IN THE INDUSTRIAL COURT OF APPEAL
SWAZILAND

HELD AT MBABANE	**CASE NO. 2/2007**
SWAZILAND ELECTRICITY BOARD	**APPELLANT**
VS	
COLLIE DLAMINI	**RESPONDENT**

CORAM	**BANDA JP** **MAPHALALA JA** **MAMBA JA**
FOR APPELLANT	**ADV. D.A. SMITH SC** **(Instructed by Currie & Sibandze)**
FOR RESPONDENT	**ADV. P. FLYNN** **(Instructed by Dunseith Attorneys)**

JUDGEMENT

27th FEBRUARY, 2008

MAMBA JA

[1] The Respondent was employed by the appellant on the 1st September 1999 as a Senior Manager – Internal Audit. She remained in continuous employment until she was dismissed by the Appellant on the 15th October, 2003. At the time of her dismissal she was earning a salary of E35, 000-00 per month.

[2] The Respondent challenged her dismissal by the Appellant in the court a quo and claimed *inter alia,* for her reinstatement, failing which maximum compensation for unfair dismissal equivalent to 24 months of her monthly salary.

[3] On the 18th May 2007, the court *a quo* found in favour of the Respondent and ordered that the Appellant is to:

> "(a) …re-instate the [respondent] in the position that she previously held or any other suitable position commensurate with her qualifications and experience, and with a pay scale not less than that at which she was previously paid.
>
> (b) …pay the [Respondent] arrear wages for one and half years from November 2005 to May 2007 by no later than 31st May2007.
>
> (d) … pay the costs of the application."

The court *a quo* also ordered that the Respondent should report for resumption of work at the Appellant's premises on the 1st June 2007.

[4] The Appellant has appealed against the decision of the court *a quo* and the grounds of appeal are as follows:

> "1. The court *a quo* erred in law in rejecting admissible and unchallenged evidence of Mr Sifiso Dlamini that the Appellant's structure had been restructured, that in the current structure, the position of Senior Manager-Internal Audit did not exist, on the basis that he was not yet employed when the alleged restructuring took place.
>
> 2. The court *a quo* erred in law in that despite that the Respondent led no evidence contrary to the evidence led by the Appellant through Sifiso Dlamini, it was competent to reject such evidence on the basis of the court's own subjective views, not supported by any evidence.
>
> 3. The court *a quo* erred in law in refusing, alternatively, failing to apply the legal requirements of section [16 (2)(c)] in that the court:
>
> 3.1 Rejected the Appellant's right to argue that it was impractical to reinstate the Respondent as a result of a restructuring which abolished Respondent's post and or as a result of Respondent's post being filled;

3.2 Considered, in determining whether it was practicable for the Appellant to reinstate the Respondent, irrelevant considerations, in particular, the hardship, prejudice, loss of property and accordingly failed to exercise its discretion judiciously and or in terms of section 16(2)(c) of the Industrial Relations Act."

[5] The Respondent has filed a Cross-Appeal where she avers that :

"1. The court *a quo* erred in law in finding that "it would be unduly onerous on the Respondent to pay arrear wages for three years and eight months taking into account that no services were rendered by the applicant during that period.

2. The court a quo erred in law in not ordering that the Respondent should be paid for the three years and eight months in view of the finding that the respondent was in law entitled to be reinstated to the position that she previously held or any other suitable position commensurate with her qualifications and experience, and with a pay scale not less than that at which she was previously paid."

[6] We shall first consider the Appellant's grounds of appeal stated above.

Section 19 (1) of the Industrial Relations Act (Amendment) Act 3 of 2005 (hereinafter referred to as the IRA) provides that there shall be a right of appeal against a decision of the Industrial court or of an arbitrator on a question of law to this court. The decision appealed against herein is a decision of the Industrial Court.

[6] The question that immediately announces itself in this enquiry is what is meant by a question of law as opposed to a question of fact.

In **MEDIA WORKERS UNION OF SA v PRESS CORPORATION OF SA LTD, 1992 (4) SA 791(A) @ 795 E M GLOSSKOPF JA** referring to **SALMOND ON JURISPRUDENCE** 12th edition @ 65-75 stated that:

> "The term "question of law" …is used in three distinct though related senses. In the first place it means a question which a court is bound to answer in accordance with a rule of law – a question which the law itself has authoritatively answered to the exclusion of the court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter. In a second and different signification, a question of law is a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and

determination is what the true rule of law is on a certain matter. A third sense in which the expression "question of law" is used arises from the division of judicial functions between a judge and jury in England and formerly, in South Africa. The general rule is that questions of law in both the aforegoing senses are for the judge, but that questions of fact (that is to say, all other questions) are for the jury."

And at 796, the learned Judge of Appeal referring to the notions of question of fact and question of judicial discretion quoted SALMOND where the author states that:

"Matters of fact are capable of proof, and are the subject of evidence adduced for that purpose. Matters of right and judicial discretion are not the subject of evidence and demonstration, but argument, and are submitted to the reason and conscience of the court. In determining questions of fact the court is seeking to ascertain the truth of the matter; in determining questions of judicial discretion it seeks to discover the right or justice of the matter. Whether the accused has committed the criminal act with which he is charged is a question of fact; but whether, if guilty, he should be punished by way of imprisonment or only by way of fine, is a question of judicial discretion or of right. …

Matters and questions which come before a court of justice, therefore, are of three classes:

(1) Matters and questions of law – that is to say, all that are determined by authoritative legal principles;

(2) Matters and questions of judicial discretion – that is to say, all matters and questions as to what is right, just, equitable, or reasonable, except so far as determined by law.

In matters of the first kind, the duty of the court is to ascertain the rule of law and to decide in accordance with it. In matters of the second kind, its duty is to exercise its moral judgment in order to ascertain the right and justice of the case. In matters of the third kind, [fact] its duty is to exercise its intellectual judgement on the evidence submitted to it in order to ascertain the truth." (The underlining or emphasis has added by us.)

[7] From the above, it is noted that issues that come for determination by a court cannot be characterised or categorised as either matters of law or question of fact only. There is the third category; matters of judicial discretion which pertains to what is fair, just equitable and reasonable. It is more of a matter of a value judgement, but still to be exercised within the law. We note this point because, the golden thread that runs throughout the IRA is the notion of fairness, equity and reasonableness (see Section 4 of the Act). We shall return to this (judicial discretion) later in this

judgement when we consider the compensation award made by the court a quo.

[8] The first ground of appeal challenges the failure by the trial court to accept or believe the evidence of Sifiso Dlamini relating to the process of the alleged restructuring of the operations of the appellant. In essence, the appellant argues that the trial court should not have rejected or failed to accept or believe the evidence of Sifiso. Whether or not a court believes the evidence of a witness, is a question of fact and not law. The matter would, however, be different if the court had declared the evidence inadmissible. That would be a question of law. In casu, the trial court received or admitted the evidence of Sifiso Dlamini but said that it could not rely on it because the events Sifiso testified about had occurred before he was employed by the appellant. Whether the court *a quo* was correct in reaching this conclusion is not the enquiry herein. That the court *a quo* rejected the evidence of Sifiso Dlamini is, in our view, a question of fact and not of law.

[9] The same applies to the second ground of appeal. The Appellant argues that since there was no evidence contradicting the evidence of Sifiso Dlamini, the trial court had no reason or justification to reject his evidence. Again this is not a question of law.

[10] The third ground of appeal by the appellant is like the previous two grounds also an attack on the way the court *a quo* treated the evidence of Sifiso Dlamini. The appellant argues that the trial court should not have rejected the evidence of Sifiso Dlamini that it would be impracticable to reinstate the Respondent to her post or any other equivalent position. The court dealt with this issue and came to the conclusion that the evidence of Sifiso Dlamini was "un helpful [because] he was not yet employed at the respondent's undertaking when the alleged restructuring took place and the alleged organogram showing the new operational structure of the Appellant was not supported by a Board Resolution of the Appellant." The trial court came to the conclusion that "it can not be said that the [Appellant] has proved on a balance of probabilities that the organogram marked 'R2' is a genuine document that proves that the applicant's position was abolished." (per paragraph 69 of the judgement). This again, is a question of fact and not law in our judgement. An appraisal, assessment or evaluation of evidence is a question of fact and not law. None of the Appellant's grounds of appeal are on a matter of law.

[11] The Appellant has no right to appeal to this court on a question of fact. Consequently, the appeal is dismissed.

[12] We now examine the Respondent's Cross-Appeal.

[13] The substance of the Cross Appeal is that the court *a quo* having found and ordered that the Respondent was entitled to be reinstated, the court erred by failing to order that such reinstatement should be with retrospective effect from the date of the dismissal of the respondent and that consequently, the Appellant must pay her for the whole period up to the date of resumption of duty. The enquiry is therefore on the meaning and or import of the concept of reinstatement as used in section 16 (1)(a) of the Industrial Relations Act 1 of 2000 (as amended). This section is similarly worded to section 193(1)(a) of the LABOUR RELATIONS ACT OF THE REPUBLIC OF SOUTH AFRICA. (The relevant extract was made available to us by Counsel for the Appellant).

[14] This section was the subject of consideration by the courts in South Africa in the following cases: **KROUKAM v SA AIRLINK (PTY) LTD (2005) 26 ILJ 2153 (LAC), CHEMICAL WORKERS INDUSTRIAL UNION & OTHERS v LATEX SURGICAL PRODUCTS (PTY) LTD (2006) 271 ILJ 292 (LAC) & SA COMMERCIAL CATERING & ALLIED WORKERS UNION & OTHERS v PRIMSERV ABC RECRUITMENT (PTY) LTD t/a PRIMSERV OUTSOURCING**

INCORPORATED, (2006) 271 ILJ 2162 (LC) AND REPUBLICAN PRESS v CEPPWAWU (2007) SCA 121 (RSA). (These judgements which were not available in our library, were supplied to us by Counsel. This is appreciated.)

[15] In the **Kroukam** case (*supra*) **DAVIS AJA** held that "in cases of automatically unfair dismissal it is competent for the court to make an order of reinstatement that operates with retrospective effect from the date of dismissal even if that goes beyond 24 months." **Zondo JP** in his minority judgement disagreed. He was of the view that the section should be read to mean that the court can only make an order for reinstatement to operate restrospectively "to the date of dismissal or up to 24 months or 12 months backwards, as the case may be, whichever is more recent." This statement by the JP was obiter and was followed in the **LATEX SURGICAL** case (supra). In that case the dismissal was found to have been unfair as opposed to being automatically unfair. **Zondo JP** held that the order for reinstatement was limited to 12 months.

[16] The Labour court (per **Frances J**) and the Supreme Court of Appeal (per **Nugent JA**) in the latter two cases stated above respectively, disagreed with the views of **Zondo JP** expressed above and held that "Where an order for compensation is made, compensation is capped at 12

months for ordinary unfair dismissal and 24 months for automatically unfair dismissals" and there Act does not place a limit for an order of reinstatement. The court has a judicial discretion to decide on the date of reinstatement, subject to such date not being earlier than the date of dismissal.

[17] In the **Republican press** case (supra) **NUGENT JA** at para 19 had this to say:

> "I respectfully disagree with that construction [Zondo JP's]. I do not think that the back-pay to which a worker ordinarily becomes entitled when an order for reinstatement is made is to be equated with compensation. … As pointed out by DAVIS AJA in KROUKAM …an order of reinstatement restores the former contract and any amount that was payable to the worker under that contract necessarily becomes due to the worker on that ground alone. Perhaps a court (or an arbitrator) that makes such an order may also order that part of that remuneration shall not be recoverable. (I make no finding on that point) but I agree with DAVIS AJA that the remuneration becomes due under the terms of the contract itself and does not constitute compensation …"

[18] We respectfully agree and endorse this exposition of the law. However, we do not find anything in the **Republican**

Press case judgement which supports the Respondents' contention that where the court orders reinstatement of a worker, as a matter of law and logic, such reinstatement is or must be with retrospective effect from the date of dismissal. Such an interpretation would do violence to the clear words used in section 16(1) (a) of the IRA. The section empowers the court to order an employer "to reinstate the employee from any date not earlier than the date of dismissal." It could even conceivably be in the future, that is to say, after judgement. The court has a discretion on the issue.

[19] In the case of CHEGUTU MUNICIPALITY v MANYORA, 1997 (1) SA 662 (ZSC), the court had to interpret the word re-instate in an agreement.

MANYORA had been dismissed from his employment by the municipality. Later the parties entered into a written agreement whereby *inter alia* Manyora was to be reinstated in his position in the same grade as at the time of his dismissal. The issue for determination by the court was whether Manyora had to be paid back pay and allowances with effect from the date of his dismissal; in short, what was meant by him being "re instated" in the agreement.

[20] The court first referred to the Oxford English Dictionary definition of the word, which gave the meaning as

> "To re-install or re establish (a person or thing) in a place, station, condition etc…"

The court noted that there was no retrospectivity implied in that definition. And after reviewing labour cases on the issue, McNALLY JA concluded that

> "…the word "re instate" or reinstatement carries no automatic retrospective connotation, either in ordinary language or in our legislation. Normally it means simply that the person concerned will be placed again in his/her former job. If retrospectivity is intended, one would normally look for additional words such as "with effect from the date of dismissal or with effect from (a particular date in the past)' or with back-pay and all benefits from … (date)."

[21] We respectfully agree. In any event the provisions of section 16 (1)(a) of our IRA are very clear. There is no need to look beyond these words to find their meaning. The court has a discretion to determine or fix the date on which the employee is to be reinstated; subject to such date not being earlier than the date of the dismissal of the employee. The court a quo exercised such discretion and determined the date of reinstatement. There is nothing to show that the court erred in this regard.

[22] We hold that in ordering reinstatement of the Respondent, the court *a quo* was not obliged in law to order that such reinstatement be with retrospective effect from the date of her dismissal.

[23] For the aforegoing reasons, the Cross-Appeal is dismissed.

[24] Both the appeal and Cross-Appeal have been unsuccessful. In other words each party has been successful. We are of the considered view that justice would, in the circumstances, be better served if each party bears its own costs.

[25] The court a quo ordered that the Respondent should be reinstated with effect from 1st June 2007. This aspect of the order has been interrupted by this appeal. Although the appeal has been unsuccessful, we do not believe that it was frivolous or vexatious. Had that been the case, we would not be interfering with the date of reinstatement. We order that the Respondent be reinstated with effect from the 1st April 2008.

MAMBA JA

I AGREE.

R.A. BANDA JP

I ALSO AGREE.

S.B. MAPHALALA JA