



IN THE SUPREME COURT OF ESWATINI
JUDGMENT

Civil Appeal Case 99/2017

In the matter between:

JABULILE ZANDILE SHONGWE

Appellant

And

**PRESIDING JUDGE OF THE INDUSTRIAL
COURT**

1st Respondent

CENTRAL BANK OF ESWATINI

2nd Respondent

Neutral citation: *Jabulile Zandile Shongwe vs Presiding Judge of the Industrial Court and Another (99/2017) [2018] [SZSC] 60 (30th November, 2018).*

Coram: **M.C.B. MAPHALALA CJ**

DR. B.J. ODOKI JA

S.B. MAPHALALA JA

Heard: **20th August, 2018**

Delivered: **30th November, 2018**

Summary: *Civil Appeal – incomplete record – the Industrial Court record has not been filed – in arguments before this Court the Appellant conceded the point – Appeal deemed abandoned and struck off with costs.*

JUDGMENT

S.B. MAPHALALA JA

Introduction

- [1] Before court is an Application for condonation which is opposed by the Respondents. On the 20 February, 2018 the Appellant filed a Notice of Application for condonation for the late filing of the record. Furthermore, in prayer 2 thereof an order was sought granting the Appellant leave to file the record and / or transcript of the proceedings. The Founding Affidavit of the attorney for the Appellant Mr. W. Zonke Magagula is filed in support of the Application.

The opposition

- [2] The Respondents oppose the Application and has filed an opposing affidavit stating *inter alia* that the Appellant's explanation for the delay is clearly unacceptable and not reasonable. Secondly the Appellant has not outlined the prospects of success in his Founding Affidavit. That in the absence of any allegation on prospects of success the present Application for condonation stands to be dismissed with costs and the appeal deemed abandoned.

The background

- [3] The facts of the case as gleaned in the affidavits of the parties as follows:
- 1. The Appellant was employed by the 2nd Respondent on the 1st day of august 2003 as a system analyst. Over the years she was promoted such that by the time of the occurrence of the events**

giving rise to these proceedings she held the position of senior system analyst.

2. On or about the 15th September 2015 the Appellant was notified of an impending disciplinary inquiry against her. In due course the inquiry was held and at the conclusion thereof the chairperson found Appellant guilty on all counts.

- 2.1 Appellant was thereafter served with a letter terminating her services forthwith. The letter of termination was authorised by the acting Human Resource Manager Mr D.G. Zwane. Mr. Zwane indicated in his letter that “the bank has considered the recommendation as to sanction and has resolved to accept the Chairman’s recommendation.

3. The Appellant noted an appeal against the dismissal citing *inter alia* the fact that the Chairman of the hearing had not heard her submission or evidence in mitigation of sanction.

- 3.1 On Appeal the decision to terminate Appellant’s services was reversed and the matter remitted to Disciplinary Inquiry Chairperson to hear submission in mitigation.

4. The Appellant then moved application for the recusal of the Chairperson on the grounds *inter alia* that the justice would not be served if the matter was referred to the Chairperson because he was tainted. The application for recusal was refused. The Appellant then turned to the Industrial Court.

- 4.1 In the Industrial Court, per Mazibuko J. founded for the Applicant. The 2nd Respondent approached the Court a quo seeking the judgment of Mazibuko J. (with assessors) be reviewed and set aside.

4.2 The Court a quo found for the Respondent on the grounds *inter alia* that the Industrial Court “in rejecting Zwane’s statement of facts as to the non-existence of a recommendation to dismiss the 2nd Respondent, the court went beyond the record of facts before it.” Page 105.

[4] It is the Appellant’s contention that the court *a quo* erred in its finding. The Industrial Court was clear in its judgment that the “employer representative, Mr. Zwane admitted in his letter of dismissal that he received a recommendation from the Chairman to dismiss the Appellant, which recommendation Mr. Zwane implemented as stated at page 40 of the record. The Industrial Court said it was not enough for Mr Zwane to merely say that he made a mistake; he ought to have given positive proof that no recommendation of dismissal was made by the Chairman. In this regard the attorney for the Appellant cited the learned author **Claser C.J. Dictionary of Legal Words and Phrases, Vol 3, Butterworth 1979** at page 78 and the South African case of **Kriegler V. Minister and Another 1949 (4) SA AD.**

[5] Therefore, it is an error by the court *a quo* to hold that the Industrial Court laboured under a misapprehension of the issues. The Industrial Court did not misdirect itself on the question of the onus as stated at page 102 of the record that:

6.1 The Human Resources Manager bore the onus to prove that the Chairman did not make a recommendation and the Industrial Court correctly found that he had not.

6.2 The Appellant does not have to prove, merely drew a legal conclusion based on the recommendation as correctly found by the Industrial Court.

[6] On the Application for condonation for failure to timeously file the certified record and for granting the Appellant leave to file the record and / or transcript of the proceedings, a Founding Affidavit of the Appellant Jabulile Zandile Shongwe is filed in support thereto. In the said affidavit the Appellant is making an application before this Court for failure to file the record of proceedings in the court *a quo* pursuant to Rule 30 (4) of the Rules of court.

[7] This is an Application pursuant to Rule 17 of the Rules of this court. The Appellant seeks the Court's condonation and leave to file a copy of the record which has been presented and as of the 14th February 2018 filed with the Registrar of this Court. That for purpose of candour same has been certified as the true and correct reflection of the proceedings *a quo*.

[8] In paragraphs 9 to 11 of the said affidavit averments are made regarding good cause shown for non - compliance. In paragraphs 12 to 14 of the said affidavit averments are made regarding the issue of prospect of success. In paragraphs 12 to 13 the following averments are made:

12. The learned Judge *a quo* failed to appreciate that while it is allowed to challenge a decision of a judicial officer, review proceedings concern themselves with the process leading to that decision as opposed to the decision itself. Therefore the finding of His Lordship *a quo* is based on a misdirection and ought to be corrected by this Honourable Court.

13. I am advised and verily believe that the learned Judge *a quo* misdirected himself when he made findings that there was no actual prejudice in the form of a recommendations to the Chairman. Given the threshold set by various decision of this Honourable Court in bias cases, a reasonable apprehension of bias suffices to impugn a decision maker as opposed to the test used by His Lordship. In effect, I am now to be adjudged by a Chairman

who at some point recommended that I be dismissed even without any form of mitigation.

- [9] In paragraphs 15 to 16 the Appellant deals with the question of prejudice. On the other hand the Respondents oppose the Application for condonation on a number of grounds. Firstly, that in terms of Rule 30 (1) of the Rules of this Court, the Appellant was enjoined to file a record of appeal within 2 months from date of the Notice of Appeal which was supposed to be on the 28 March, 2018. The record was filed on the 14 February, 2018 way out of time.
- [10] The second argument of the Respondent is that the appeal has been abandoned by the Appellant in terms of Rule 30 (4) of the Rules of this Court for filing the record out of time without any condonation application and for filing an incomplete record.
- [11] The third argument advanced for the Respondents is that in any event there is no substance in the grounds of appeal and it stands to be dismissed. In support of the above arguments the attorney for the Respondent in paragraph [15] cited the Supreme Court case of **Jabulane Soko vs Mawandle case no. 34** and that of **Meshack Langwenya vs Swazi Poultry Processors (Pty) Ltd Supreme Court case no. 65/2012.**
- [12] The Respondents further advanced argument on the merits of the matter and concluded that the grounds of appeal have no substance and ought to be dismissed.
- [13] In this regard the attorney for the Respondents contended that the grounds of appeal, are with respect have no substance on the following basis:

9.1 The court *a quo* erred in law when he made a finding that the decision of the 1st Respondent was reasonable (I shall assume that they meant “unreasonable”) whereas there was no ground of

review that was established by the 2nd Respondent. The 2nd Respondent challenged the decision (the merits) of the Industrial Court and not the decision making process;

9.2 The court *a quo* erred in law when it placed reliance on the fact that the Chairman had not made a recommendation as to sanction. The law of bias in disciplinary hearings is such that the standard to be proved is “apprehension of bias” and not “actual bias”. The letter of dismissal was adequate to remove Sicelo Dlamini as Chairman as it created a reasonable apprehension of bias; and

9.3 The court *a quo* erred in law when it granted costs against the Appellant owing to the fact that the employee – employer relationship exists between the parties.

[14] Finally on the merits of the Application the Respondents contend that the appeal stands to be dismissed with costs and the judgment of the court *a quo* be confirmed.

The analysis and conclusion

[15] Having considered the affidavits of the parties and the arguments by learned Counsel, it is without question that the Applicant’s case ought to be determined within the provisions of Rule 30 of the Rules of this Court. That in terms of Rule (30) (1) of Rules of Court, the Appellant was enjoined to file the record of proceedings within two months from date of Notice of Appeal. That was supposed to be on the 28 January, 2018. However, the record in the present case was filed on the 14 February, 2018 way out of time on the face of the record. It also appears that the record of the Industrial Court has not been filed as part of the proceedings.

[16] Upon realization of the fact that the record of the Industrial Court as mentioned above in paragraph [17] Mr Magagula for the Appellant applied for a postponement of the matter citing decided cases. On the other side Mr Jele opposed the application for postponement. The attorney for the Respondent in arguments before this Court referred the Court to a letter being annexure “DJ2” which he wrote representing his client on the 24 July, 2018 addressed to the attorney of the Appellant to the following effect:

“Zonke Magagula & Company

1st floor, Bhunu Mall

Nkoseluhlaza Street

Manzini

Dear Sir,

**Re: Supreme Court case no. 99/2017: Jabulile Zanele Shongwe vs
Presiding Judge of the Industrial court and Another**

- 1. The above matter refers.**
- 2. You were supposed to file you Heads on the 11th of July 2018. You are now way of time.**
- 3. You have also not filed the complete record. The pleading of the Industrial Court have not be filed up to date.**
- 4. We shall consider you client’s appeal abandoned.**
- 5. We are now executing the High Court judgment.**

Yours faithfully”

[17] Following a long line of decided cases before this Court in the absence of the record of the Industrial Court as stated above in paragraph [17] and [18] the

appeal is deemed abandoned and struck off with costs. See the Supreme Court cases of **Meshack Langwenya vs Swazi Poultry Processors (Pty) Ltd (65)/2012** [2013] SZSC 26 and that of **Thandi Mkhathshwa vs Nomsa Stewart and Others Supreme Court case No. 3/2016 SZSC 07**.

[18] In the circumstances, the appeal is hereby deemed abandoned with costs to the Respondents.

Order

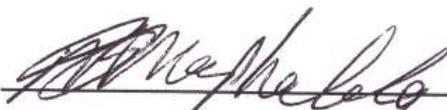
[18] It is the order of this Court that:

- (i) The Appeal is deemed to have been abandoned and is accordingly struck off.
- (ii) The Appellant is to pay the costs.



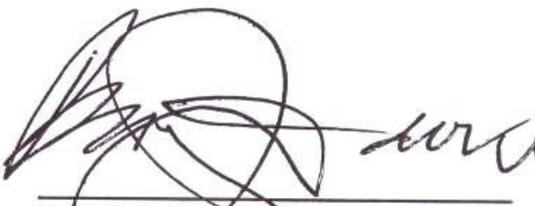
S.B. MAPHALALA J.A.

I AGREE



M.C.B. MAPHALALA C.J.

I ALSO AGREE



DR. B.J. ODOKI J.A.

For the Appellant:

Mr. Z. Magagula
(of Zonke Magagula & company)

For the Respondents: Mr. Jele
(of Robinson Bertram)