36(j) of the Employment Act.

2. The Court a quo ought to have found that the Appellant discharged the onus in terms of section 42(2) as a reason for dismissal in terms of section 36 existed and the Court a quo found, on the facts, that the dismissal was reasonable in the circumstances.

3. The Court a quo erred in ordering the payment of severance allowance in that the court ought to have found that the dismissal was under section 36(j) of the Act and severance allowance is accordingly not payable by virtue of section 34(1) of the Act.

4. The Court a quo erred in ordering the payment of notice pay and additional notice pay in that the respondents were summarily dismissed and notice pay was accordingly not payable in terms of sections 33(7) and 33(8) of the Employment Act."

In respect of "Granite"the Industrial Court a quo found that:

"As concerns the Granite workers, the company policy was to re-employ the employees involved in the mass stay-away, if they came back within a reasonable time."

The court then referred to evidence of Mr. David Crabtree, and (quoting him) said that

"...it was not the policy or decision of the respondent to dismiss the employees of (Granite) for participating in the illegal strike and that the company intended to reengage (my emphasis) all the Granite employees who returned to work within a reasonable time. This being the respondents' position, it cannot (my emphasis) be said that any of the fourteen employees of (Granite) were dismissed summarily in terms of Section 69(1) of the Industrial Relations Act of 1996. It is however the evidence of (the granite employees) ... that they had indeed been dismissed and therefore continued to picket outside the gate... The respondent (Granite) having decided not (my underlining) to dismiss them for participating in the stay-away did not inform them that they had not been dismissed... It would appear to us that the fourteen employees of (Granite) had reasonable apprehension that indeed they had been dismissed together with the employees of (Treated Poles). The respondent (Granite) could not justifiably dismiss them in terms of Section 36(f) of the Employment Act without first establishing the reason why they did not return to work within a reasonable time as from the 6th February 1992. "

Herein are the grounds of appeal in respect of Granite, which in the amended form reads :-

"1. The court a quo erred in law in that it ought to have found that the Respondents were dismissed for a reason permitted by section 36(j) of the Employment Act as the appellant had dismissed Respondents summarily for breach of contract which breach arises by operation of section 69(I) of the Industrial Relations Act, 1996. The Court a quo ought to have so found in that:

1.1 Ex facie exhibits Al' and A' the Respondents were summarily dismissed for participating in an illegal strike action.

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1.2 The court a quo erred in law in holding that the Appellant purported to dismiss the Respondents in terms of section 36(f) of the Employment Act.

2. The Court a quo ought to have found that the appellant discharged the onus in terms of section 42(2) as a reason for dismissal in terms of section 36 existed based on the breach of contract and the Court a quo found, on the facts, that the dismissals were reasonable in the circumstances.

3. No severance allowance is payable in that the Court ought to have found that the dismissal was under section 36(j) of the Act and severance allowance is accordingly not payable by virtue of section 34(1) of the Act.

4. The Court a quo erred in ordering the payment of notice pay and additional notice pay in that the respondents were summarily dismissed and notice pay was accordingly not payable in terms of sections 33(7) and 33(8) of the Employment Act. "

Section 36 of the Employment Act, 1980 (Act 5 of 1980) determines various "fair reasons" for the termination of an employees services, inter alia where an employee is guilty of violence, threats or ill will towards the employer or any other employee (section 36(b)); absenteeism without proper excuse for more than three working days (section 36(f)); and for any other reason which entails for the employer or the undertaking similar detrimental consequences to those set out in section 36 (section 36 (j)).

Section 42(2) of the same Act reads that:

"The services of an employee shall not be considered as having been fairly terminated unless the employer proves -

(a) that the reason for termination was one permitted by Section 36; and

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(b) that taking into account all the circumstances of the case, it was reasonable to terminate the

service of the employee. "

Section 34 of the same Act provides for a situation where the services of an employee is terminated for other reasons than those in paragraphs (a) to (j) of Section 36, that a severance allowance be paid.

Section 33(l)(c) of the same Act, referred to in the Order of the Court a quo, determines the period of Notice of Termination of Employment, in lieu of which payment was ordered, in addition to any other accumulated terminal benefits.

A part of the unstated and tacit rationale behind the noting of this appeal may well be the provisions of section 33(7) of the same Act which, contrary to the different payments referred to above and ordered by the Industrial Court, provides for the situation of summary dismissal for just cause. In such a situation, only the wages due to the employee up to and including the date of dismissal need to be paid by the employer. Thus, whereas a finding a quo that the dismissals were indeed in terms of section 36 of the Employment Act would have had the result that only due wages were to be paid to the dismissed employees, a finding that it was not in terms of section 36, as was in fact held, resulted in additional payments that were ordered to be made.

The Industrial Relations Act of 1996 (Act 1 of 1996) came into effect early in 1996 and was repealed by Section 113 of the "new" Industrial Relations Act of 2000 (Act 1 of 2000) which commenced in August 2000. Section 112 of the "New Act" provides for the continuation of matters already initiated and pending under the repealed Act of 1996, to continue. In both the "Treated Poles" and "Granite" cases, the matters commenced in terms of the "Old Act" of 1996 in October 1999, thereby falling to be dealt with under the "Old Act" as far as it may be applicable and not under the present "New Act" of 2000.

Section 69 of the 1996 Act, headed: "Consequences for (sic) strike or lockout action not in conformity with this part" (being part VIII of the Act which determines disputes and also strike and lockout procedures) reads:-

"69(1) If any strike or lockout takes place otherwise than in conformity with this part-

(a) .....

(b) ...

(c) where an employee takes part in such strike action the employer may treat such action as a breach of contract and may terminate his services summarily ".

In their application for determination of an unresolved dispute, in both matters, the then applicants averred (in paragraphs 4 of their applications) that "...the termination of their services was unlawful, unfair and unreasonable in all the circumstances." In both matters they claimed as alternatives to reinstatement, "maximum compensation for unfair dismissal "and" payment of one month's notice, additional notice and severance allowance." To this, the then respondent companies pleaded that the ".. .applicants services were fairly and legally terminated."

It may be mentioned in passing that it does not appear from either the Judgment of the Industrial Court or from the filed record of proceedings what the outcome was of the points raised in limine by the then respondents, or whether it was argued at all. It does however not form the basis of the appeals and was not argued before this court either.

In the Treated Poles case the argument of the respondents is that the appellants could not justifiably have dismissed anyone in terms of section 36(f) of the Employment Act, firstly, because the two companies allegedly did not first establish the reason for the workers being absent, secondly that no disciplinary enquiry had been held to establish and enquire into this reason.

In the Granite case, for very much the same reasons, respondents argued that the appellants failed to discharge the burden of proof on it, to justify dismissal under Section 36 of the Employment Act.

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It transpired at the hearing of the appeal that different subsections of section 36 of the Employment Act were referred to by counsel, also in the heads of argument, than what was actually being intended to refer to. The reason for this is that in 1985, renumbering of subsections were enacted and not reflected in the statute compilations used by all the parties. The appeals are dealt with as if the proper new renumbering has been used, throughout. As best as we could ascertain, with the actual 1985 amendment not being available, neither at the High Court, the Industrial Court or at the Attorney General, the renumbering of section 36 is as follows:- Subsection (j) which refers to "...any other reason ... similar detrimental consequences..." now follows after (i); subsection (k) remains as it was (referring to the normal retiring age); and subsection (1) refers to redundant employees.

The overall encompassing factor remains, in both matters, whether the employees of the two companies were unfairly dismissed or not, and whether the provisions of section 36 of the Labour Act of 1980 were applicable, or whether the provisions of section 69 of the Industrial Relations Act of 1996 had to be applied. It is the latter proposition which, if found as it has been in the Industrial Court to be the applicable legislation to apply, that makes the former workers entitled to the additional benefits that were ordered against the employees.

As indicated above, the 1996 Industrial Relations Act determines the consequence of partaking in an illegal strike as summary dismissal, due to breach of contract.

In order for employees to partake in a "legal strike", the procedures clearly stipulated in the 1996 Act have to be followed, in order to avoid the adverse result when their employer dismisses them as a consequence. The then applicable Act elaborately sets out the conditions and circumstances as to exactly when employees may embark on a "legal strike" in part VIII of the Act.

Without having to set out the statutory parameters, the employees of both "Treated Poles" and "Granite" very clearly did not comply with the provisions. For various reasons, as advanced in the Industrial Court, they partook in the "General Mass Action" in vogue at the time. Neither of the two labour forces followed the statutory disputes procedures, which may well have resulted in their strike and stay-away

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actions to have been deemed legal. In both instances, the workers succumbed to the influences of outsiders who managed to persuade them to join the "general strike" or the "mass stay-away", which was not sanctioned by law at all. In neither of the two matters did the employees hold any formal meeting or enquiry at which the rationale behind the strike action was formally investigated, enquired into and determined.

According to the Notice given to the dismissed employees of Treated Poles, the cause for dismissal was participation in an illegal strike. It refers to "People who went on strike on the 3rd of February..." and "...have been dismissed for going on an illegal strike..."and "...have in any event forfeited any terminal benefits by illegally going on strike."

It is common cause that the strike action was not in conformity with Part VIII of the Industrial Relations Act, at least as far as the employees of both Treated Poles and Granite goes. The court a quo also found that the employees were not coerced to partake in the strike. The significant finding by the Industrial Court and which has the greatest impact presently, is that "(Treated Poles) acted reasonably in all the circumstances of the case in dismissing the applicants especially because they all had a previous warning not to engage in a wildcat strike. "

The dismissal of the Treated Poles workers for participating in the illegal strike was thus found to be reasonable. Furthermore, section 69(1)(c) of the Industrial Relations Act of 1996 also labels such strike participation as a "breach of contract" over and above the fact that services may be terminated summarily.

In paragraph 4 of their application in the Industrial Court, the employees averred their dismissal as unlawful, unfair and unreasonable, with unfair dismissal being prohibited in section 35(2) of the Labour Act. Section 42(2) of the Act, quoted above, straddles an employer with a burden of proof to show that the reason for dismissal is one as per section 36 and also that the termination of services was reasonable, a dual requirement. Section 33(7) provides for the dismissal to be summarily, if for just cause, and that wages due are to be paid up to and including the date of dismissal.

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As indicated above, the Industrial Court found as fact that the dismissal was reasonable, as is required under section 42(2)(a). To establish whether the onus in section 42(2)(a) has also been discharged, it is necessary to revisit section 36 of the Labour Act, paraphrased above.

Section 36(l) (as renumbered in 1985) states that termination of service shall be fair if: "for any other reason which entails for the employer or the undertaking similar detrimental consequences to those set out in this section (being reasons as per subsections (a) to (k).

The question then becomes one of whether a "breach of contract", as participation in an unlawful strike is deemed to be in section 69(l)(c) of the Industrial Relations Act of 1996, is of "similar detrimental consequences", as per section 36(l) of the Labour Act.

Under the Industrial Relations Act, summary dismissal is the consequence attached to the seriousness of the breach of contract resulting from participation in an unlawful strike. The legislature most certainly regard it as detrimental. The inclusion of "similar detrimental consequences" in section 36(1) of the Labour Act amplifies the fair reasons for dismissal, over and above those already enumerated. Section 36 is not a numerus clausus of reasons for fair termination of services.

It is my considered view that in the Industrial Court, Treated Poles discharged the burden placed on it by both legs set out in section 42(2)(a) and (b).

The services of the employees were accordingly not only reasonably terminated, as already held a quo, but also fairly, as per the statute. It is as a consequence of such a finding that the provisions of section 34(1) of the Labour Act does not take effect, since the services of the employees were not terminated outside the ambit of section 36.

Thus, section 33(7) of the Employment Act of 1980 and not section 34(1) becomes the operative statutory provision when the monetary consequences of summary dismissal for just cause are to be determined. An employee who is dismissed

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summarily for just cause "shall be paid the wages due to him up to and including the date of such dismissal" (section 33(7)).

It is for the above reasons that I cannot agree with the finding of the Industrial Court regarding Treated Poles, where it held that:

"We reiterate that the employees of Swaziland Treated Poles (Pty) Ltd were not dismissed in terms of section 36 of the Employment Act, but in terms of section 69(1) (c) of the Industrial Relations Act (of 2000) "

It is this finding by the Court a quo that has to be set aside on appeal, as well as the resultant order

pertaining to various benefits under section 33(l)(c) read with section 33(5), Section 34(1), and other terminal benefits.

The "Granite" employees who were dismissed received a notice dated 10th March 1997 which reads in part:

"You have been on an illegal strike for over four (4) days... "

"Secondly, this is what is defined as a strike in the Industrial Relations Act, 1996"

"Thirdly, this is an illegal strike... "

"Fourthly, the company cannot reasonably be expected to employ people who refuse to work and endanger its viability. This is covered by section 36 of the Employment Act 1980 as well as the Industrial Relations Act (section 69). "

"Fifthly, the company warned the entire labour force in October 1996 that if there were any more illegal strike actions/refusals to work, the people involved would be dismissed immediately... "

"Sixthly, you have been absent without leave for more than 3 days".
12 The notice concludes with:-

"You are therefore hereby summarily dismissed in terms of section 69 of the Industrial Relations Act 1996 and/or section 36 of the Employment Act, 1980."

From this notice to the employees the clear reasons for dismissal are stated, namely partaking in an illegal strike, and absence for over three days. The dismissal is stated to be in terms of the abovequoted legislation.

Preceding the dismissal, a notice dated the 5th February, 1997 was given to employees of "Treated Poles", wherein re-employment was offered to employees who went on strike on the 3rd February. It also informed them that:-

"People who only return now have been dismissed for going on an illegal strike, being absent etc."
and "The above people have in any event forfeited any terminal benefits by illegally going on strike. "
It was held in the Industrial Court that "the respondent (Granite) could not justifiably dismiss them in terms of section 36(f) of the Employment Act without first establishing the reason why they did not return to work within a reasonable time as from the 6th February, 1997."

It therefore concluded that the onus under section 42(2) could not have been discharged, with the result that the dismissal was held to be unlawful both substantively and procedurally. This result was held to follow on a finding that Granite did not purport to dismiss the employees in terms of section 69(1)(c) of the (now repealed) Industrial Relations Act of 1996.

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The finding of fact by the Industrial court is that "...it was not the policy or decision of the respondent (now appellant) to dismiss the employees of (Granite) for participating in an illegal strike. "

This finding is not challenged. The Court farther found as fact that after Granite decided not to dismiss the workers for participating in the stay-away, it did not inform them that they had not been dismissed and should report to work at Granite on the 6th February 1997. It was only thereafter, when those who did not report for work, were then handed the abovequoted letters of dismissal dated the 10th March 1997, in respect of which the court said that they were not afforded an opportunity of a disciplinary hearing. That is so.

However, the Court then went on to find that the fourteen employees of Granite had reasonable apprehension that indeed they had been dismissed together with the employees of Treated Poles. This is a finding of fact, not law.

Thus, the reasoning of the Industrial Court was that the workers could not have been dismissed in terms of section 36(f) (absent without leave or justification for more than three days), without first establishing the reason why they did not return for work within a reasonable time as from the 6th February 1997.

It is this chain of reasoning, that leads to the result appealed against. It was incorrectly found that the dismissal cannot be held to be as a result of participating in the unlawful strike.

Throughout the history of these matters, it has all along been common cause that the reason why the workers of both Granite and Treated Poles were absent from work was due to their participation in an illegal strike. The Industrial court found so as fact. This was also so conveyed to the workers in their letters of dismissal.

Accordingly, the decision that "Granite" "...did not purport to dismiss them in terms of section 69(l)(c) of the Industrial Relations Act No. 1 of 1996" cannot be sustained and has to be set aside.

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From this, it follows that the same reasons enumerated in Treated Poles pertaining to a summary dismissal under section 69(l)(c) and the subsequent burden of proof in section 42(2)(a) and (b) with section 36(1) being operative, become applicable, mutatis mutandis, in the Granite matter.

As a result, the order to pay terminal benefits and additional compensation for unfair dismissal, which were to have been determined in the next phase of proceedings in the Industrial Court, is also to be set aside.

In the event, the orders of the Industrial Court in both Treated Poles and Granite are set aside, the appeals being upheld. It is ordered that in both instances, the summary dismissal of the workers who participated in the illegal strike action were sanctioned by section 69(1)(c) of the Industrial Relations Act of 1996, which brought it into the ambit of section 36(1) of the Employment Act of 1980. The employers (appellants) discharged the burden of proof under section 42(2) (a) and (b). All of the workers are entitled to be paid the wages due to them up to and including the date of such dismissal, as per section 33(7) of the Employment Act, but not also to a severance allowance as per section 34(1), nor to payment in lieu of notice as per section 33, or to any other additional compensation.

No costs were ordered in the court a quo and none were sought on appeal. No costs order is thus made.

ANNANDALE, J P

I AGREE

MATSEBULA, J A

I AGREE

MAPHALALA, J A