THE HIGH COURT OF SWAZILAND

SHADRACK MHLONGO

Applicant

And

RELYANT RETAIL LTD t/a SAVELLS

1st Respondent

SICELO B. DLAMINI N.O.

2nd Respondent

THE CONCILATION MEDIATION AND ARBITRATION COMMISION

3 rd Respondent

Civil Case No. 330/2004

Coram

S.B. MAPHALALA - J

For the Applicant: MR. S. SIBANDZE

For the 1st Respondent: MR. M. SIBANDZE

JUDGMENT

(7m October 2005)

[1] The application before court is for the review of the arbitrator's award of 15 August 2003, on the sole ground that the arbitrator acted with gross unreasonableness in coming to the conclusion that he did. The averments relied upon are found in Applicant's Founding affidavit at paragraph 9 thereof, as follows:

9.The grounds upon which I seek to review the ruling of the 2nd Respondent are that he arrived at a decision which was so grossly unreasonable as to justify the inference that he failed to apply his mind to the matter before him in accordance with the behests and t he tenants of natural justice by reason of one or more or all of the following:

9.1 In finding that I did not lodge a grievance with the lsl Respondent simply because he had not followed established and agreed company rules and procedures;

9.2 In finding that I had refused to be transferred from the Nhlangano branch of the 1st Respondent's undertaking;

9.3 In finding that the intolerable circumstances I complained of were not created by 1st Respondent.

[2] The 1st Respondent has answered the above complaints in its Answering affidavit deposed to by its Industrial Relations Executive Dirk Cornells De Wet as follows i) that the finding by the 2nd Respondent that the Applicant did not file a grievance was reasonable and was based upon the evidence led at the arbitration proceedings; ii) further that as a means of solving Applicant's complainant, the Applicant was offered a transfer to another branch which he refused; and iii) furthermore, the 1st Respondent denies that the findings that the intolerable situation alleged by Applicant existed and that it was created by the Respondent is unfounded.

[3] Before delving into the substance of the present dispute I wish to digress for a moment to recount a very brief background of the matter, for a better understanding of the lis between the parties as follows: The Applicant was employed by the Respondent in or about the 23rd June 1997, as a Sales Consultant until the Applicant handed in his resignation in terms of Section 37 of the Employment Act No. 5 of 1980 (as amended). The Applicant's reasons for the resignation were caused (according) to him by the frustration suffered on the non-attendance of his grievances which were raised from the shop floor to higher management. The Applicant also stated in his resignation letter that the grievances were raised out of a life threat directed to him by his colleagues. The issue went through the whole gauntlet provided for by the Industrial Relation Act 2000 until 2nd Respondent was appointed as arbitrator on the 9th May 2003. The 2nd Respondent heard evidence in accordance with the Act and gave his award supported by reasons on the 15th August 2003. This award is the subject matter of these proceedings.

[4] According to the authors Herbstein and Von Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition at page 929 thereof the grounds upon which proceedings can be brought under review to a provisional division, or before a local division having review jurisdiction are as follows:

a) Absence of jurisdiction on the part of the court;

b) Interest in the cause, bias, malice or corruption on the part of the presiding officer;

c) Gross irregularity in the proceedings; and

d) The admission of inadmissible or incompetent evidence, or the rejection of admissible or competent evidence.

[5] Further on at page 932 in fin the learned authors continued as follows:

"The giving of a judgment not justified by the evidence would be a matter of appeal and not review, upon this test. The essential question in review proceedings is not the correctness of the decision under review but its validity".

[6] According to Rose Innes in the book titled "Judicial Review of Administrative Tribunals in South Africa " published by Juta in 1963 at page 2IT.

"It is true that the courts have exercised their common review power on the grounds of gross

unreasonableness but only in the special sense that the unreasonableness of the decision must be so gross that something else can be inferred from it, either that it is inexplicable except upon the assumption of malafides or ulteria motives or that it amount to proof that the person on whom the discretion is conferred has not applied his mind to the matter".

[7] The important question therefore which is presented by what is said by the learned author Rose Innes (supra) above is whether on the record of the proceedings before the arbitrator one can infer from it, either that it is inexplicable except upon the assumption of mala fides or ulterior motives, etc.

[8] It would appear to me on the totality of the affidavit evidence and the submissions made by Counsel that none such can be inferred from the record a quo. A reading of the ruling of the arbitrator Mr. Sicelo Dlamini makes it clear that he applied his mind to the matter totally and in a logical and admirable manner beginning by defining the meaning of the concept of constructive dismissal. The arbitrator then analysed the evidence and his findings of fact were reasonable and based upon the evidence led. The Applicant's case simply put was that his colleagues had made his work life intolerable by harassing him and his customers, threatening him with death and that the employer had made his life intolerable by not attending to these complaints.

[9] I shall therefore proceed to examine each point of complaint found in paragraphs 9.1, 9.2 and 9.3 of the Applicant's Founding affidavit ad seriatim, thusly:

i) a finding that Applicant did not lodge a grievance per established company rides and procedures.

[10] The complaint in this regard is that the arbitrator's decision was grossly unreasonable in his finding that Applicant did not lodge a grievance with the 1st Respondent simply because he had not followed established and agreed company rules and procedures. Mr. Sibandze who appeared for the Applicant argued in his Heads of Arguments in support of this complaint that the arbitrator's decision is based mainly on the fact that the Applicant did not follow procedure in forwarding his complaint. This finding is not supported by the evidence. It is common cause that the 1st Respondent became aware that there were issues of ill-treatment being raised by the Applicant, even if these issues were not raised as per the grievance procedures. It is Applicant's submission that it was unreasonable for the arbitrator to find that Applicant had not followed the grievance procedure when it was clear that the problem was well known to the 1st Respondent.

[11] On reading the record of the proceedings a quo it appears to me that the arbitrator was correct in his finding in this respect because, firstly, the Applicant was aware of the grievance procedure and had admitted as much under cross-examination. At page 7 of the transcript of the proceedings, the Applicant says:

"I knew there was an established way of reporting grievances within the company and I had not exhausted them".

[12] The transcript of proceedings also reflects that the Applicant never filed a formal grievance in the normal and established way but reported in writing to management. The Regional Management tried to deal with the Applicant's complainant by investigating it and found that there was insufficient evidence and advised the Applicant of his views (see pages 21 and 22 of the transcript of the proceedings).

[13] In this regard I agree in toto with the submissions by Mr. Sibandze for the Respondent that the findings by the arbitrator cannot be faulted and therefore Applicant's application ought to fail under this ground.

ii) Applicant's refusal to be transferred.

[14] The second ground advanced therein is that the arbitrator's finding that Applicant had refused to be transferred from the Nhlangano branch of the 1st Respondent's undertaking was also so grossly unreasonable as to justify the inference that he failed to apply his mind to the matter before him in accordance with the behests and the tenets of natural justice.

[15] From the facts on the record of proceedings, it appears to me that the arbitrator gave a well-reasoned judgement supported by legal authority in this regard. The arbitrator correctly found that before an employee may correctly claim to have been constructively dismissed, "resignation must be ascribed to some form of coercion and the prospect of continued employment must be unbearable before the constructive dismissal is considered" (vide page 22 of the Book of Pleadings).

[16] Further, the other question that the arbitrator asked "was the termination of employment the only reasonable option open to the employer?" In this regard the arbitrator relied on three decided cases, namely the cases of Demosa Obo Monutsioa vs Victorias Hospital (2000) 9 CCMA. Smith vs Magnun Security (1997) 3 BLLR 336

(CCMA); and that of Beets vs University of Port Elizabeth [2000] 8 BALR 871 (CCMA).

[17] Furthermore, Applicant was approached after his resignation but declined to reconsider (see page 10 of the transcript). I agree with Mr Sibandze for the Respondent in this regard that the dictum in the Industrial Court case of Neopac Swaziland vs Jameson Thwala - Industrial Court Case No. 18/1998 is apposite. In that case an employee had an alternative to resignation but did not utilise it in the form of grievance or other procedures, it was held that the employee could not have been taken to have been constructively dismissed. In that case the employee was approached after the dismissal with a view to convincing him to consider but declined.

[18] For the afore-going reasons this ground for review ought to fail.

ii) the intolerable circumstances created by employer.

[19] In this regard the complaint is that the arbitrator's finding that the intolerable circumstances he complained of were not created by 1st Respondent. The basis of Applicant's claim against the 1st Respondent was that he had been constructively dismissed by the 1st Respondent. Constructive dismissal being a concept created under Section 37 of the Employment Act which reads, "when the conduct of an employer towards an employee is proved by that employee to have been such that the employee can no longer be reasonably expected to continue in his employment and accordingly leaves his employment, whether with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by the employer". It is inherent in this section that, firstly the onus of

proof is upon the employee and secondly, the conduct which must be proven by the employee to have forced him to leave his employment must be the conduct of the employer. A reading of the ruling of the arbitrator makes it clear that he applied his mind to the matter and he analysed the evidence and his findings of fact were reasonable and based upon the evidence led. In this respect I am in total agreement with the submissions made on behalf of 1st Respondent at paragraphs 9 to 14 of Mr. Sibandze's Heads of Argument.

[20] The Applicant's application correctly failed before the arbitrator as the Applicant could not discharge his onus under the section to prove that the employer did create any intolerable circumstances which would have entitled Applicant to rely on the claim of constructive dismissal as envisaged by the Act.

[21] In the totality of all the facts and arguments advanced herein the circumstances of this matter are that the arbitrator gave a well-reasoned judgment supported by legal authority. It cannot be said or suggested that the ruling was unreasonable to the extent that it can only be concluded that the arbitrator did not apply his mind to the facts at all.

[22] In the result, for the afore-going reasons the application is dismissed with costs.

S.B. MAPHALALA

JUDGE