THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE	APPEAL CASE NO. 1 /2008
In the matter of	
SWAZI SPA HOLDINGS LIMITED	Appellant
vs	
ANNAH DLAMINI	Respondent
CORAM	BANDA, CJ
	MAPHALALA, JA MABUZA, JA
For the Appellant	Mr. N.J. Hlophe
For the Respondent	Mr. N.A. Mthethwa

JUDGMENT 31March,

2009

BANDA, CJ

[1] This is an appeal against the judgment of the Industrial Court which was delivered on the 5th February 2008. The grounds of appeal filed are in the following terms:-

1. That the Court *a quo* erred in law and misdirected itself on the evidence by placing an unduly high and technical standard on the matter. By so doing the court *a quo:-*

    1.1 Ignored appropriate and uncontroverted evidence proving applicant's guilt and thereby entitling appellant to dismiss applicant (now respondent).

    1.2 Failed to appreciate that the applicable standard of proof in such matters was proof on a balance of probabilities which appellant had met in the circumstances of the matter.

2. The Court *a quo* failed to properly evaluate the evidence before it resulting in it drawing a wrong conclusion from the facts; not supported by evidence.

3. The Court *a quo* erred in law in excluding the evidence of PW1 in as much as his evidence was probably true and was not unreasonable when taking into account

the circumstances of the matter, particularly those material aspects of it corroborated by "PW2" and the video recording.

4. The Court *a quo* erred in law and misdirected itself in that it failed to appreciate its role to hear the matter as a court of first instance, resulting in it approaching it as a review Court and confining itself into considering whether or not there were any irregularities at the hearing of the matter.

5. The Court *a quo* erred in law in that it failed to draw proper conclusions from the evidence before it resulting in it failing to find that:-

    5.1 The applicant was in possession of the gambling chips against the rules of the company.

    5.2 Had given such chips to the late Vusi Maseko for changing into national currency as confirmed either by the direct evidence of "PW1" or concluding from the circumstantial evidence as regards the white substance handed over by applicant to Maseko, who put it in the same pocket, "PW2" later saw him draw when he handed it over to him.

5.1 The applicant's failure to explain what she gave to the late Vusi Maseko, in light of direct evidence she gave him the gambling chips or even the white substance (from which the chips were later retrieved before "PW2".

5.2 The possession of the gambling chips (in this case amounting to El 500-00) by the applicant without authorisation was a serious and dismissible offence in accordance with the Company's Disciplinary code confirmed by the applicant herself.

2] The appellate powers of this court are derived from Section 19(1) of the Industrial Relations Act 2000 which states as follows:-

> "*19(1) There shall be a right of appeal against the decision of the court on a question of law to the Industrial Court of Appeal.*"

3] The appeal to this court only lies on a question of law and not on points of facts.

] The brief facts in this appeal are as follows:- The respondent was employed by the appellant as a waitress from 25th February 1997 and was so employed continuously until the 4th June 2003 when her services

were terminated by the appellant. She contended that the termination of her service was unlawful and was both procedurally and substantively unfair and unreasonable in the circumstances.

[5] The appellants have submitted that the termination of the respondent's services was lawful after she was found to be in an unlawful and unauthorised possession of the gambling chips amounting to E1 500 which she sought to encash against the company rules. Such unlawful possession is viewed as a serious dismissible offence by the company. After referring to the evidence which was called at the hearing in the court *a quo* Mr. Hlophe, for the appellants, has submitted that the Court *a quo* erred in excluding the evidence of "PW1" on the assumption that his evidence was suspect when in fact it was corroborated in all material particulars by the analysis of the video recording and by the evidence of "PW2" and the statement recorded by "RW2" from the late Vusi Maseko.

[6] It is important to briefly review that evidence in this judgment in order to put the respective contentions of the parties in their proper setting.

[7] It is common cause that the respondent was on duty on that particular day of 3rd May 2003 when she was

stationed at the gambling section next to the Black-Jack Table. There were, at that table, one late Vusi Maseko who was in the company of two other clients namely Lucky Vusi Maseko and another customer of European extraction. The evidence was that the respondent was seen to approach the late Vusi Maseko twice. On the first occasion the respondent served Vusi Maseko with some tea and it is on the second occasion that it is alleged that the respondent gave Vusi Maseko a substance wrapped in a white item. After some time the respondent and Vusi Maseko were called to the Surveillance room where they were confronted by PW2 with questions regarding the possession, by the respondent, of gambling chips which were allegedly handed over to Vusi Maseko for him to encash. After being questioned and denying the allegation, the respondent was later charged with unauthorised possession of gambling chips. The matter was referred to a Disciplinary Tribunal.

[8] During the disciplinary proceedings Lucky Vusi Maseko was not called to give evidence nor was Vusi Maseko. It was suggested that it was against company policy to call clients of the company to come and testify in Disciplinary. proceedings. It would appear that after reviewing the surveillance tape recordings together with the statement

recorded from Vusi Maseko the respondent was found guilty and her services were accordingly terminated. It is to be observed that the respondent contended that the surveillance tape recording was not played at the Disciplinary proceedings contrary to what PW2 had stated.

[9] Mr. Hlophe has submitted that the appellants had discharged the onus placed on them, on a balance of probabilities, that the respondent had been found in possession of the gambling chips unauthorised and that the appellants were perfectly entitled to terminate the respondent's services. He submitted that the evidence of both Lucky Vusi Maseko PW1 and Mr. Fakudze RW2 who were both called as witnesses for the appellant in the Court *a quo* was corroborated by the video recording.

[10] The duty to prove that the respondent was unlawfully in possession of the gambling chips is placed on the appellants. They had to discharge that onus on a balance of probabilities. The provisions of Section 42(2) of the Employment Act make it clear that the Court is bound to consider all the circumstances of the case when considering whether the employer has discharged the burden of proving that the dismissal was fair and reasonable. Section 42(2) provides as follows:-

"*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*

(b) *that, taking into account all the circumstances of the case, it was reasonable to terminate the service of the employee.*"

I direct myself to the provisions of Section 19(2) of the Industrial Relations Act which provides as follows:-

"*The Industrial Court of Appeal in considering an appeal under this section, shall have regard to the fact that the court is not strictly bound by the rules of evidence or procedure which apply in civil proceedings*".

[11] Mr. Mthethwa, who appeared for the respondent, has submitted that the grounds of appeal which have been filed in this appeal do not raise a point of law but are grounded on conclusions of facts which in terms of the provisions of section 19(1) of the Act cannot be challenged. He has contended that the conclusions of facts which the grounds of appeal have raised are matters which provide a basis for review by the High Court on grounds permissible by the common law. Section 19(5) provides as follows:-

> "*A decision or order of the court or arbitrator shall at the request of any interested part, be subject to review by the High Court on grounds permissible at common law.*"

Mr. Mthethwa has further contended that the evidence of PW1 cannot be trusted. He also submitted that the failure by the appellant to call Vusi Maseko at the disciplinary proceedings deprived the respondent of the right to cross examine him and that such failure constituted an irregularity. In the case of **WRIGHT VS DOED TATHAM 1887 7 AD & E 1 313;** See also the South African Law of Evidence - D.T. Zeffert at 367 it is stated as follows:-

> "*The party against whom such evidence is tendered would clearly be prejudiced by not having the opportunity to cross-examine the…….on the vigour of his inspection and on his expertise in evaluating the seaworthiness of the vessel, as well as by not having the evidence presented under oath in open court in the conventional manner of question and answer within a broader and more textured factual framework*".

Mr. Mthethwa has contended, therefore, that the respondent's dismissal was procedurally unfair. This, in my view, was unassailable submission especially when it is remembered that the respondent's

conviction, at the disciplinary proceedings, was based purely on the tape recording and on the statement made by Vusi Maseko.

[12] The crux of the matter in this appeal is whether or not it was proved that the respondent was found in an unlawful possession of the gambling chips. The respondent conceded that unlawful possession of the gambling chips was a dismissible misconduct in terms of Section 36 of the Employment Act. The onus to prove the unlawful possession was on the appellants which they had to discharge on a balance of probabilities. The witnesses the appellant called were Mr. Lucky Vusi Maseko PW1 and Mr. Fakudze PW2. PW1 is the witness who alleged that he had heard the respondent telling Vusi Maseko that she was handing over the chips to him. Mr. Fakudze was the security officer at the appellants' establishment and it was this witness who interrogated both the respondent and Vusi Maseko and obtained a statement from the latter. Mr. Hlophe for the appellant has forcefully submitted that the evidence of these witnesses is fully corroborated by the surveillance tape recording.

[13] The judge in the court *a quo* did not believe that the evidence of the two witnesses including the tape recording were worth of any

credit. The learned judge in the court *a quo* made the following observation on that evidence at page 4 and paragraph 7 of his judgment:

> *"The surveillance camera tape was played in court. It did not however assist the court much as it was not clear and had no sound. From the blurred pictures the applicant is seen approaching Vusi Maseko who is sitting with three people at the table. She is carrying a tray. She extends one hand towards him in a way that suggests that she is giving him something white in colour. As the pictures were blurred, it was not clear what that substance was".*

And at paragraph 8 of the judgment the learned judge stated as follows:-

> "*The evidence that was clear to see from the tape was that there was somebody (who) was seated between PW1 and the late Vusi Maseko. The court has difficulty in accepting PW1 's evidence about what was allegedly said by the applicant to the late Vusi Maseko pertaining to the chips for the following Reasons:*"

and learned judge then proceeded to give his reasons why he found difficulties in believing the evidence adduced by the appellant.

The learned judge accordingly came to the factual conclusion that PWI's evidence was unworthy of belief

and that it was either something the witness had "pieced together after having seen the video or something that he was told to say in court."

[14] I have already observed that the appellants did not call PW1 at the disciplinary proceedings nor was Vusi Maseko called and they only relied upon the statement which Maseko had made to PW2. The learned judge in the court *a quo* had the opportunity to listen to the evidence of the witnesses called and was also able to watch the tape recording an opportunity which is denied to this court.

[15] The appellants had the best evidence which they could have called to prove the unlawful possession of the gambling chips but by their own decision they chose not to do so because the company policy prevented them to do so. It is a decision which they took at their own peril because once the evidence of PW1

was rejected as unworthy of any credit, and the court *a quo* having also rejected the value of the tape recording the only evidence left was the statement which Vusi Maseko had made to PW2. But that statement as the learned judge in the court *a quo* properly found, was inadmissible hearsay. There can be no doubt, in my judgment, that the factual conclusions which the learned judge found were amply

justified on the facts before him and those conclusions were reached after the learned judge had also considered the proceedings at the Disciplinary hearing. In addition the judge in the court *a quo* found that there was no evidence produced to show that any gambling chips went missing from the appellants' establishment on the particular night.

[15] The grounds of appeal which were filed in the appeal only raised conclusions of fact. An appeal lies to this court on a question of law only. The issue of what is a question of law and what is a question of fact was exhaustively reviewed in the case that came before this court and it is not necessary to repeat that review in this judgment. See **SWAZILAND ELECTRICITY BOARD v COLLIE DLAMINI** CASE NO. 2 OF 2007. And I would have found that this appeal was incompetent on the ground that it only raises

matters of fact and not of law. Furthermore I am satisfied that the finding of the court *a quo* that the respondent's termination was unlawfully and procedurally and substantively unfair and unreasonable having regard to all the circumstances was correct on the evidence before the court below. It was not proved that the respondent was found in unlawful possession of the gambling chips. I would, therefore, dismiss this appeal with costs.

BANDA CJ

I agree

MAPHALALA JA

I also agree

MABUZA JA