IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

JUDGMENT

Case No. 01/21

In the matter between:

DATA NETWORK SERVICES (PTY) LTD Appellant

And

MMANGALISO MALINGA Respondent

IN RE:

MMANGALISO MALINGA Applicant

And

DATA NETWORK SERVICES (PTY) LTD Respondent

Neutral citation: Data Network Services (Pty) Ltd v Mmangaliso Malinga [2021] [01/2021 SZICA 01 (20 September 2021)

Coram: **S. NSIBANDE J.P., M. VANDER WALT JA AND N.NKONYANEJA**

Date Heard: 27 May 2021

Date Delivered: 20 September 2021

JUDGMENT

[1] Before this Court is an appeal against the Industrial Court's judgment of 17th March 2021, dismissing a point of law raised by the employer in response to the employee's claim based on the termination of his services that he considered to have been both substantively and procedurally unfair.

[2] The employer's point of law raised in the *court* a quo was that:

"1.1 The relationship between the Applicant and the Respondent is *not an employer/employee relationship in terms of the Employment Act of 1980,* as *appears ex facie the agreement annexure MM2 of the Applicant's Application.*

1.2 The relationship between the parties has a/ways *been* a *consultancy relationship. The Applicant* has *failed to establish any employer/employee relationship between the Applicant and the Respondent."*

[3] The Appellant initially brought an application for leave to appeal on Notice of Motion. When the matter was heard the appellant correctly submitted that it was entitled to appeal any decision of the *court* a *quo* in terms of **section 19 (1) of the Industrial Relations Act 2000 as**

amended and that the application for leave to appeal was therefore unnecessary. It was agreed that the merits of the appeal be heard.

[4] The following are the grounds of appeal:

"The Court a *quo erred in law and in fact in holding that:*

1. *The respondent* was *denied* a *chance to take the draft contract with him in order to read it during his spare time;*
2. *The respondent (sic) did not explain the contents of the draft contract to the applicant;*
3. *The applicant* was *given assurance by the respondent that the contract would not affect the terms of employment that existed between the parties;*
4. *The* assurances *were meant to induce the applicant to sign the draft contract and the applicant* was *induced to sign;*
5. *A demand* was *made to the applicant to sign there and then, failing which he would not allowed to carry on with his work;*
6. *The applicant signed the contract out of fear of the threat of being denied an opportunity to work;*
7. *The presiding judge misdirected himself when holding that annexure* ***MM2*** was *void ab initio, which* is *finding of fact and brings the matter to an end;*

8. The *court* a *quo failed to consider that the respondent never raised an issue in respect to the change of his terms and conditions of employment as stipulated in terms of* ***Section 26 of the Employment Act;***

9. *The court* a *quo further misdirected itself in holding that the Appellant statement to the respondent was* a *fraudulent misrepresentation of fact;*

10. *The court* a *quo failed to take into account the fact that the respondent after signing annexure MM2, was referred as an independent consultant and required to present invoices of work done per month in order to be paid. And that payment made to an independent contractor is not referred as salary but consultant fees. The court* a *quo turned* a *blind eye to this important aspect;*

11. *The enquiry before the* court a quo *at that stage was whether the applicant had presented evidence that prima facie established that he was an employee to whom Section 35 applied. The court* a *quo ought to have limited itself an employee to whom Section 35 of the employment act applied or not (sic);*

12. *The court* a *quo misdirected itself in relation to the issue of control and supervision that was afforded to the respondent, which led to the court* a *quo to pronounce* a *finding of fact;*

13. *Again the court* a *quo misdirected had presented evidence itself in dealing with the principle of Novation, by holding that annexure MM2 was void ab initio;*

14. *The court* a *quo erred in law in granting costs against the appellant (respondent). No reasons were provided in the judgement for the grant of costs against the appellant.*

[5] The appellant appears to be alleging that the *court* a *quo* committed a combination of errors of facts and law in finding against it. Grounds 1 up 6 of the appellant's grounds of appeal deal with the *court* a *quo's* findings on the manner in which the respondent came to sign the second contract (annexure MM2 in the *court* a *quo).* These are clearly findings of fact based on the evidence led by the respondent in the *court* a *quo.* Although the respondent was cross-examined, the appellant chose not to lead any evidence in rebuttal of the respondent's evidence in the *court* a *quo.* These are findings of fact by the *court* a *quo* and are not appealable **(See Swaziland Fruit Canners (Pty) Ltd v Nomcebo W. Dlarnini, ICA Case No.14l2017** and **Trevor Shongwe v Machawe Sithole and Another [2021] (0812020) SZICA 1 1st August 2021**).

[6] An appeal to this Court lies in respect of a question of law only and not in respect of a question of fact. (See **Section 19(1)** of the **Industrial Relations Act 2000** as amended and the cases cite above). Consequently grounds of appeal 1 up to (and including) 6 must fail.

Annexure MM2 being void ab initio

[7] The appellant, by its own admission, complains that the *court* a *quo* made a finding of fact that the annexure MM2 was *void ab initio.* Again, on the evidence presented before it, the *court* a *quo* made the following factual findings:

(a) that the respondent (applicant in the *court* a *quo)* was denied an opportunity to take the draft contract with him in order to read it in his spare time;

(b) that the contents of the draft contract were not explained to the respondent and that he was intentionally kept in the dark regarding the contents of the draft contract;

(c) that the respondent was given the assurance that the draft contract would not alter the terms of the contract of employment that existed between the parties and that, that assurance was meant to and did, in fact induce the respondent to sign the draft contract; and

(d) the draft contract was presented to the respondent to sign without prior notice and a demand was made on the respondent to sign there and then failing which he would not be allowed to continue with his work.

[8] Further, on the basis of those facts, the *court* a *quo* came to the legal finding that one of the essential elements of a lawful contract were not met when annexure MM2 was signed; that, because the respondent had been made to sign annexure MM2 under threat of penalty, there was no consent to contract with the appellant and that without such consent there could be no contract. The annexure MM2 was therefore found to be *null and void.*

[9] Annexure MM2 was also said to be null and void because the Court found the parties were not *ad idem* as to the material terms of the agreement because the appellant had fraudulently misrepresented that the proposed contract would not affect the existing employment contract.

In the circumstances and in line with the authorities the Court correctly held that *"there is no contract if the parties are not ad idem as to*

material terms of their agreement." **Gibson JTR (South African Mercantile Company Law 8th Edition** at page 49).

[10] In the circumstances this ground of appeal must be dismissed.

Ground 2.9 Fraudulent Misrepresentation

[11] The *court* a *quo's* finding that the respondent (applicant in the *court* a *quo)* was given an assurance, by the appellant, that the proposed contract, MM2, would not affect the employment relationship between the parties was a fraudulent misrepresentation was also based on the evidence that was led before the Court. The Court concluded that respondent signed the draft contract with the understanding and the assurance that the contents therein complemented those of the employment contract whereas the appellant was aware that the material terms of MM2 contradicted those of the employment contract. These findings constitute factual findings that are unappealable in terms of **section 19 of the Act.**

[12] It may be apposite to state that in our view, the court a quo, having found that there was fraudulent misrepresentation by the appellant,

came to the correct legal conclusion in finding that there could not be a contract between the parties. This ground of appeal must also be dismissed.

Grounds 10 &12 - The respondent's position after signing MM2 and issue of control and supervision.

[13] The appellant complains that the *court* a *quo* failed to consider that after signing MM2, the respondent was referred to as an independent consultant and was required to present invoices of work done per month in order to be paid; secondly that the *court* a *quo* misdirected itself in the issue of control and supervision that was afforded the respondent.

[14] The enquiry into these two matters was a factual enquiry, which the *court* a *quo* answered following its assessment of the evidence led before it. The Court found that despite signing MM2, the appellant continued to supervise and control the respondent; that he continued to report to the appellant on his activities of the previous week and take instructions on what to do in the new week. The Court concluded that the control and supervision that the appellant

exercised on the

respondent was consistent with that of an employer controlling an employee in the course of an employment.

[15] On the issue of the respondent being a consultant and issuing invoices monthly, the Court again came to the factual finding that the invoices were a sham and that they were made to create the impression that the respondent was a consultant and the appellant his client when this was not the position. The *court* a *quo* found that the appellant's demand for invoices was not genuine but was fraudulent. As already stated, these were the Court's findings of fact drawn from the evidence that was before it at that time. They are un-appealable in terms of the Act. Again having made the factual findings as the *court* a *quo* did, we can not fault it on its application of the law to the facts. On the authority **of Percy Lokotfwako v Swaziland Television Broadcasting Corporation t/a Swazi T.V. IC case No. 151/2007,** the *court* a *quo* was correct *"to have regard to the realities of [the parties] relationship and not regard itself to be bound by what they [the parties] have chosen to call it."* **Goldberg v Durban City Council 1970 (3) SA 325 N @ 331 C.**

Ground 13 - Novation.

[16] The appellant's complaint with regard to this ground was that the *court* a *quo* did not have the right to make any findings relating to the second contract between the parties being MM2. This ground of appeal ties up with appeal ground 11 wherein the appellant complains that the *court* a *quo* ought to have limited itself to the enquiry whether the respondent was an employee to whom **Section 35** of the **Employment Act** applied or not.

[17] The appellant raised a point in limine in the court a quo in terms of which it disputed the respondent's assertion that he was an employee and contended that he was in a consultancy relationship with the appellant. In part, the appellant depended on annexure MM2 to show that the relationship between itself and the respondent was a client and consultant relationship and not an employer and employee relationship. The enquiry into whether one is an employee or a consultant necessitated that the court hears evidence adduced for that purpose. That is a factual enquiry and the respondent led evidence in the *court* a *quo* to show that he was an employee. In that respect the respondent produced his contract of employment,

annexure MM1,

which he attached to his application. He then challenged the legitimacy of the consultancy agreement, annexure MM2. In those circumstances the court a quo was obliged to examine the two contracts and pronounce on their status. The circumstances under which MM2 was entered into was examined by the Court through the respondent's evidence in chief and in cross-examination and the Court came to the factual findings that it did which supported its finding that there had been no novation of the original contract of employment.

As already indicated, these finding are findings of fact wherein evidence was required to prove or disprove the respondent's, consent to the novation, for example. The *court* a *quo* made a factual finding on the issue. The *court* a *quo* weighed the evidence before it to reach its conclusion. It is not a conclusion we can interfere with. This ground of appeal is dismissed.

Failure to report change of terms and conditions of employment in terms of section 26 of the Employment Act 1980.

[18] In terms of **section 26(1)** of the **Employment Act 1980**

"Where the terms of employment specified in the copy of the form in the second schedule given to the employee under section 22 are changed,

the employer shall notify the employee in writing specifying the changes which are being made and, subject to the following subsections, the changed terms set out in the notification shall be deemed to be effective and to be part of the terms of service of that employer."

Section 26(2)

"Where, in the employee's opinion, the changes notified to him under subsection (1) would result in less favourable terms and conditions of employment than those previously enjoyed by him, the employee may, within fourteen days of such notification request his employer, in writing, (sending a *copy of the request to the Labour Commissioner) to submit to the Labour Commissioner* a *copy of the form given to him, under* ***section*** **22,** *together with the notification provided under subsection (1) and the employer shall comply with the request within three days of it being receive by him."*

The appellant complains that the respondent did not notify the employer or Labour Commissioner of his opinion that the changes to his contract resulted in less favourable terms and conditions of employment for examination by the Labour Commission as envisaged

by **section 26.** The logical conclusion of that argument is that, in the absence of the request for the Labour Commissioner to make a ruling in **terms of section 26(3),** the changed terms set out in the notification would be held to be effective and would have become part of the terms of service of the respondent.

[19] The factual findings of the *court* a *quo* with regard to the manner in which the second contract, annexure MM2, are such that the question of **section 26** and its remedies does not arise. It was the Court's finding that the respondent was not aware of the contents of annexure MM2 having been assured that it would not have any effect on the employment contract. The Court found further that these assurances were made to induce the respondent to sign MM2 and that they, in fact constituted a fraudulent misrepresentation. The appellant did not, itself issue a notification in terms of which it specified what changes were being made in the employment contract.

[20] In these circumstances there in no question that the respondent would have seen MM2 as representing a change in his terms and conditions of employment. **Section 26** would have been irrelevant to him. In any

event, MM2 sought to replace the employment contract with a new

consultancy contract; it sought to change the very nature of the relationship between the parties and not the terms and conditions of employment. **Section 26** of the **Employment Act** would in our view, not have been applicable in such a situation.

Costs at the Court a quo

[21] The appellant's final ground of appeal is that the *court* a *quo* granted costs against it but provided no reasons for the costs order. It was submitted that in the Industrial Court, costs do not necessarily follow the course and that a costs order should at the very least be justified by the Court, in as much as the Court has a discretion to grant costs. It was argued that in the absence of reasons for the award of costs, the *court* a *quo* could not be said to have exercised its discretion judiciously in granting same.

[22] **Section 13(1)** of the **Industrial Relations Act 2000 as amended** gives the *court* a *quo* the licence to grant costs. The section reads as follows: *"13(1) The Court may make an order for payment of costs, according to the requirements of the law and fairness and in so doing, the Court may*

take into account the fact that a *party acted frivolously, vexatiously or with deliberate delay in bringing or defending proceedings."*

[23] The general rule of our law is that in the absence of special circumstances the costs follow the event. However, in view of **section 13(1) of the Act,** this general rule will yield where considerations of fairness require it to and where the conduct of one of the parties in the litigation requires so. The *court* a *quo* has a wide discretion in respect of the granting of costs in any matter that comes before it. The law and fairness must be taken into account in the exercise of this discretion. In general an appeal Court should be slow to lay down general rules where matters of judicial discretion are concerned.

(See National Union of Mine Workers v East Rand Gold Mine and Uranium Company Limited 1992 (1) SA 700 AD).

This Court in particular, may only entertain questions of law and not of judicial discretion. In any event, in the matter of **Swaziland Fruit Canners (Pty) Ltd v Nomcebo W. Dlamini Industrial Court of Appeal Case No. 1412017** the appeal Court stated the following at paragraph [7]

"It is noted that costs are granted at the discretion of the Court. Also applicable is the salutary rule that costs follow the event. Unless the

appellant can show gross irregularity on the part of the Court a *quo's decision to award costs, such as improper exercise of discretion, irrelevant considerations etc, the appeal court is not well placed to disturb the Court's decision."*

In casu, the appellant has not set out any gross irregularity that would require that we disturb the Court's decision. We therefore find no merit in this ground of appeal.

Decision

[26] From the foregoing, the appeal is dismissed and the judgement of the Industrial Court is up held.

S. NSIBANDE JP

I agree

M. VANI DER WALT JA

I agree

N. NKONYANE JA

For Appellant: Mr. M. Dlamini (Robinson Bertram & Associates)

For Respondent: Mr. C. Bhembe (Bhembe & Nyoni Attorneys)