



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No: 02/2013

In the appeal between:

**NOMAKANJANI SCRAP YARD &
RECYCLING (PTY) LTD**

APPELLANT

VS

THANDI TSABEDZE

RESPONDENT

Neutral citation: *Nomakanjani Scrap Yard & Recycling (Pty) Ltd vs Thandi Tsabedze (02/13) [2013] SZSC37 (31 May 2013)*

CORAM: **DR. S. TWUM, JA**
M.C.B. MAPHALALA, JA
P. LEVINSOHN, JA

Heard : 22 May 2013
Delivered : 31 May 2013

Summary

Civil Appeal – appellant instituted an application for an anti-dissipation order in the Court *a quo* - respondent raised a point of law that the Court *a quo* has no jurisdiction over the matter since the relationship between the parties arises from an employer/employee relationship – counter-claim raised by the respondent for the release of the money – held that the Court has no jurisdiction to entertain the matter in light of section 8 (1) of the Industrial Relations Act No. 1 of 2000 – further held that the essential requirements for the anti-dissipation order have not been established – appeal accordingly dismissed with costs at attorney and client scale.

JUDGMENT

M.C.B. MAPHALALA, JA

[1] The appellant instituted an urgent application before the Court *a quo* on the 5th December 2012 that a *rule nisi* do issue with immediate and interim effect calling upon the respondent to show cause why an order in the following terms should not be made final: Firstly, that appellant's attorneys be authorised to seize the funds in the amount of E159 000.00 (one hundred and fifty nine thousand emalangeni), place them in an interest bearing account pending the institution and finalisation of action proceedings against the respondent for recovery of monies stolen by the respondent from the appellant. Secondly, that the appellant is directed to issue summons no later than the end of January 2013, failing which the funds should be released to the respondent. The appellant further sought an order that prayer 2.1 above operates with immediate and interim effect pending the finalisation of the application; it further sought an order for costs.

[2] The respondent is employed as a cashier by the appellant, which is a company involved in the purchase and sale of scrap metal. It is not in dispute that the respondent would be given a cash float of about E20 000.00 (twenty thousand emalangeni) per day by the appellant. Customers selling their scrap metal to the appellant are initially attended by the employees responsible for weighing

the scrap metal; a handwritten weigh-slip is given to the customer by one Sibongile Gamedze whose duty is to sign the weigh-slips. The customer in turn presents the weigh-slip to the respondent for payment.

[3] The appellant alleges in its founding affidavit that on or about the 5th September 2012, various anomalies with regard to the company stock not tallying up with the scrap metal purchased came to the attention of the management of the appellant; these anomalies were discovered at a time when the company was plagued with serious cash flow problems. This led to the appellant launching an internal investigation. The appellant concedes that the respondent was a trusted employee of the company; hence, she was not part of the employees who were being investigated by the appellant.

[4] It is common cause that on the 1st December 2012, and at Oshoek Border Post, the respondent was intercepted by the South African Police for not declaring E205 000.00 (two hundred and five thousand emalangi) in her possession and which she was taking to South Africa. The South African Police seized R45 000.00 (forty five thousand Rands) of the amount which was in South African currency with a view to verify the serial numbers in order to ensure that the money was not forged. The money in Swazi currency was given back to the respondent. The South African Police subsequently handed the respondent over to the Swaziland police. It is not in dispute that the money

seized by the South African Police in their currency was handed back to the respondent at a subsequent date.

[5] The local police based at the bordergate decided to call her employer, the General Manager of the appellant, in order to dispel any notion that the respondent had misappropriated the money from her employer. The General Manager of the Appellant Sean Stewart together with the appellant's Administration Manager Laura Orwin promptly arrived at the bordergate; however, they cleared the respondent of any wrongdoing, theft or irregularities committed by the respondent at their workplace which could be associated with the money in her possession.

[6] The appellant's General Manager doesn't deny that he advised the respondent to abandon her trip to South Africa in order to avoid hijacking by South African criminals since many people were now aware that she was in possession of a large amount of money. Similarly, he doesn't deny that he persuaded the respondent to return in his motor vehicle in order to deflect attention from possible criminal elements at the bordergate; hence, she ordered her driver to return to the country. The balance of the money amounting to E160 000.00 (one hundred and sixty thousand emalangen) was placed in the boot of the motor vehicle driven by the General Manager.

[7] The General Manager does not deny as well that when they arrived at the premises of the appellant company, the respondent expressed her gratitude to him for transporting her safely back to the country with the money; and, that she called her driver to come and transport her with the money back to her apartment at Ngwane Park in Manzini. However, she was advised by the General Manager to leave the money in their custody in the appellant's safe for security reasons; she was further advised that taking the money with her was extremely risky. They counted the money using a money-counting machine; she took an amount of E1 000.00 (one thousand emalangeni) leaving a balance of E159 000.00 (one hundred and fifty nine thousand emalangeni) in the possession of the General Manager and the Administration Manager Laura Orwin for safe-keeping. It was agreed between the respondent and the General Manager that she would collect the money on the following day being Sunday the 2nd December 2012.

[8] It is not in dispute that on the 2nd December 2012 she requested the police at Sgodvweni Police Station to escort her after she had collected the money from the appellant. The police phoned the appellant's General Manager to confirm if he was holding any money on behalf of the respondent; however, he requested to come to the police station to consult with the police on the matter. On arrival at the police station, the General Manager told the police that he could not release the money to the respondent on the basis that the appellant was investigating the respondent on the disappearance of certain material at the

appellant's premises. However, he failed to substantiate the allegations when he was invited by the police to do so. Similarly, he did not lay a criminal charge against the respondent for fraud or theft; hence, the police advised him to release the money to the respondent on the following day being the 3rd December 2012.

[9] However, when she reported for work on the said date, the General Manager refused to give her the money as advised by the police. On the contrary she was subjected to vigorous questions with a view to disclose the source of the money notwithstanding that no theft or fraud had occurred at the appellant's company to warrant such conduct. Her Nigerian boyfriend who resides in South Africa and who happens to be the father of her children faxed annexure "TTI" being details of stock from which he conducts business; the stock was valued at E370 000.00 (three hundred and seventy thousand emalangeni). This was intended as proof by the respondent that the boyfriend and respondent were involved in business; hence, they had money.

[10] The respondent informed the General Manager that her boyfriend has a thriving clothing business in South Africa and that he occasionally gives her money. Similarly, she contended that she did not depend on her meagre salary for her livelihood but that she was a hawker generating a substantial income from her own business. Notwithstanding the explanation given by the respondent for the source of the money, the appellant's General Manager consistently refused

to release the money to the respondent notwithstanding that there was no Court order permitting him to keep the money; and, he had not laid a criminal charge with the police for theft or fraud against the respondent.

[11] On the 4th December 2012 the General Manager served the respondent with a letter of suspension from employment pending investigations of possible irregularities she had committed at the workplace; this was done in order to validate and legitimise the unlawful retention of the money. As expected the General Manager subsequently claimed that the Administration Manager had brought to his attention a litany of forged weigh-slips; and, that Sibonile Gamedze, who is responsible for preparing and signing weigh-slips for goods purchased had denied appending her signature and handwriting on the weigh-slips which were shown to her. According to the General Manager, Sibonile Gamedze told him that the handwriting on the weigh-slips was that of the respondent, and, that the signature on the weigh-slips purported to be her signature but that it was not.

[12] However, neither Sibonile Gamedze, the Administration Manager nor the General Manager are handwriting experts; hence, they cannot conclusively say that the handwriting and signature on the specimen weigh-slips are that of the respondent. This is merely speculation which does not advance the case for the appellant.

[13] Similarly, the said Sibonile Gamedze does not say in her confirmatory affidavit that her signature was forged. She should have expressly stated that she had read the documents shown to her and that she can confirm that her signature had been forged.

[14] There is no evidence before this Court that the money does not belong to the respondent or that it was misappropriated by the respondent from the appellant. Furthermore, there is no evidence on the papers before Court that her explanation of the source of the money is false. Her contention that she has a thriving business as a hawker and that she also receives money from her boyfriend who has a clothing business in South Africa do constitute a legitimate ground for the source of the money in the absence of evidence to the contrary.

[15] It is common cause that the matter, in the Court *a quo* was dismissed on the point in *limine* that the Court had no jurisdiction over the matter since it involves an employer/employee relationship. The Court *a quo* went further to grant the orders as prayed for in the counterclaim, and ordered the appellant to release the money to the respondent.

[16] The appellant accordingly filed a Notice of Appeal to this Court. The citation in the Notice of Appeal is very misleading on the basis that three appellants have been cited including the appellant, the General Manager as well as the

Administration Manager. Only the appellant company is the proper appellant; the General Manager and the Administration Manager merely deposed to the founding and confirmatory affidavits respectively before the Court *a quo* on behalf of the appellant.

[17] Three grounds of appeal were raised: firstly, that the Court *a quo* erred in finding that the application arose from the employer/employee relationship between the appellant and the respondent as contemplated by section 8 (1) of the Industrial Relations Act No. 1 of 2000. Secondly, that the Court *a quo* erred in finding that the application arose from the employer/employee relationship between the appellant and the respondent on the basis that the application was in the form of an interdict or attachment “*pendete lite*” and that if the appellant was ultimately successful in its pending suit against the respondent, the refusal of the interdict or attachment would result in the relief which would be given being precluded, the respondent having dissipated any means of honouring the judgment. Thirdly, that the Court *a quo* erred in law in that it failed to appreciate that the contemplated action was delictual in nature to recover damages notwithstanding that the employee committed a wrong against the employer such as theft.

[18] It is common cause that the appellant, on the merits, seeks an anti-dissipation interdict with a view to keep the amount of E159 000.00 (one hundred and fifty nine thousand emalangen) which was unlawfully obtained from the

respondent. Such a remedy is extraordinary in nature on the basis that it seeks to execute in advance. This remedy is available to a party who can show that the respondent is arranging his affairs in such a way as to ensure that by the time the applicant is in a position to execute judgment, he will be without sufficient assets on which to execute. Certainly, it is not a claim to substitute the applicant's claim for the loss suffered. The purpose of the interdict is to prevent a person who can be shown to have assets and who is about to defeat the plaintiff's claim or to render it hollow by secreting or dissipating assets before judgment can be obtained or executed. No evidence has been advanced by the appellant in this regard. See *Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa, fifth edition, volume 2, Cillers Loots and Nel, Juta Ltd, 2009 at pp1488-1491; Knox D'Arcy Ltd v. Jamieson 1996 (4) SA 348 (A) at pp 371-372.*

- [19] The onus lies on the party seeking the interdict to establish the requirements for the grant of the interdict. However, it is trite law that this remedy is discretionary in nature; and, the discretion has to be exercised by the Court judiciously in light of the circumstances of the particular case. Undoubtedly, it is an invasive remedy which can cause severe prejudice to the respondent. It is against this background that due caution should be exercised by the Court in granting such an order taking into account all possible practical safeguards against abuse. The remedy can also interfere with the Constitutional rights of

individuals if not properly and carefully considered. See *Herbstein & Van Winsen* (supra) at pp 1492-1493.

[20] The appellant has failed to establish the requirements of the interdict sought. In particular it has failed to establish a *prima facie* right. There is no evidence that the money was indeed stolen from the appellant or that the explanation given by the respondent is not legitimate or reasonably possible. No finding has been made by appellant in the form of a disciplinary hearing against the respondent. The General Manager failed to convince the police that the money was stolen from the appellant; hence, he did not lay any criminal charge against the respondent for fraud or theft. Presently, the respondent is not charged. The application for the interdict is based on a mere suspicion that the money could belong to the appellant on the basis that the respondent earns a meagre salary.

[21] In a Constitutional democracy, like ours, the conduct of the appellant and its Management leaves a lot to be desired. It is not in dispute that at the border, the management confirmed to the police that the respondent was a trustworthy employee; they offered her a lift in their motor vehicle even though she had a motor vehicle of her own and a driver on the pretext that there might be criminal elements who might rob her of the money if travelling in her motor vehicle. On arrival at the appellant's premises, they offered to keep the money in the company safe to be collected by the respondent on the following day;

however, they did not honour their undertaking and decided to deprive her of the money unlawfully and without a Court Order.

[22] The conduct of the appellant constitutes an infringement on the right of the respondent to own property. There is no basis in law to deprive the respondent of the money. The appellant has failed to establish the essential requirements of the interdict sought. Section 19 of the Constitution provides the following:

- 19. (1) A person has a right to own property either alone or in association with others.**
- (2) A person shall not be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied –**
 - (a) The taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health;**
 - (b) The compulsory taking of possession or acquisition of the property is made under a law which makes provision for –**
 - (i) Prompt payment to a Court of law by an person who has an interest in or right over the property;**
 - (ii) A right of access to a Court of law by any person who has an interest in or right over the property;**
 - (c) The taking of possession or the acquisition is made under a Court order.”**

[23] The basis of the appeal is that the Court *a quo* has no jurisdiction to entertain this matter because the cause of action does not arise out of the employer/employee relationship of the appellant and the respondent but on a delictual action to be instituted by the appellant as the employer to recover damages. Certainly this is not correct. The cause of action arises from the relationship of employer/employee between the appellant and the respondent as contemplated by section 8 (1) of the Industrial Relations Act No. 1 of 2000.

[24] The police called the management of the appellant to the border because they suspected that the respondent might have misappropriated the money from her employer. The respondent agreed to use the motor vehicle from the border because it belonged to the General Manager of the appellant company. Similarly, the respondent agreed that the money should be kept at the appellant's company for security reasons because of the employer/employee relationship existing between the parties. Furthermore, the management of the appellant refused to release the money to the respondent on suspicion that the money had been stolen from the appellant by the respondent during the course of her employment. The respondent was subsequently suspended from her employment on suspicion that she had stolen the money from the appellant; and, an investigation was subsequently undertaken. If misappropriation of the funds is established, the respondent may face a disciplinary hearing which may lead to her dismissal as an employee of the appellant.

[25] Section 8 (1) of the Industrial Relations Act No. 1 of 2000 provides the following:

“8. (1) The Court shall, subject to sections 17 and 65, have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this, the Employment Act, the Workmen’s Compensation Act, or any other legislation which extends jurisdiction to the Court, or in respect of any matter which may arise at Common law between an employer and employee in the course of employment or between an employer or employee’s association and a trade union, or staff association or between an employees association , a trade union, a staff association, a federation and a member thereof.”

[26] I should mention that section 17 mentioned in section 8 (1) of the Industrial Relations Act relates to Arbitration proceedings at the workplace. Section 65 which is also referred to in section 8 (1) of the Act relates to the governing Body of the Conciliation, Mediation and Arbitration Commission (CMAC) which is also empowered to resolve industrial disputes before they are referred to the Industrial Court.

[27] It is apparent from the evidence that the appellant took the respondent’s money because they suspected that she had stolen it from the appellant during the course of her employment. It is for this reason that the appellant suspended her from employment on the ground of dishonesty; hence, the appellant instituted the said investigations with a view to subject her to disciplinary

proceedings and ultimately to dismiss her in terms of section 36 (b) of the Employment Act No. 5 of 1980.

[28] Section 36 (b) of the Act provides the following:

“36. It shall be fair for an employer to terminate the services of an employee for any of the following reasons:

....

(b) because the employee is guilty of a dishonest act, violence, threats or ill-treatment towards his employer, or towards any member of the employer’s family or any other employee of the undertaking in which he is employed;”

[29] The wording of section 8 of the Industrial Relations Act No. 1 of 2000 leaves no doubt and in fact confirms that the Industrial Court has exclusive jurisdiction to hear and determine all disputes in which the cause of action arises from the relationship between an employer and employee in the workplace and during the course of employment or between the employer and employees’ representatives.

[30] *Zietsman JA* delivering the unanimous decision of the Supreme Court in *Delisile Simelane v. The Teaching Service Commission and Another* Civil Appeal No. 22/2006 stated:

“In my opinion the wording of Section 8 (1) of the 2000 Act can be interpreted in one way only and that is that the Industrial Court now has exclusive jurisdiction in matters arising at Common law between employers and employees in the course of employment. The fact that special procedures for the determination of disputes have to be followed before the matter comes before the Industrial Court does not alter the position.”

[31] *Ramodibedi JA*, as he then was, in *Swaziland Breweries Ltd and Another v. Constantine Ginindza*, Civil Appeal 33/2006 stated the following:

“The effect of this change, read with the use of the word "exclusive" in the section makes it plain in my view that the intention of the Legislature in enacting Section 8(1) of the Act was to exclude the High Court's jurisdiction in matters provided for under the Act and thus to confer "exclusive" jurisdiction in such matters on the Industrial Court.

It is important to recognize that the purpose of the Legislature in establishing the Industrial Court was clearly to create a specialist tribunal which enjoys expertise in industrial matters.

In the context of the Legislative Scheme and object of the Act as fully set out above, I am satisfied that the intention of the Legislature was to confer exclusive original jurisdiction on the Industrial Court in matters provided for under the Act. Put differently, all such matters must first go to the Industrial Court. It is only after the latter Court has made a decision or order in the matter that an aggrieved party may approach the High Court for

review on Common law grounds. It follows that by launching his review application in the High Court before the Industrial Court had made a decision or order in the matter, the respondent chose the wrong forum.”

[32] It is well-settled that this Court may only interfere with the judgment of the High Court if the trial judge has misdirected himself resulting in a failure of justice. No such misdirection has been established by the appellant. In view of section 8 (1) of the Industrial Relations Act of 2000, this Court has no jurisdiction to hear and determine the dispute between the parties. It is apparent from the evidence that the dispute between the parties arises from a relationship between an employer and employee during the course of employment. Furthermore, the employer has suspended the employee on suspicion of misappropriation of company funds for which section 36 (b) of the Employment Act finds application.

[33] There is no doubt that the appellant took the law into its own hands and unlawfully deprived the respondent of her money on the basis of a suspicion. It exercised “self-help” in circumstances where there was no evidence that the respondent had misappropriated the money from the company. Similarly, there is no evidence that any money had been stolen from the appellant; the appellant has only annexed to the founding

affidavit weigh-slips worth about E15 000.00 (fifteen thousand emalangeni) which are allegedly forged. The appellant is yet to prove in the pending action that the handwriting and signatures on the alleged weigh-slips are forged; and, that the respondent is liable. It is therefore surprising that an amount of E159 000.00 (one hundred and fifty nine thousand emalangeni) has been seized by the appellant using self-help and without a Court order when the appellant cannot establish a *prima facie* right over the money. It is thus understandable why the appellant's management did not lay a criminal charge of theft or fraud against the respondent at the police station.

[34] This is a proper case in which this Court should impose punitive costs against the appellant with a view to dissuade and discourage litigants from taking the law into their own hands. The conduct of the appellant may at best be described as vexatious, frivolous, reckless and malicious. The appellant instituted the proceedings in the Court *a quo* after the “self-help” with a view to legitimize its unlawful conduct. See *The Law of Costs, Cilliers A.C., Butterworths*, 1972 edition at pp 59-69.

[35] Accordingly, the appeal is dismissed with costs at attorney and client

scale.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree

DR. S. TWUM
JUSTICE OF APPEAL

I agree

P. LEVINSOHN
JUSTICE OF APPEAL

For Appellant

Attorney N. Manzini

For Respondent

Attorney S.P. Mamba

DELIVERED IN OPEN COURT ON 31 MAY 2013.