



**CONCILIATION MEDIATION AND
ARBITRATION COMMISSION**

HELD AT SITEKI

REF NO:STK 078/14

In the matter between:

ANTONY DLAMINI

APPLICANT

AND

SWAZILAND CITRUS ESTATES (PTY) LTD RESPONDENT

Coram

ARBITRATOR : VELAPHI Z. DLAMINI

FOR APPLICANT : PATRICK MAMBA

FOR RESPONDENT : MXOLISI DLAMINI

RULING ON INTERLOCUTORY POINTS OF LAW

1. DETAILS OF HEARING AND PARTIES

- 1.1 The arbitration hearing was held on the 1st July and 9th October 2015 at the offices of the Conciliation, Mediation and Arbitration Commission (CMAC) at the Swaziland National Provident Fund Building in Siteki, in the Lubombo region.
- 1.2 The Applicant is Antony Dlamini, an adult Swazi male of Lubulini area in the Lubombo region. Mr. Patrick Mamba, a Labour Law consultant from Manzini represented the Applicant.
- 1.3 The Respondent is Swaziland Citrus Estates (Proprietary) Limited, a company duly incorporated and registered in terms of the company laws of Swaziland, with its principal place of business at Nsoko in the district of Lubombo. Mr. Mxolisi Dlamini from Robinson Bertram, a firm of attorneys based in Mbabane in the Hhohho region, represented the Respondent.

2. POINTS OF LAW TO BE DECIDED

- 2.1 The Respondent's attorney raised two points of law as follows: Firstly, that the matter was prematurely registered at CMAC and/or alternatively, the arbitrator had no power to arbitrate over an issue that was prematurely before him. Secondly, that the Respondent did not voluntarily consent to arbitration under the auspices of CMAC. The issue for determination is whether or not the dispute is properly before CMAC for arbitration.

3. BACKGROUND FACTS

- 3.1 The Respondent is carrying on the business of producing citrus fruits for sale to the local and international market.
- 3.2 According to the Report of Dispute, the Applicant was employed in March 1987 as Indvuna (Foreman) and was in continuous employment until 7th August 2014 when he was allegedly dismissed verbally for alleged theft of grape fruits. The Applicant was earning the sum of E 1918.80 when his services were allegedly terminated.
- 3.3 In terms of the Acknowledgement of Dispute Form, the Applicant reported a dispute for unfair dismissal to the Commission on the 30th October 2014. Following conciliation, the dispute remained unresolved and a Certificate of Unresolved Dispute no.632/14 was issued by CMAC. As per the Request for Arbitration Form, the parties consented to arbitration on the 18th November 2014.
- 3.4 The Applicant prayed for the following relief: Notice pay (E1,918.80); Additional notice (E7,675.20); Severance allowance (E19,188.00); and Compensation for unfair dismissal (E23, 025.60). The Respondent opposes the claims.

4. SURVEY OF PLEADINGS

- 4.1 On the 11th February 2015, the Respondent filed an application before the Commission raising the points that were referred to above. The application was accompanied by an affidavit deposed to by Mr. Danie Visser, the Respondent's Director.

- 4.2 The Director's affidavit may be summarised as follows: In August 2014, a security guard caught the Applicant carrying fresh grapefruits in a bag. When the guard confronted the Applicant about the fruits, he claimed that they were spoilt. Subsequently, the Applicant was suspended on the 7th August 2014 pending investigations to determine if disciplinary proceedings should be instituted.
- 4.3 According to Mr. Visser, the Applicant disappeared from the living compound on the farm as such the letter of suspension was served on Sphiwe Matsenjwa, who received it on behalf of the Applicant. The Director further averred that, the company searched for the Applicant to no avail. The Respondent then waited for him to resurface so he could be served with the disciplinary notice.
- 4.4 However, on or about the 24th September 2014, the Applicant wrote to the Respondent demanding payment of terminal benefits. The Director averred that the letter surprised him because the Applicant was not dismissed, but under suspension. Nevertheless, upon receipt of the letter of demand, the Respondent searched for the Applicant to serve him with the notice of disciplinary hearing, however they could not locate him again. The notice was again served on Sphiwe Matsenjwa on the 30th September 2014. The hearing was scheduled for the 7th October 2014.
- 4.5 On the day of the disciplinary hearing, the Applicant came with the Report of Dispute Form to serve the Respondent, alleging that he had been dismissed on the 7th August 2014. The chairperson of the disciplinary hearing rejected the Report of Dispute and proceeded with the hearing. The chairperson found the Applicant guilty of stealing

grapefruits and the company subsequently dismissed him.

- 4.6 The Respondent's director submitted that the points of law were premised on the fact that, the Applicant misled the Commission by reporting a dispute on the 22nd September 2014 claiming that he was dismissed in August 2014 yet he was dismissed on the 7th October 2014.
- 4.7 Mr. Visser further averred that he was advised that at the end of the conciliation, the then Commissioner Mr. Mavimbela advised the parties that since the dispute remained unresolved, the matter would proceed to the next level. Immediately, the Commissioner caused the parties to sign a certain form. Unbeknown to the parties, the form was the Request for Arbitration. The director submitted that, his representative Mr. Zakhele Dlamini advised him that he did not consent to arbitration.
- 4.8 In response to the allegations in the Respondent director's affidavit, the Applicant averred that the director verbally dismissed him. However, the letter of suspension was given to him after he delivered a letter demanding his terminal benefits. The invitation to a disciplinary hearing was given to him six (6) weeks after he was verbally dismissed. He submitted that the notice of suspension and invitation to attend a disciplinary hearing were afterthoughts.
- 4.9 The Applicant stated that after his dismissal, as normal procedure, he left the living compound and the Respondent never called him to collect any notices. Mr. Dlamini averred that although he left the compound, he returned to his former workplace

to serve his letter of demand, this presented the Respondent with the opportunity to serve him the notices. The Applicant argued that if he had disappeared, in addition to the theft charge, the Respondent ought to have also charged him with absenteeism or desertion.

4.10 The Applicant contended that, the disciplinary hearing chairperson erred in rejecting the Report of Dispute form and proceeding with the hearing because his services were already terminated.

4.11 Mr. Dlamini averred that the former Commissioner, Mr. Mavimbela explained the next stage of the matter and, it is after such explanation that the parties elected to request arbitration. The Commissioner then produced the form for the parties to formally consent to arbitration.

5. ANALYSIS OF ARGUMENTS

5.1 The parties' representatives made compelling arguments, which were supported by authorities. During the course of arguments, the Respondent's attorney abandoned the second point, which was that, the parties never consented to arbitration. On account of the ruling I will make below, it is not necessary to adumbrate the representatives' submissions.

5.2 Now, it is common cause that the unfair dismissal dispute that the Applicant reported on the 30th October 2014 (**See: Acknowledgement of Report Form**) was conciliated and remained unresolved. It is that dispute in respect of which the Certificate of Unresolved no: 632/14 was issued, certifying the dispute unresolved. The Commissioner, who

conciliated summarised the reasons for certifying the dispute unresolved as follows:

'3.1 Applicant states that he was dismissed for being found in possession of spoiled fruits and that he was not aware that such was an offence.

3.2 Respondent states that Applicant was dismissed for stealing fresh fruits and that he was fully aware of the rule against being found in possession of fruits.

3.3 Both parties maintain their respective positions and the dispute remains unresolved.'

5.3 The parties referred the dispute that was certified as unresolved to arbitration. Now, **Section 85 (2) of the Industrial Relations Act 2000 (as amended)(IRA)** reads thus:

'If an unresolved dispute concerns the application to any employee of existing terms and conditions of employment or denial of any right applicable to any employee in respect of his dismissal, employment, reinstatement, or reengagement, either party to such a dispute may refer the dispute to court for determination or, if the parties agree, to refer the dispute to arbitration.'

(Emphasis added).

5.4 **Section 2 of the IRAs** is quite restrictive in its definition of the noun and verb “**dispute.**” That notwithstanding, the relevant provisions define the term as follows:

‘Dispute’ includes a grievance, a grievance over a practice, trade dispute and means any dispute over the-...(c)disciplinary action, dismissal, employment, suspension from employment or re-engagement or reinstatement of any person or group of persons.’

5.5 The Oxford Advanced Learner’s Dictionary of Current English (2005) defines the noun ‘**dispute**’ as ‘**an argument or disagreement between two people, groups or countries; discussion about a subject where there is disagreement.**’ The verb ‘**dispute**’ is also defined as ‘**to question whether something is true or valid.**’

5.6 A disagreement whether or not an employee was dismissed fairly goes to the merits of the case. **Section 42 (2) of the Employment Act 1980 (as amended) (EA)** was promulgated for that purpose. **Section 42 (2) of the EA** enjoins the Industrial Court or Arbitrator to investigate whether or not an employee was dismissed fairly. Depending on the peculiar circumstances of each case, the enquiry may entail making a finding whether the employer dismissed the employee in the first place and if so, on which date. For example, in the case of **Simon Dlodlu v Emalangi Foods (IC case no: 47/04 unreported)** that the Respondent’s Counsel

cited, the Court had to determine the Applicant's date of dismissal. More significantly, the Court arrived at its finding after both parties led oral evidence. quantum

5.7 Now, **Section 17 (1) and (3) of the IRA** reads thus:

'In hearing and determining any matter referred to arbitration whether by the President of the Court in terms of section 8 (8) or any other provisions of this Act, an arbitrator shall have all the remedial powers of the Court referred to in section 16...Subject to any rules promulgated in terms of section 64, the arbitrator shall conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly.'

5.8 **Section 64 (2) (g) of the IRA** provides that the Commission may make rules regulating the practice and procedure of the Commission. Arbitration proceedings before the Commission are governed by **Parts D, E and F of theCMAC Rules**.It is not necessary to quote the provisions of Parts D, E and F of the Rules extensively, suffice to state that the provisions provide procedures for holding a pre-arbitration conference, the filing of statements, representation, the postponement of arbitration, applications for joinder, substitution, consolidation, variations and rescissions.

5.9 The practice and procedure of the Industrial Court and by necessary extensionarbitration, has always been that, disputes that come to Court through **Part**

V111 of the IRA are treated like action proceedings under the Civil Courts. This means that, at the hearing of the matter, the parties are entitled to adduce oral evidence, if they so wish.

5.10 **The Conciliation, Mediation and Arbitration Commission Guidelines** published under **Section 109 of the IRA** provide as follows:

'In broad outline, arbitration is a process for resolving a dispute in which a person independent of the parties determines the dispute for them. The process involves a hearing at which the parties present evidence and argument, and the arbitrator's decision is provided with reasons in a written award. It is very much like a Court process except that arbitration is more informal and less adversarial in the manner in which the hearing is conducted.' (Emphasis added).

5.11 In the case of **Independent Municipal and Allied Trade Union on behalf of Ngcobo and others and eThekweni Municipality (2015) 36 ILJ 330 (BCA)** the following was stated at page 341:

'The arbitrator in the matter of Chetty/ Department of Education continued to say that: Arbitrations under the Labour Relations Act are conducted according to general principles of procedural law, which have been established and consolidated by the practice of the higher courts. Accordingly, arbitration proceedings, although less formal than High Court proceedings, are conducted in generally the same format, and similar rules of procedure and evidence apply'.

5.12 I find that, it would be improper to determine the factual issue under review only on the affidavits and arguments of counsel. The credibility of each party's versions should be determined after oral evidence has been led. I will accordingly dismiss the point of law and order the arbitration to proceed.

5.13 I make the following order.

6. **RULING**

6.1 I find that the point of law raised goes to the merits of the issues for determination and as such can only be decided after oral evidence has been led. Consequently, I dismiss the point and I order the arbitration to proceed to the merits.

DATED AT SITEKITHIS 18th DAY OF JANUARY, 2016

VELAPHI Z. DLAMINI
CMAC ARBITRATOR