IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

JUDGMENT

HELD AT MBABANE **CASE NO. 16/17**

In the matter between:

AVENGE INFRASET SWAZI (PTY) LTD **APPELLANT**

And

CLEOPAS S. DLAMINI **RESPONDENT**

Neutral Citation: **Avenge Infraset Swazi (Pty) Ltd vs. Cleopas S. Dlamini (16/17) [2018] SZICA 88 [2018]**

Coram: **J.S Magagula AJA**

C.S Maphanga AJA

D. Tshabalala AJA

Date heard: **10th April 2018**

Date delivered: **3rd May 2018**

Summary: Labour law – dismissal without compliance with employer's disciplinary code – urgency – non – compliance with

procedure in Part VIII of the Industrial Relations Act – Import of Rule 14 (1) of Industrial Court regulations.

MAGAGULA

PRELIMINARY POINTS RAISED IN LIMINE

At the commencement of this appeal the Respondent's counsel presented to the court three (3) points of law which he had prepared in writing and filed. He however indicated that he was no longer pursuing the first two points which were on the late filing of the record and heads of argument.

He indicated that he was pursuing the third point which was that the Appellant was approaching the court with dirty hands in as far as it had not complied with the order of the *court a quo* directing it to re – instate the Respondent to his employment.

We dismissed the point instantly and indicated that reasons will come with the main judgment.

Counsel for the Respondent Mr L. Simelane informed the court that the *court a quo* issued an order setting aside the dismissal of the Respondent on the 22nd September, 2017. He contended that the effect of that order was to re-instate the Respondent into his job. However as of the date of hearing of this appeal the Respondent had not been re-instated as such nor was he being paid his salary. Mr Simelane further pointed out that in terms of section 19 (4) of the Industrial Relations Act 2000 as amended the noting of an appeal does not stay execution

of the judgment of the court. He argued therefore that failure by the appellant to re-instate respondent amounted to contempt of court and that appellant should first purge this contempt before the appeal can be heard.

We were however also informed by counsel from the bar that contempt proceedings were instituted in the court a quo and that the decision of the court a quo on contempt has been taken on review to the High Court. The matter is still pending at the High Court.

We accordingly came to the conclusion that we could not order the appellant to purge its contempt as a condition for the appeal to be heard, when there were still proceedings pending in another court on which the alleged contempt was being challenged.

We accordingly dismissed the point raised in *limine*.

I now turn to the appeal before this court.

THE APPEAL

[1] This is an appeal from a decision of the Industrial Court in an application instituted therein purportedly in terms of rule 15 read with rule 14 of the said court. Rule 14 provides for institution of legal proceedings by notice of motion supported by affidavit where " a material dispute of fact is not reasonably foreseen." Rule 15 provides for the institution of such proceedings on urgent basis where such process is desirable and appropriate.

BACKGROUND

[2] The Respondent who was the Applicant in the court a quo sought in that court the following substantive relief; to wit and order:

> ***" 2. Declaring the termination of Applicant's employment by Respondent on the 30th May 2017 as grossly irregular, unlawful and null and void;***
>
> ***3. Directing that the termination of Applicant's employment be hereby set aside;***
>
> ***4. Interdicting and restraining the Respondent from recruiting another employee to take the Applicant's position of maintenance Supervisor;***
>
> ***5. That a rule nisi to operate with immediate and interim effect do hereby issue calling upon the Respondent to show cause on a date to be determined by the above Honourable Court why orders 2,3 and 4 should not be made final;***
>
> ***5. Granting the applicant costs of suit at punitive scale…."***

[3] The application was supported by a founding affidavit deposed to by the Respondent as applicant then. From the founding affidavit it emerges that the Respondent herein was employed by the Appellant in May 1989. He was in the employ of the Appellant until the 30th May 2017 when his employment was terminated by the Respondent in writing.

[4] Contending that the decision to terminate of his employment was not properly arrived at, Respondent then instituted the proceedings forming the basis of this appeal in the court a quo.

[5] The termination of Respondent's services came about pursuant to charges of dishonesty which were preferred against him by the Appellant in October 2016. It was alleged that he asked a supplier of the Appellant to inflate a quotation given to the Appellant by an amount of E500 – 00 to the prejudice of his employer, the Appellant. He was found guilty on this charge and dismissed.

[6] He appealed this decision successfully and the chairman of the appeal hearing directed that his disciplinary hearing should start ***de novo*** before another chairperson. In the new hearing the chairperson denied Respondent the right to legal representation. She also dismissed an application for postponement of the matter for purposes of reviewing the decision denying him legal representation. The Respondent then walked out of the hearing which then proceeded in his absence leading to his conviction.

[7] The Respondent instituted proceedings in the court a quo which found in his favour and directed that his disciplinary proceedings be started de novo before yet another chairperson. The disciplinary proceedings under this new chairperson were scheduled to commence on the 3rd April 2017. The hearing could not proceed on that day as Respondent's attorney was not available. The hearing was set for the 8th April, 2017 but it still failed to take off on that day.

[8] The hearing eventually took off on the 26th April 2017. On this day one witness testified on behalf of the Appellant. He was partially cross – examined by Respondent's attorney. Cross – examination could not be finalized as the scribe for the day got tired. The hearing was postponed to the 12th May 2017. The hearing could not proceed on this day since the chairperson was not available.

[9] The chairperson wrote a letter dated 18th May, 2017 and addressed to the Appellant which read as follows;

> ***" Re: CLEOPAS DLAMINI HEARING***
>
> 1. ***We refer to this matter.***
> 2. ***We tender our apology, the Chairman was held up in the High Court until 13:30 hours last Friday.***
> 3. ***Can we proceed with the hearing on the 25th or 26th May 2017 at 09:30 am on each day?"***

The letter is marked Att: Mr Mavimbela, apparently a manager at appellant's company. It is also copied to L.M Simelane Attorney's who were Respondent's attorneys representing him in the proceedings.

[10] I take particular note that this letter is neither directed nor copied to the Respondent personally. It is only copied to this attorneys. I also note that the sentence referring to the 25th or 26th May 2017 a 9:00 am ends with a question mark. This puts it beyond doubt that these dates are not being fixed but proposed. In other words a response is expected from the people to whom the letter is addressed.

[11] Indeed Respondent's attorney responded by letter dated 22nd May 2017 and stated that both dates were not suitable for him since he would be attending a crucial Board meeting from the 24th to the 26th May, 2017. He further suggested in this letter that the hearing proceeds either on the 1st or 7th June 2017. There was no response to this letter.

[12] What transpired next is that on the 31st May, 2017 the Respondent received a telephone call from the offices of the Appellant directing him to appear at Appellant's premises. Upon arrival at Appellant's premises he was served with a letter terminating his services and this letter was dated 30th May 2017. The tenor of the letter was that it was issued pursuant to the findings and recommendations of the chairperson of the disciplinary hearing. It also advised the Respondent that he had a right to appeal the termination within five (5) days from the date of receipt thereof.

[13] From the papers filed in court the sequence of events outlined above were not in dispute in the court a quo. The Appellant differs only in so far as it alleges that the 25th or 26th were not proposed dates of hearing but fixed dates. As I have already indicated above from the tenor of the letter it is abundantly clear that the dates were proposed by the chairperson and not fixed.

[14] The Appellant also maintains that the Respondent was notified of these dates. He should therefore have come to the hearing, which Appellant alleges took place on the 26th May 2017, even if his attorney could not attend as he had already indicated.

However the letter was not copied to the Respondent, let alone addressed to him. It is not clear then how Respondent was notified of the hearing and it is his contention that he was not notified.

[15] The Appellant further maintains that Respondent had a duty to appear at the hearing and apply for a postponement of the matter in the absence of this attorney. It baffles the imagination how this obligation arises where a party is legally represented and his legal representative has not only formally communicated his unavailability on the appointed date but has went on to indicate dates on which he is available.

Further, even if the dates had been fixed, which in our view is clearly not the case, the proposed dates were the 25th OR 26th May, 2017. How was the Respondent to know the date on which the matter would proceed? This butresses the point that the chairperson did not fix any of these dates as a date of hearing. He only proposed them.

GROUNDS OF APPEAL

The grounds of appeal are couched as follows:

> ***"1. The Court a quo erred and misdirected itself in law by making a determination of an unresolved dispute without following the procedures laid down in Part VIII of the Industrial Relations Act 2000 as amended.***
>
> ***2. The Court a quo erred in law and in fact in dismissing the points of law in limine raised by the Appellant therein and went straight to determine the merits of the case.***

3. ***The Court a quo erred in law in holding that the Industrial Court does have jurisdiction to make a determination of an unresolved dispute in a matter that does not have a certificate of unresolved dispute issued by CMAC in terms of Part VIII of the enabling legislation.***
4. ***The Court a quo erred in law and in fact in refusing to hold that the application before it had material disputes of fact which necessitated that witnesses be called to clarify same as to what really happened during the disciplinary hearing.***
5. ***The Court a quo erred and wrongly decided a matter which was fraught with serious factual conflict on affidavits and ordered re-instatement on that basis without hearing evidence in the normal way in which an unresolved dispute is determined.***
6. ***The Court a quo erred in law and grossly misdirected itself in holding that the application was still urgent despite that a letter of dismissal had been issued by the employer and the employer- employee relationship had been terminated.***
7. ***The Learned Judge a quo grossly erred in directing that a re-hearing of the disciplinary hearing be conducted within 10 days as he had no jurisdiction to do so after termination of employment between appellant and Respondent.***
8. ***The Judge a quo erred in law and in fact that he was creating a bad precedent which authorized newly dismissed employees to obtain a hearing date earlier than those who are awaiting trial date on the guise that the newly***

dismissed employees have more urgent matters than that of the long list of litigants awaiting trial dates.

9. ***The learned Judge a quo erred in law and misdirected himself when interpreting Section 4 (1) (i) of the Industrial Relations Act 2000 as amended.***
10. ***The Court a quo erred in law in that in as much as he was running a court of equity not to naturally be clogged by procedural issues however his court is still a creature of statute and can only do what the statute authorizes him to do under the principle of legality.***
11. ***The Judge a quo erred and grossly misdirected himself in ignoring all past decided case law presented to him and decided the matter on novel principles defying established practice and procedure even from superior courts".***

[16] It is one of the grounds of appeal that the court a quo should not have entertained the matter since it had material disputes of fact. One such dispute is said to be whether or not the matter was heard and an ex tempore ruling made by the chairperson on the 26th May, 2017. From the foregoing it is clear that there was no and there could not have been a hearing on the said date. The chairperson states clearly in a letter dated 1st June 2017 that he never made any findings nor recommendations in the matter. If there was any dispute on this point it is clearly determinable on the papers. There was therefore no need to hear oral evidence on this issue.

[17] If there was no hearing on the 26th May 2017, or at the very least a proper one, and the chairperson never made any findings nor

recommendations, it follows that the disciplinary proceedings were never finalized and there was therefore no basis for Appellant to issue the letter of the 30th May 2017 by which it purported to dismiss the Respondent.

[18] The question that remains is whether or not in the circumstances the court a quo was entitled to hear and determine the matter without it first having followed the procedure laid down in Part VIII of the Industrial Relations Act 2000 as amended. This is actually the first ground of appeal and in this ground the appellant states;

> ***" The Court a quo erred and misdirected itself in law by making a determination of unresolved dispute without following the procedures laid down in Par VIII of the Industrial Relations Act of 2000 as amended."***

[19] Regulation 14 (1) of the Industrial Court Rules, 2007 provides:

> ***" Where a material dispute of fact is not reasonably foreseen, a party may institute an application by way of notice of motion supported by affidavit."***

[20] The above cited rule is clearly designed to give the court some discretion to determine whether a matter should be referred to the procedure laid down in Part VIII of the Act or dealt with through motion proceedings. The court will be guided by the existence or non – existence of foreseeable material disputes of fact.

In casu the crisp issues for determination were whether the 26th May 2017 had been fixed by the Chairperson of the disciplinary inquiry

and whether or not the chairperson ever concluded the hearing and made a recommendation for dismissal of the Respondent.

[21] As demonstrated above these issues were easily determinable from the papers filed in court. No further evidence was needed to prove such. It is abundantly clear ***ex facie*** the papers filed that no proper hearing, if any was held at all, on the 26th May, 2017 and that the chairperson never made a finding nor a recommendation pursuant to the hearing.

[22] It is apposite at this juncture to point out that according to the rule in PLASCON – EVANS PAINTS LTD vs VAN RIEBECK PAINTS (PTY) LTD 1984 (3) SA 623 at page 634:

> ***"……..where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order."***

Corbett JA went on to clarify that:

> ***" The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute."***

In our view the above statement aptly applies to the Appellant's papers *in casu*. They do not raise any real, genuine or *bona fide*

dispute of fact. Some of the Appellant's denials and allegations are so far – fetched and clearly untenable that the *court a quo* was manifestly justified in rejecting them merely on the papers.

[23] There is a disciplinary code at Appellant's work place. In stage 4 of this document and under the heading ***"Notification of Penalty"*** it is provided that:

> "***The employee should be given his or her sanction in writing by the presiding officer."***

It is common cause that no sanction was given to the Respondent by the chairperson.

[24] Further and under article 6.2.5 which deals with dismissal, the code provides at 6.2.5. c and d:

> ***" c. The presiding officer shall decide on the appropriate disciplinary action only after investigating the incident and considering all the facts and circumstances, including the general conduct of the employee and his or her personal record.***
>
> ***d. The exact nature of the employee's offence and the decision taken by the presiding officer must be recorded on the relevant form (annexure vi). This form must be signed where required by the employee concerned and the presiding officer. Should an employee refuse to sign the form this should be verified by having another witness sign."***

There is no question that the presiding officer never decided on the appropriate disciplinary action to be taken against the Respondent as the chairman himself states that he never made any findings on the matter. Further the Respondent never signed any form containing the decision taken by the chairman.

From the foregoing it is abundantly clear that the chairman never finalized the proceedings nor took any decision on the matter.

In our view the application that was filed in the court a quo fell squarely within the provisions of Rule 14 (1) in so far as no material dispute of fact could reasonably be foreseen and in fact there are none. The court a quo was therefore perfectly correct in hearing the matter without it having gone through the procedure prescribed in Part VIII of the Act. This determination covers the 3rd, 4th and 5th grounds of appeal and it equally applies to those grounds.

[25] Under the 2nd ground of appeal the Appellant maintains that the court a quo erred in dismissing the points raised in ***limine***. There were three points raised in ***limine*** by the Appellant who was respondent in the court a quo. These were lack of urgency, failure to meet the requirements of an interdict and lack of jurisdiction. The court a quo handed down a written and reasoned ruling by which it dismissed all three points.

[26] Regarding urgency it is our view that the court a quo correctly dealt with the matter urgently since the Respondent had been given five (5) days to appeal yet he had not been provided with the decision and reasons thereof by the chairperson. Had he delayed in bringing the

application he would be assumed by the Appellant to have waived his right of appeal and the disciplinary process reasonably deemed finalized to Respondent's prejudice. It is our finding therefore that the matter was indeed urgent and the court a quo correctly dealt with it as such. This finding takes care of the 6th and 8th grounds of appeal as well.

[27] As regards lack of jurisdiction the court a quo found that it had such jurisdiction in the circumstances since internal processes were incomplete. Respondent was contending that he had not been given the results of the hearing and therefore had not exercised his right to appeal. The disciplinary process provided for by the Appellant in its establishment was not finalized. The court was intervening merely to direct that the internal processes should first be exhausted so that the Respondent exercises his right to appeal. The court was not reviewing the decision of the employer as such, it was saying let it be exercised at the right time, that is, after completion of the disciplinary hearing. In our view the court a quo correctly intervened in the matter for this purpose. This finding takes care of the 7th and 10th grounds of appeal as well.

[28] As regards the interdict Respondent sought an order interdicting the Appellant from recruiting another employee to take his position as Maintenance Supervisor.

Although the prayer in the notice of motion is couched as a prayer for a perpetual interdict, the Respondent states in his affidavit that he seeks the interdict pending finalization of the application. In support

of this prayer the Respondent states that he has a right to have his disciplinary proceedings handled fairly in terms of the disciplinary procedure and in terms of the law. He goes on to state that the Appellant has flagrantly violated its disciplinary procedure and the basic principles of employment law.

These contentions do not show how Respondent is entitled to the interdict sought and in our view they fail to demonstrate that he has any right to the order sought. We note also that the court a quo did not grant the interdict.

On the points raised in ***limine*** that were dealt with by the court a quo it appears to us that the court correctly dealt with them and for this reason this ground of appeal must also fail.

[29] In ground of appeal No.9 the Appellant states that the court a quo misdirected itself in interpreting section 4(1) (i) of the Industrial Relations Act of 2000 as amended. Suffice it to point out that the said section does not give any powers to the Industrial Court. It only outlines the objectives of the Act. In other words it tells us what the Act seeks to do and it does that by making specific provisions in its body. The section cannot therefore be cited as giving any powers to the court and to construe it in this light is a clear misdirection. Powers of the court are to be found in section 8 of the Act.

[30] Under ground of appeal No.11 the Appellant claims that the court a quo ignored all past decided case law and decided the matter on novel principles. The court a quo referred to the cases referred to during argument and stated that in its view these cases were distinguishable

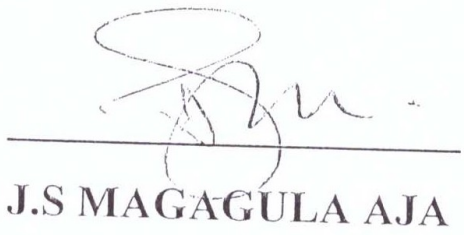
from the present one. This to us suggests that the court considered the cases cited and did not just ignore them as alleged.

For the foregoing reasons we have come to the conclusion that there is no merit in the grounds of appeal and that it must accordingly fail. The court accordingly makes the following order:

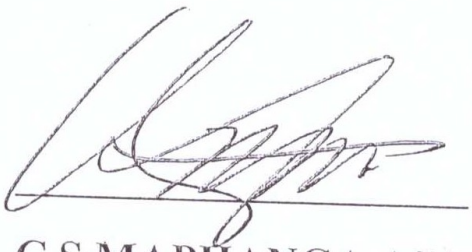
30.1 The appeal is dismissed,

30.2 The judgment of the court a quo is confirmed;

30.3 The Appellant is to bear the costs of this appeal.

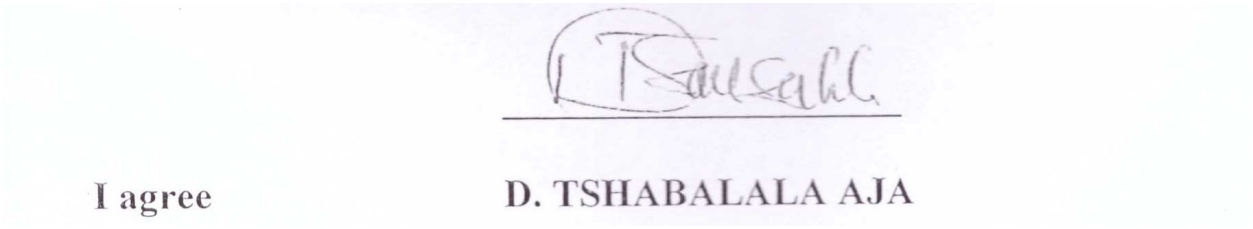


J.S MAGAGULA AJA



I agree,

C.S MAPHANGA AJA



I agree D. TSHABALALA AJA

For Appellant: **Mr F.K Msibi & Mr Z. Dlamini**

For Respondent: **Mr L. Simelane**