IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

Held at Mbabane Case No. 04/2014

In the matter between:

PATRICK MAGONGO NGWENYA **APPELLANT**

And

SWAZI BANK **RESPONDENT**

Neutral Citation: *Patrick Magongo Ngwenya and Swazi Bank (04/2014) [2014] SZICA 03 (30th September 2014)*

Coram: **M.M. RAMODIBEDI JP**

M.C.B. MAPHALALA AJA

M.S. SIMELANE AJA

Heard : **16/09/2014**

Delivered : **30/09/2014**

Summary

Labour law – Compromise – By way of a settlement "in full and final settlement" of all issues between the parties – The appellant subsequently "cancelling" the agreement – The court a quo upholding the respondent's defence of compromise – Appeal dismissed with costs.

JUDGMENT

The Court

[1] Following the respondent bank's dismissal of the appellant from work consequent upon his conviction in certain disciplinary proceedings, the parties entered into an amicable settlement agreement in terms of which the appellant accepted the sum of Eighty Five Thousand Seven Hundred and Thirty Four Emalangeni (E85, 734.00) "in full and final settlement of all and any issues between the parties" in the matter. It is common cause that this agreement constituted a compromise.

[2] The parties are on common ground that the appellant subsequently unilaterally attempted to repudiate the agreement by cancelling it. The repudiation was not accepted by the respondent. Thereafter, the appellant sued in the court *a quo* for "maximum compensation for unfair dismissal" and other ancillary claims. The court upheld the respondent's defence in *limine* that the appellant's claim was novated by way of compromise. Hence, the court dismissed his claim on that basis. The present appeal is brought to this Court against that order.

[3] Before proceeding further, it is necessary to record that when the matter was called for hearing on appeal, Mr. D. Manda for the appellant applied from the Bar for postponement on the ground of his alleged non-

preparedness. He said that he had only received the record of proceedings in the matter on the previous day. He could not say why a proper application brought on notice of motion and supported by affidavits could not be made. He did not even address the question of prospects of success in the matter.

[4] The Court gained a clear impression that the application by Mr. D. Manda was made simply to force a postponement. It was not *bona fide* but a delaying tactic. We point to the following factors:

(1) On 11 August 2014, the court roll for the Industrial Court of Appeal session in September 2014 was issued to all legal practitioners and litigants in person, giving notice of commencement of the session on 15 September 2014. It was specifically stated that postponements would not be entertained except for "good cause shown on written application and properly motivated in open court".

(2) On 19 August 2014, Mkhwanazi Attorneys wrote to the Registrar of the Industrial Court. In paragraph 4 they stated the following:

"4. It would seem that this matter cannot proceed in this session and we profusely tender our apologies for the inconvenience cause (sic) to their Lordships and the Respondent."

(3) On 27 August 2014, the Registrar wrote to Mkhwanazi Attorneys / T.R. Maseko Attorneys as follows:

"Mkhwanazi Attorneys /T.R. Maseko Attorneys
P.O. Box 5888
Mbabane

RE: PATRICK MAGONGO NGWENYA VS SWAZI BANK – INDUSTRIAL COURT OF APPEAL CASE NO.4/2014

1. *We refer to the above matter and acknowledge receipt of your letter dated 19 August 2014, which appears to have not been copied to respondent's attorneys.*
2. *We are appalled at your statement that the matter "cannot proceed….". It is only the court which has a right to make such a determination. It is not the function of counsel.*
3. *We advise that the court has directed that the matter will proceed as scheduled since there is still sufficient time to obtain instructions from the appellant and the roll was issued on 11 August 2014.*
4. *We also advise that between now and the 15 September 2014 when the session commences, there is still enough time to obtain instructions from the appellant. A copy of your aforesaid letter is enclosed for respondent's attention.*

5. *You are kindly reminded that in terms of section 4 (d) of the Industrial Relations Act 2000, labour disputes must be disposed of speedily. Furthermore, in terms of section 21 of the same Act appeals are expected to be disposed of within three (3) months from the date on which they were noted. The appeal in the present matter was noted as long ago as 30 April 2014. The respondent is entitled to finality in the matter.*
6. *For the above stated reasons, we advise that the matter will proceed as scheduled.*

Yours faithfully,

LUCKY N. VILAKATI

REGISTRAR – INDUSTRIAL COURT."

(4) On 15 September 2014, Mr. Mkhwanazi appeared for the appellant at the roll call in this Court. He duly undertook to represent the appellant on the following day on 16 September 2014 at 9.30 am.

(5) On 16 September 2014, Mr. Mkhwanazi failed to make an appearance contrary to his solemn undertaking to the Court. Instead, Mr. D. Manda now appeared for the appellant as stated above.

[5] In these circumstances, it was apparent to the Court that the appellant's attorneys were playing delaying tactics to the prejudice of the respondent as well as the inconvenience of the Court. Needless to add that the application for postponement was strenuously opposed by Mr. S.K. Dlamini for the respondent. In the result, the application was dismissed for all of the foregoing reasons.

[6] Finally, this Court wishes to warn legal practitioners and litigants in person that, as the highest Court in labour disputes in this country, the Court will not postpone cases willy-nilly except for valid reasons properly motivated in open court. Section 4 (d) of the Industrial Relations Act 2000 specifically provides that disputes must be disposed of speedily. Delaying tacties will not be tolerated in this Court and in appropriate cases defaulting legal practitioners may expect to face costs *de bonis propriis*.

[7] It is not seriously disputed that the appellant commenced his employment with the respondent bank on 1 November 1989 as an administrative clerk. He rose through the ranks to the position of Automatic Teller Machine (ATM) Supervisor in March 2008.

[8] The undisputed facts show that on 21 May 2008, the appellant and one Zama Shongwe, who was a colleague of his, collected the sum of Two Hundred Thousand Emalangeni (E200, 000.00) in cash from Mbabane Commercial Bank and transferred it to Mbabane Branch. They "loaded" the cash in the ATM. It subsequently turned out, however, that there was a huge shortage amounting to several thousands of Emalangeni. This led to the respondent bank preferring disciplinary charges against the two of them.

[9] The charge sheet contained three (3) counts which were particularised as follows:

> *"1. Dishonesty/fraud (5.2.1.1)*
> *2. Gross violation of procedures (5.2.1)*
> *3. Gross Neglect of duty (5.2.1)*
>
> *1.* ***Dishonesty /Fraud in that****:*
>
> *(i) You wrote a false report that, you and Charles Dlamini went to exchange E100,000.00 from Mbabane Commercial branch and that the latter Busi Zondi and Canaan Mavuso gave you and Charles the said amount, yet the correct amount that you exchanged and received from Mbabane Commercial through the hand of Busi Zondi and Canaan Mavuso was E150,000.00. Under the circumstances you were unable to account for the shortfall between E150, 000.00 and E100, 000.00, which is E50, 000.00 shortfall.*

You deny knowledge of the cash that you and Charles Dlamini exchanged with Mbabane Commercial yet you were a co-custodian of this cash.

(ii) On 21st May, 2008 you concealed/caused to be concealed and/or allowed the concealment of the specification, being a bank record that you had used to requisition cash from the vault custodian Charles Dlamini to the prejudice of the bank.

(iii) On the 21st May Charles Dlamini, the vault custodian allegedly gave you E210, 000.00 and you deposited E200,000.00 to the Gwamile ATMs. During the transaction E10, 000.00 was not deposited although it was posted as having been deposited into the Swazi Plaza ATM. Under the circumstances you caused to be lost E10, 000.00, which was in your custody during the deposit process of the ATMs.

(iv) In your report to Management dated 17th June 2008 you stated that on 21st May 2008 you left the office at 12.00 pm yet you left the office at 16.15 hours.

2. Gross violation of procedures in that it is alleged that:

(i) On 21st May 2008 you did not follow the bank's procedures on transfer of cash from one branch to the other, in line with the teller manual procedure 1C (1) (a), (c) and (d) which stipulates that under no circumstances should cash be moved without security. All cash movements must be advised to Head Office Finance and Operations. The services of an armed guard or recognised security company must be used and where security is not available, advise Head Office Operations. You went to Mbabane Commercial Branch

without a Security Guard. Secondly, you did not inform anyone, either your immediate Manager, Head Office Finance and Senior Manager Banking Operations.

(ii) On 21st May 2008 you did not observe cash requisitioning procedures that when two branches are involved you inform either your immediate Manager / Head Office Finance or Senior Manager Banking Operations.

(iii) On 21st May 2008 you requisitioned and received cash from vault custodian Charles Dlamini but you did not sign for the cash you received.

3. Gross Neglect of duty in that:

(i) As an ATM Supervisor, you, contrary to procedure, allowed and or condoned the non execution of daily ATM cash balancing procedures."

[10] It is common cause that the appellant was duly found guilty on the first two counts, namely, (1) dishonesty/fraud contrary to Regulation 5.2.1.1 and (2) gross violation of procedures (5.2.1). He was acquitted on the third count.

[11] Following his conviction, and on 20 January 2009, the appellant was summarily dismissed from work by the respondent bank.

[12] On a subsequent appeal against his summary dismissal, the appellant enjoyed very limited success. His conviction on both counts was confirmed and so was his sentence of summary dismissal in respect of count 1. However, the sentence of dismissal in respect of count 2 was altered to a final written warning.

[13] Thus rebuffed, the appellant subsequently approached the Conciliation, Mediation and Arbitration Commission (CMAC), threatening to report a dispute in court if that recourse failed.

[14] It is not in dispute that in order to avoid litigation in the matter the respondent bank entered into negotiations for the purpose of reaching an amicable settlement with the appellant. This resulted in a document entitled "Memorandum of Agreement", annexure "PN 11" signed by and between the parties on 25 June 2009. This is the agreement referred to in paragraph [1] above. It will be recalled that the respondent bank relied on this agreement as constituting compromise. It is for this reason that it is necessary to reproduce clauses 2 and 6 of the agreement in full, namely:

> *"2. In furtherance of the said settlement, the employer undertakes to pay its former employee, Mr. Patrick Ngwenya a sum of E85, 734.00*

being nine (9) months salary equivalent, in full and final settlement of all and any issues between the two parties arising from the employment of the said former employee by the employer.

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6. Payment of the above stated sum shall constitute a full and final settlement of all and any claim the former employee has or may have against the employer arising from the employment of the former employee by the employer."

[15] Similarly, it proves convenient to reproduce the letter, annexure "PN 12", dated 1 July 2009, in terms of which the appellant purported to cancel the parties' memorandum of agreement referred to in the preceding paragraph. The letter was in these terms:

"The Managing Director
Swaziland Development & Savings Bank
P.O. Box 336
MBABANE

Dear Sir,

WITHDRAWAL/NULLIFICATION OF AGREEMENT ON TERMINATION OF SERVICES OF PATRICK M. NGWENYA AND SWAZI BANK

(i) I refer to the above matter, which you will recall that our discussions were based on the fact that the other terminal benefits per the note I gave you were a given and the only thing that remained for negotiation was the 24 months wages.

(ii) With the offer of 9 months' wages in addition to all the other payments referred to above, the offer was acceptable to me as a full and final settlement.

(iii) Your officer who put the agreement for me to sign, can attest to the fact that after signature I then asked the other monies at (i) above and only than (sic) did that this agreement being full and final and did not include these monies.

(iv) I trust such payments will be made with the understanding we had.

I wait your response.

Yours faithfully

PATRICK M. NGWENYA."

[16] Not surprisingly, the respondent bank did not accept the appellant's purported repudiation as indicated above. Quite obviously, the appellant's annexure "PN 12" was impermissibly at varience with the signed memorandum of agreement between the parties in several respects. For starters, it will be recalled from clause 9 of that agreement that the parties bound themselves in these terms:

"9. This agreement constitutes the entire agreement between the parties. No amendment of any term hereof shall be of any force and effect unless reduced to writing and signed by both parties".

[17] Secondly, and perhaps more importantly, we are satisfied that clauses 2 and 6 of the memorandum of agreement, between the parties referred to in paragraph [10] above provide a killer blow to the appellant's case. His contention as gleaned from annexure "PN 12" that there might have been in existence "other terminal benefits" such as "24 months wages" is, as a matter of overwhelming probabilities, false. Otherwise the appellant would not have accepted the sum of Eighty Five thousand Seven Hundred and Thirty Four Emalangeni (E85, 734.00) as he admittedly did "in full and final settlement of all and any issue" as well as "any claim" between the parties as clauses 2 and 6 respectively show. Furthermore, in clauses 3.3 the appellant undertook not to institute any proceedings against the respondent bank for whatever reasons and in whatever form or forum for any issue arising from the employment relationship between the parties. We are satisfied in these circumstances that the appellant tried too hard to wrongfully attempt to novate or vary the parties' agreement.

[18] It remains for us to say something on the concept of payment "in full and final settlement" by a creditor in so far as the law of compromise is concerned. But, first, it is necessary to bear in mind that a compromise itself is generally an agreement in terms of which the parties settle their dispute. This is usually an out–of–court settlement. A compromise

creates new obligations and existing ones are extinguished. In effect, a compromise is a form of waiver or estoppel. Where payment is made in full and final settlement following a firm offer to compromise, then existing obligations fall away. In such a situation, the creditor is precluded from suing. For further reading on the law in this jurisdiction see **Dlamini NO and Others v Dlamini and Others Civil Appeal 19/2005**, reported on SwaziLii. See also the dissenting judgment of Ramodibedi JA (now our own Chief Justice) in the Court of Appeal of Botswana in **Motor Sales and Services (Pty) Ltd v Bapedi Transport (Pty) Ltd 2009 (1) BLR 81 (CA)**.

[19] It is not in dispute that the present matter is a classical example of a compromise as described in the preceding paragraph. In his grounds of appeal, the appellant recognises this basic fact. His only gripe is that he cancelled the compromise as indicated in paragraph [15] above. We are unable to agree. The undisputed fact is that the respondent bank did not accept the purported cancellation. And so the compromise in question stays alive and is of full force and effect. It is binding on the appellant who is precluded from suing. We stress that he cannot in law be allowed to blow hot and cold at the same time or eat his cake and have it. By entering into a compromise agreement as he did, he waived any rights

he may have had previously. That, we are afraid, is the cold reality of the matter such as this one.

[20] For the sake of completeness, it is necessary to record that it was specifically agreed in clause 7 of the compromise agreement that the respondent bank would deduct from the sum due to the appellant all the monies he owed to the bank. In its amended reply to the appellant's claim the bank quantified the debt as amounting to the sum of Fifty Nine Thousand Eight Hundred and Ninety Seven Emalangeni Eighty Three cents (E59, 897.83). This amount was duly deducted from Eighty Five Thousand Seven Hundred and Thirty Four Emalangeni (E89, 734.00) due to the appellant, thus leaving a net balance of Twenty Five Thousand Eight hundred and Thirty Six Emalangeni and Eighty Three cents (E25, 836.83). In paragraph 8.5 of its amended reply, the respondent bank duly tendered payment of this amount to the appellant. It seems to us that he is not entitled to more than he bargained for in the compromise agreement. That agreement created new obligations whilst extinguishing any existing ones. In fairness to both counsel however, they properly consented that the appellant was entitled to payment of the net balance as reflected in the order proposed below.

[21] It follows from the foregoing considerations that there is no merit in the appellant's appeal. Accordingly the following order is made:

(1) The appeal is dismissed with costs.

(2) For the sake of certainty and by consent the respondent bank is ordered to pay to the appellant forthwith the net balance of Twenty Five Thousand Eight Hundred and Thirty Six Emalangeni and Eighty Three cents (E25, 836.83) referred to in paragraph [20] above.

DELIVERED IN OPEN COURT ON THIS THE 30th DAY OF SEPTEMBER 2014.

M. M. RAMODIBEDI
JUDGE PRESIDENT

M.C.B. MAPHALALA
ACTING JUSTICE OF APPEAL

M.S. SIMELANE
ACTING JUSTICE OF APPEAL

For the Appellant : Mr. D. Manda
For the Respondent : Mr. S.K. Dlamini