

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 22/05

In the matter between:

EMMANUEL MKHWANAZI

Applicant

and

K. K. INVESTMENTS (PTY) LTD

Respondent

CORAM:

P. R. DUNSEITH: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: S. DLAMINI

FOR RESPONDENT: L. ZWANE

R U L I N G - 09/08/06

[1] The Applicant has applied to the President of the Industrial Court to direct that his claim in the main application be determined by arbitration under the auspices of the Commission for Conciliation, Mediation & Arbitration. The President has the power to make such an order in terms of sections 8(8) and 85 (2) (a) of the Industrial Relations Act 2000 (as amended by the Industrial Relations (Amendment) Act, 2005).

[2] The Respondent is opposing this application, and filed an opposing affidavit. At the hearing, Ms Zwane for the respondent abandoned certain points in limine which were raised in the affidavit, but she otherwise persisted in objecting to the matter being referred to arbitration without the respondent's consent.

[3] The Applicant's representative submitted that the main dispute is suitable for referral, because:

3.1. the issues involved are simple and straightforward.

3.2. there is a likelihood that the Respondent company may be liquidated, following the death of its principal director and shareholder, and in that event the Applicant will not be able to participate in any distribution unless he has obtained judgement. Due to the congested roll of the Industrial Court, he believes that the matter can be resolved more expeditiously if it is referred to arbitration by CMAC.

[4] The Respondent's counsel on the other hand argues that:

4.1. the matter is important to her client because it involves an allegation of unfair dismissal.

4.2. the main dispute requires determination whether a retrenchment exercise was carried out lawfully and fairly. This involves reasonably complex issues of law which her client would prefer to have determined by a court of law.

4.3. the allegation regarding possible liquidation of the Respondent is denied. The Respondent is still trading and earning an income through renting out its businesses.

4.4. the claim for E18,000-00 is reasonably substantial, and a decision adverse to the Respondent may give rise to claims by other retrenched employees.

[5] Having regard to the factors raised by the Respondent, all of which have some substance, the court would be reluctant to compel the Respondent to submit to arbitration and deny it the adjudication of the Industrial Court.

[6] The Applicant does not appear to appreciate that the Respondent is a separate legal entity from its late shareholder and director, and that the

assets of the company do not fall into the winding-up of the deceased estate.

[7] Should the Respondent be placed into liquidation, the provisions of the Companies Act 1912 operate to protect the interest of creditors, and there is nothing on the papers which establishes that the Applicant will be unduly prejudiced unless his matter is immediately adjudicated upon by way of arbitration.

[8] No other special circumstances have been shown which warrant the court referring the matter to arbitration against the wishes of the Respondent.

[9] The application for referral is dismissed. There is no order as to costs.

P.R. DUNSETH

PRESIDENT OF THE INDUSTRIAL COURT