



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No: 1980/2008

In the matter between:

**SWAZI PAPER MILLS LTD**

**Applicant**

and

**KHANYAKWEZWE KHUMALO N.O. & 2 OTHERS**

**Respondent**

**Neutral citation:** *Swazi Paper Mills Ltd vs Khanyakwezwe Khumalo N.O. & 2 Others 1980/2008 SZ HC (29 February 2012)*

**Coram:** Maphalala PJ

**Heard:**

**Delivered:** 29 February 2012

**Summary:**

[1] Before court is an Application for the review of an award of the 1<sup>st</sup> Respondent in the following terms:

- “1. That the default judgment of the 1<sup>st</sup> Respondent, awarded on the 19<sup>th</sup> February 2008, under CMAC Case No.627/2007 be and is hereby reviewed and corrected or set aside;
2. Costs of this Application to be paid by the party or parties opposing the Application.
3. Further and/or alternative relief.”

[2] At paragraph 16 to 17 of the Founding Affidavit the Applicant outlined the grounds of review as follows:

“16. It is my submission further that the 1<sup>st</sup> Respondent failed to apply his mind to the matter before him in that, in reaching a decision he did not take into consideration the terms in the 3<sup>rd</sup> Respondent’s contracts and that the 3<sup>rd</sup> Respondent’s contract did not provide for further renewal of the contracts on the lapse of the contract.

16.1 The 1<sup>st</sup> Respondent failed to take into consideration that the Applicant has a discretion whether to renew the contract or not;

16.2 A fixed term contract comes to an end on the lapse of the stipulated time frame agreed upon by the parties and I deny that any reasonable legitimate expectation

was created by the Applicant to the 3<sup>rd</sup> Respondent for re-employment on a permanent basis.

16.3 The 1<sup>st</sup> Respondent was wrong in his interpretation that the Applicant unfairly and unlawfully terminated the 3<sup>rd</sup> Respondent's employment, as the 3<sup>rd</sup> Respondent's services automatically came to an end at the expiry of his contract, as stated above.

16.4 The 1<sup>st</sup> Respondent further failed to verify whether the Applicant was aware or notified of the proceedings, but granted an Order against the Applicant to the Applicant's prejudice.

17. I submit that the 1<sup>st</sup> Respondent's findings were grossly unreasonable and irregular as he did not apply his mind. Notwithstanding the absence of the Applicant, on the 3<sup>rd</sup> Respondent's own version, the 1<sup>st</sup> Respondent could not reasonably have reached the conclusion he did."

[3] The 3<sup>rd</sup> Respondent on the other hand in arguments raised a point that is akin to a preliminary objection to the proposition that the review application instituted by the Applicant is improper in that the Applicant ought to have invoked the provision of Rule 35 of the CMAC rules prior to launching the proceedings before court.

[4] In terms of Rule 35 of the CMAC Rules:

"1. An arbitration award may be varied or rescinded if;

- (a) The award was erroneously sought or erroneously made in the absence of any party affected by the award.
- (b) It is ambiguous or contains an obvious error or omission, but only to the extent of that ambiguity, error or omission or
- (c) It was made as a result of a mistake common to the parties to the proceedings.”

[5] It is contended for the 3<sup>rd</sup> Respondent that in the present Application there is no evidence before court that indicates that the rescission Application was made to and dismissed by the Executive Director of CMAC or that there is a pending rescission Application.

[6] That if the court would entertain such Application the court will open floodgates to the abuse of the court powers under the guise of review powers. Unless there is full compliance with Rule 35 of CMAC Rules of Court cannot properly deal with the matter. Due to the failure to comply with the above rule, this court cannot hear the present Applicant as a peremptory step was not taken by the Applicant.

[7] The second argument for the 3<sup>rd</sup> Respondent is that the Applicant's grounds for review are not grounds for review as stated by *Herbstein et al*, *The Civil Practice of the Supreme Court of South Africa 4<sup>th</sup> Edition* at page 929 to the following effect:

- “(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.”

[8] The Applicant contends that the present Application is for the review of the Default Judgment granted by the 1<sup>st</sup> Respondent failed to apply his mind to the facts before him in that reaching a decision he failed to take into consideration the terms of the 3<sup>rd</sup> Respondent’s contracts and that the contracts did not provide for further renewal. He further failed to take into consideration the provision of section 35 of the Employment Act as amended.

[9] The said section provides the following:

“section 35(1) this section shall not apply to

- (e) “an employee engaged for a fixed term whose terms of engagement has expired.
- (2) no employer shall terminate the services of an employee unfairly.”

- [10] Applicant's counsel advanced detailed arguments on this aspect of the matter at paragraph [3] to [9] of her Heads of Arguments and cited the cases of *Nkosinathi Dlamini vs Tiger Security Industrial Court Case No.287/2002* and *Thandi S. Dlamini vs Swaziland Liquor Distributors Case No.240/2002 Industrial Court* to the proposition that at common law a fixed term contract expires automatically on the date on occurrence of the event on which the parties agreed that the contract would terminate.
- [11] Having outlined the case for the Applicant on the merits, I turn to the preliminary objection made by the 3<sup>rd</sup> Respondent at paragraph [3] and [4] of this judgment.
- [12] On the first point raised therein the Respondent contends that in the present Application there is no evidence before the court that indicates that the rescission Application was made to and dismissed by the Executive Director of CMAC or that there is a pending rescission application.
- [13] That if the court would entertain such Application it will open floodgates to the abuse of the court powers under the guise of review powers. Unless there is full compliance with Rule 35 of the CMAC Rules of court cannot properly deal with the matter. Due to the failure to comply with the above Rule, this court cannot hear the present Application as a peremptory step was not taken by the Applicant.

