IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

JUDGMENT

HELD AT MBABANE Case No. 21/2018

In the matter between

LANGA ERIC NGWENYA **APPELLANT**

And

HIGH POINT FARM (PTY) LTD **RESPONDENT**

Neutral Citation: *Langa Eric Ngwenya v High Point Farm (Pty) Ltd (21/18) SZHC 06 [2019]*.

Coram: M Dlamini AJA, D Tshabalala AJA, N Maseko AJA.

Heard : 04/04/2019
Delivered: 02/05/2019

For Appellant : KQ Magagula
For Respondent : MM Dlamini

Summary: *Labour law – Appeal against Industrial Court's decision dismissing Appellant's claim for unfair dismissal. The Appellant avers that that he was verbally dismissed without a disciplinary hearing. The Respondent's defence in its papers is that dismissal followed a duly constituted disciplinary hearing. The evidence shows that no hearing was conducted and no charges were preferred prior to dismissal. Therefore, the employer has not discharged the onus to prove that dismissal was procedurally and substantively fair.*

Labour law: Alleged termination of employment by mutual agreement and retrenchment for reasons other than operational requirements and related reasons stipulated by the Employment Act/1980 is a sham and may not be legally recognized or enforced. Voidable contract concept is not relevant or applicable in this case where no fraud or misrepresentation is alleged or is apparent.

JUDGMENT

---

[1] This appeal was prosecuted on the basis of the record of proceedings reconstructed from the notes recorded by the Judge *a quo.* This court was informed that transcription of recorded proceedings before the court *a quo* could not be located. It is presumed that the recording was misplaced or lost during relocation of the Industrial Court to new premises. Diligent search realized no results. The late filing of the reconstructed record was accordingly condoned.

[2] This is an appeal against the decision of the Industrial Court (IC) dismissing Appellant's claim for compensation for unfair dismissal. The Appellant filed seven grounds of appeal alleging in all of them that the *Court a quo* erred in fact and in law. Justifying this against Section 19 (1) of the Industrial Relations Act (IRA) which requires the appeal to be lodged on points of law, Counsel for the appellant argued that the legal points raised were intertwined with factual issues hence the difficulty to argue one without the other.

[3] The **first ground** of appeal reads *"The Court a quo erred in law and in fact that the Appellant's dismissal was procedurally fair, wherein it was proved on a balance of probabilities that no disciplinary hearing was conducted against the Appellant. There was never an invitation to any disciplinary hearing*." This ground is closely related with **the second** that *"The Court a quo erred in law and in fact in making the findings that the Appellant disappeared from work, yet Appellant was verbally dismissed from work. Appellant was directed to hand-over company car keys and take his belongings and go home."*

[4] The **third ground** of appeal is that *the Court a quo erred in law and fact in that it dealt with the fact of Appellant's disappearance that was never pleaded*. The **fourth ground** of appeal is that *the Court aquo misdirected itself concerning the application of void and voidable contract and its enforceability.* The Appellant alleges that on a balance of probabilities the

parties' minds were not *ad idem* when they signed the contract in that the Appellant stated that he was signing for a loan agreement while the Respondent alleged a retrenchment. In the **fifth ground** the Appellant alleges *a misdirection by the court a quo in finding that the Appellant was retrenched yet Section 40 of the Employment Act / 198 was not compiled with.*

The six ground of appeal is that *there was error of law and fact in the findings and reasons for termination of employment for disappearance whereas the Respondent alleged dismissal of Appellant was for absenteeism and gross dishonesty.* The **Seventh ground** of appeal alleges that *the Court was partial and did not consider the Appellant's evidence, and that it considered only the evidence of the Respondent thus failed to properly determine that the dismissal was substantively and procedurally unfair.*

[5] The Appellant was employed as a Foreman of the Respondent, High Point Farm, an enterprise situated at Magomba in the Lubombo region, owned by one Brian Pearson, its director.[1] According to the Appellant he was employed by the Respondent since the 30 June 2001 until the date of his dismissal on the 5th December 2014.[2] The Respondent's contention on the other hand is that the Appellant was indeed employed on the 30 June 2001, however, his employment was terminated by mutual agreement and retrenchment on the 29th August 2013. Further that that he was immediately re-engaged on the same day. The alleged agreement and or retrenchment, according to the Respondent, entailed payment of his full terminal benefits

[1] Brian Pearson and High Point Farm will hereinafter be referred to interchangeably as the Respondent.

[2] See pages 25 and 30 of the record.

of E18,000.00 which he said were, severance pay, and additional notice.[3] The said amount was however not paid to the respondent because he owed that much amount of money to the Respondent as loans. According to the Respondent the agreement for retrenchment was a ploy he suggested to set-off Appellant's indebtedness to him, and that the Appellant was happy with it. The two different assertions therefore put in dispute, among others, the length of service at the time that the Appellant's employment was terminated. According to the Appellant he had been in service for 13 years while the Respondent puts the period at 3 months.

[6] The Appellant's duties entailed supervision of cattle keeping, supervision of farm employees among others. According to the Appellant's evidence the employer verbally terminated his services without any warning or disciplinary hearing. The basis for termination was that the Respondent complained of his poor work performance and abuse of company's motor vehicle.[4] The Appellant stated before the Court *aquo* that the alleged poor performance was misplaced as he was not exposed to any training, and that he had alerted the employer to the shortage of staff for the farm operations. The Appellant disputed the alleged abuse of company motor vehicle.

[7] The Appellant earned a salary of E3000.00 per month. He claimed before the Court *aquo* compensation for procedurally and substantively unfair dismissal as follows:

[3] See page 9 of the record.

[4] Page 4 of the record.

a)	*Notice pay*	*E 3,000.00*
b)	*Additional notice*	*E 5,280.00*
c)	*Severance allowance*	*E13,200.00*
d)	*Maximum compensation for unfair dismissal*	*E36,000.00*
e)	*Leave pay*	*E 1,440.00*
		E58.920.00

f) costs of suit.

[8] The Respondent's defence to the claim before the Court *a quo*, according to its pleadings, was that three months after re-engagement, on the 9th December 2013 the Appellant was *"in writing dismissed after a lawfully constituted disciplinary hearing found him guilty of being absent from duty for a period of four days in a month without permission of the employer, and for gross dishonesty in the performance of his duties."*[5] At paragraph 8.2 the Respondent's Plea reads: *"The Respondent's pleads that the Applicant was dismissed for being absent from duty and for dishonesty and a proper disciplinary hearing was held wherein the Applicant was found guilty as charged."*[6]

[9] The Appellant denies in its Replication as well as in his evidence that the

[5] See paragraph 2.3 of the Respondent's Plea (termed Replies) at page 9 of the record, see also paragraph 8.2 thereof.

[6] At Page 11 of the record.

Respondent held any disciplinary hearing. He denies that any evidence was led against him and asserts that he was never served with any verdict. The Appellant disputed the Respondent's evidence that he was terminated by mutual agreement or retrenchment. The Appellant admitted signing an agreement with the respondent but said it was in respect of a loan for money from the Respondent. He expected to receive the cash but did not. He alleged that his subsequent follow-up to get the loan money often led to fights with the Respondent.

[10] The court *a quo* dismissed the Appellant's claim and found in favour of the Respondent that the dismissal of the Appellant was justified on the ground that he Absented himself from duty for 4 days. The learned Judge *a quo* referred to the provisions of the Employment Act/1980 which make it lawful and fair for the employer to terminate an employee who absents himself from work for more than three days in one month.[7] The learned Judge *a quo* quotes thus from Section 36(f)of the Act:

> "*It shall be fair for the employer to terminate the services of an employee, because the employee has absented himself from work for more than a total*

[7] See page 70 of the record, paragraphs [7] and [8] of the judgment.

of three working days in any period of thirty days without permission of the employer or a certificate signed by a medical practitioner..."

[11] The *court a quo* further quotes from Grogan's work, *Work Place Law*[8] on the requirement for the employee to notify the employer within a reasonable time in the event of his absence from work, stating the likely duration of his absence. It is noted that the employee is guilty of absenteeism if he is absent from work without a good reason or where he is absent for an acceptable reason, if there is no timeous notice of it to the employer.

[12] There are various points of departure in the evidence of the Appellant and the Respondent that the *court a quo* had to deal with before reaching its decision. It is the responsibility of the trial court to weigh the evidence presented before it by both sides, weigh credibility of the witnesses on both sides and to decide which evidence it accepts. This court may not on appeal interfere with the findings of the trial court on the credibility of the oral evidence presented to it, except if there is a clear mistake

[8] 10th edition.

on its part that leads to gross injustice. The *court a quo* states at paragraphs [24] and

[25][9] that:

"[24] on analysis of the evidence the court made the following observation,

the applicant's evidence was not consistent, whilst the

respondent's evidence was consistent, and a number of issues were not

disputed by the applicant...."

"[25] The court comes to the conclusion that the applicant was not dismissed from work, he disappeared only to resurface with papers from the Conciliation Mediation and Arbitration commission (CMAC) claiming that he was unfairly dismissed."

[13] The way I understand the finding of the *court a quo* is that the Appellant was not dismissed on the 5 December 2013 as he claims, but on that day he 'disappeared' or left the work place on his own and did not return until the 9 December 2013 or later, when he served the Respondent with CMAC papers alleging unfair dismissal. The *court a quo* made this finding despite the Respondent stating unequivocally its papers that it dismissed the Appellant following a duly constituted disciplinary hearing, and the respondent's counsel's assertion to the Appellant in cross-examination that Pearson will attest to that. Ordinarily this court should not interfere with such finding by the trial court which has vested powers regarding factual questions and findings. The *court a quo* did not address related and relevant

[9] See page 73 of the record.

issue that up to the 9 December the Respondent still regarded the Appellant as his employee, hence Pearson's telephonic invitation[10] to the Appellant to come on that day for 'disciplinary hearing' (or discussion about it).[11] The court *a quo's* finding that the Appellant 'disappeared' is therefore not conclusive as far as fairness or otherwise of the subsequent dismissal of the Appellant by the employer on the 9 December or thereabout. The court did not pronounce itself on whether the Respondent proved that the dismissal was both substantively and procedurally fair. This follows that the court decided that the appellant was not dismissed. However, dismissal of the Appellant was directly admitted in the respondent's defence posted in its papers[12] as aforesaid, that the Appellant's dismissal was fair and followed a duly constituted disciplinary hearing. There is also the assertion made in the cross-examination of the Appellant that when he failed to honour the invitation to the meeting "*on the 9th December to discuss the allegations against the Applicant… the employer resorted to make a conclusion based on the Applicant's response and evidence from other employees*."[13] The Respondent's papers aver that the Appellant was dismissed for misconduct ranging from absenting himself from work for 4 days without leave, and acts of dishonesty. Appellant's dismissal is also confirmed by Pearson's evidence in chief at page 47 of the record.

[10] The Respondent testified that on the 6 December he invited the Appellant to come on the 9th for a disciplinary hearing. He later changed and said the meeting was to discuss or prepare for disciplinary hearing. The invitation was made a day after confronting the Appellant about his alleged shenanigans and depriving him of the company car keys.

[11] At page 51-52 of the record.

[12] See Paragraphs 2.3 and 8.2 of Respondent's Replies at pages 9 and 11, respectively, of the record.

[13] Page 33 of the record

[14] However, Pearson's evidence partly confirmed the defence pleaded in Respondent's papers that was also put to the Appellant by the defence counsel. He stated in chief that Appellant's dismissal was fair because he was absent from work for 4 days, abused company car and a host of other alleged acts of misconduct.[14] He also testified about deterioration in Appellant's performance leading to a letter of accusations he wrote him to which he responded, denying a lot of things. This is apparently Respondent's letter of the 18 November 2013 which Pearson said he wrote to admonish the Appellant that if he did not change his wayward conduct disciplinary measures would be taken against him.[15]

[15] Pearson's evidence shifted when asked under cross-examination whether he conducted a disciplinary hearing before dismissing the Appellant. He stated that he had meetings with him which were not disciplinary hearings. When his attention was brought to the assertions in the Respondent's pleadings,[16] he reiterated that "*there was no proper disciplinary hearing."*[17] Pearson first said under cross examination that he called the Appellant to a disciplinary hearing on the 9th and that the charges were to be finalized on that day. When queried about disciplinary charges that were to be preferred on the same day of the hearing, he then changed and said that the hearing was not to proceed on the 9th but just a discussion of it. This is clearly in contrast to the defence papers, as pointed out elsewhere in this judgment.

[14] Pearson's evidence in chief at page 47.

[15] Page 45-46 of the record.

[16] To the effect that dismissal of Appellant followed duly constituted disciplinary hearing.

[17] Page 48 of the record.

[16] It is trite in our law that the employer bears the onus to prove that dismissal of an employee was procedurally and substantively fair before it can be declared lawful. The Employment Act further sets the parameters for cases in which it shall be lawful for the employer to terminate the employee, hence the onus on the employer to show that the employee's termination complied with those provisions.[18] It cannot be said from the evidence presented by the Respondent that procedural and substantive fairness was observed where no charges were served on the employee and there was no proper hearing. The contradictions that characterised the evidence of Pearson, namely asserting in chief that Appellant's dismissal was fair, and later admitting under cross examination that no proper disciplinary hearing was conducted, and that no charges were preferred against the Appellant before his dismissal[19] attest to the failure of the Respondent to prove procedural fairness in the dismissal. The view that the Appellant was aware of some of the charges from prior admonishing letters written to him is unacceptable.[20]

[17] The *court a quo's* finding that the Appellant was not dismissed is therefore at odds with unequivocal assertions of the Respondent as stated in the preceding paragraphs of this judgment. The court a *quo* did not deal with the

[18] Section 36 of the Employment Act/1980.

[19] Dismissal on or after the 9 December wherein the appellant failed to attend per invitation.

[20] Pearson's evidence under cross-examination, page 52 of the record.

glaring contradictions in the Respondent's defence raised in its papers[21] and the oral

evidence of its key witness, Brian Pearson.[22] It is difficult to gloss over these

contradictions, considering that contents of papers filed in the *court a quo* were

intended to form the basis of each party's case before that court. A party must stand

or fall by its pleadings filed unless they are amended. Admittedly, the Respondent

did not prefer or serve charges of misconduct on the Appellant before, on or after

the 9 December 2013. Counsel for the Respondent indicated during cross examination of the Appellant that when he failed to attend the meeting on the 9 December, the "*employer resorted to make a conclusion based on the Applicant's response and evidence from other employees.*"[23]

[18] The *court a quo* made a mistaken reflection that the Appellant did not dispute certain important allegations made against him by the Respondent. Firstly, that the Appellant did not dispute that he was absent from work for 4 days without leave, and that he owed money to the Respondent. The *court a quo's* mistaken assumptions in this regard appear at paragraph 4 of the judgement which reads,

> "*Having considered the respondent's evidence and having read the papers filed, the following evidence was not challenged:*
>
> *I. that the applicant was absent from work for four consecutive days*

[21] That dismissal was fair and followed a duly constituted disciplinary hearing.

[22] Stating on one hand that the dismissal was fair and that no charges were preferred nor proper disciplinary hearing held.

[23] Page 33 of the record

II….

III. And that the applicant owed money to the respondent."[24]

[19] On the contrary the Appellant testified that he was away from work for 2 days on account of his sick child and that he reported his absence to the respondent who then authorized it.[25] The Appellant also denied that he signed for retrenchment in order to settle a debt with the Respondent, asserting that he borrowed E12,000 from the employer, repayment of which was deducted monthly from his salary and that the debt was eventually cleared in April 2013.[26] It appears on the face of the *court a quo's* judgment that the learned Judge, in her own words, considered only the evidence of the Respondent and the papers filed. This explains the error made. The fact that the court gave consideration to depositions of one party in exclusion of the other party's, led to a partial decision. It gives credence to the **seventh ground** of appeal that "*the Court was partial and did not consider the Appellant's evidence, and that it considered only the evidence of the Respondent thus failed to properly determine that the dismissal was substantively and procedurally unfair."* It was incumbent upon the *court a quo* to give due consideration to the evidence of both parties and thereafter decide which evidence in its own judgment was credible and acceptable. What transpired in this instance amounts to an irregularity.

[20] From the foregoing analysis it clear that the Appellant was dismissed from employment after he informed the employer that he was reporting a

[24] At page 69 of the record.

[25] Page 27 of the record.

[26] Page 32 of the record. Also at page 36 under cross-examination by the Respondent's counsel – "Q: The last time you were in court you gave evidence to the effect that you were not indebted to your employer, do you remember that? Answer: yes, I do."

complaint against the employer with CMAC, and the Appellant did not honour the employer's invitation to attend a hearing or a meeting to discuss a hearing. The complaint with CMAC followed that the Appellant was either aware of imminent disciplinary measures against him by the employer or believed that he had been unfairly dismissed. The Respondent failed to show that the dismissal of the Appellant was procedurally fair in that no charges were communicated to him nor a proper hearing conducted before the dismissal. The Respondent having failed to prove procedural and substantive fairness before dismissal, the dismissal was accordingly unfair. The next question for determination is the duration of Appellant's employment for purposes of compensation for unfair dismissal.

[21] The Appellant challenges the *court a quo's* decision that he was retrenched in August 2013 in circumstances where section 40 of the Employment Act/1980 as amended was not invoked or complied with. Reading the judgment of the *court a quo* it is noted that the court did not deal with the allegation of retrenchment directly or make a finding that the Appellant was retrenched. The *court a quo* approached the issue as a contract to terminate employment entered into by the parties where one now claims lack of mutual understanding of the terms thereof. The court then decided that there was a voidable contract and decided that the Appellant should be bound by the contract because he did not seek to cancel it within a reasonable time.

[22] Having stated the elements of a voidable contract – coercion, undue influence, misrepresentation or fraud, none of which fitted the circumstances of the contract under consideration, the *court a quo*

nonetheless found that the Appellant *"did not take any steps to repudiate the agreement which shows that he understood what he was signing for."* It is my view that part of the inquiry before the *court a quo* concerned a claim that due to language barriers one party (Appellant) believed that he was signing a contract for loan of E18000.00 while the Respondent maintains that the contract was for a retrenchment package by mutual agreement meant to set off terminal benefits for the debt owed to the Respondent. In reaching the decision in favour of the Respondent on this issue the learned Judge noted consistency in the evidence of the Respondent and in inconsistencies in that of the Appellant, and that Appellant did not dispute most of the issues. The court did not specify the consistencies, inconsistencies or the undisputed issues. The court concluded that the Appellant took advantage of the good relationship he had with the Respondent.

[23] From the legal perspective there was never any retrenchment of the Appellant as alleged by the Respondent. The Respondent admittedly purported to deliberately use 'retrenchment' for its convenience and for wrong purpose that is not contemplated by the law. As highlighted by counsel for Appellant in his Heads of argument, Section 40(2) provides a rigorous procedure to be followed by an employer contemplating to retrench staff. The most important is the reason for retrenchment - operational requirements, which was not the case with the Respondent. There could be no retrenchment without the intention to lay off the Appellant. The question is whether the invalid purported agreement to retrench can be salvaged and enforced as an ordinary contract. The answer ought to be in the negative. The agreement is legally invalid and unenforceable in so far as it affects the term of employment for the Appellant and benefits for unfair dismissal.

[24] The logical conclusion is that the Appellant's employment never terminated prior to December 2013. He was in continuous employment from the 30 June 2001 until December 2013. That is the period applicable for computation of his compensation for unfair dismissal.

The court makes the following order:

1. The appeal is allowed and the decision of the court aquo is hereby set aside.
2. The Appellant is awarded compensation as claimed in the *court a quo*:

a) Notice pay	E3000
b) Additional Notice	5,280
c) Severance allowance	13,200
d) Maximum compensation	36,000
e) Leave pay	1,440.00
TOTAL	**E58,920.00**

3. There is no order as to costs.

D Tshabalala AJA

_____

I agree M Dlamini AJA

_____

I agree N Maseko AJA

_____