

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 88/08

In the matter between:

PHINDA MAHLALELA

APPLICANT

And

MUSA HLOPHE N.O

1st RESPONDENT

**CONCILIATION MEDIATION &
ARBITRATION COMMISSION**

2nd RESPONDENT

TREDCOR (PTY) LTD t/a TRENTYRE

3rd RESPONDENT

CORAM

NKOSINATHI NKONYANE: JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANT: MR. B.S. DLAMINI

FOR 1ST & 2ND RESPONDENT: MR. A. LUKHELE

FOR 3RD RESPONDENT: MR. Z. JELE

**RULING ON POINT OF LAW
12.06.08**

[1] The applicant is a former employee of the 3rd respondent. He reported a dispute of unfair dismissal against the 3rd respondent at the Manzini Branch of the Conciliation, Mediation and Arbitration Commission (CMAC) in November 2007.

[2] The first conciliation meeting was scheduled for January 2008 and the Commissioner who was to handle the process was Ms. Nomthetho Simelane. On the first day set for the conciliation, nobody appeared on behalf of the 3rd respondent. The

meeting was postponed until 14th February 2008. On that day the Commissioner failed to show up and a new Commissioner, the 1st respondent was appointed.

[3] The 1st respondent scheduled the next meeting for 12:00 p.m. on the following day, 15th February 2008. On that day, an articled clerk from Robinson Bertram Attorneys showed up and said he was representing the 3rd respondent. The applicant argued before the 1st respondent that as the 3rd respondent's Directors or employees were not present, the matter ought to proceed on the basis of default appearance, the 1st respondent however declined to do that but directed that the meeting be postponed until 22nd February 2008.

[4] On 22nd February 2008, again the 3rd respondent's Directors or employees did not attend but the articled clerk from Robinson Bertram Attorneys appeared and he told the 1st respondent that he had the mandate to represent the 3rd respondent in that meeting. The applicant however protested and did not give his consent that the articled clerk represents the 3rd respondent. The 1st respondent however allowed the articled clerk to make representations on behalf of the 3rd respondent. It is against this conduct of the 1st respondent that the applicant has brought this application on Notice of Motion to the court.

[5] The applicant is seeking an order in the following terms:

- (a) That an order be and is hereby issued directing that certificate of unresolved dispute No.098/08 issued by the 1st respondent herein was improperly and irregularly issued.

(b) That an order be and is hereby issued directing that the matter involving the applicant and the said respondent herein be referred back to the 2nd respondent to take the proper lawful route.

(c) Costs of application.

(d) Further and/or alternative relief.

[6] The respondents are opposed to the applicant's application and have also raised a point in *limine*, namely that this court has no jurisdiction to review the decision of the 1st respondent who was executing his duties under the auspices of CMAC.

[7] The applicant's complaint in this matter is predicated upon the provisions of **SECTION 81(4) AND (5) OF THE INDUSTRIAL RELATIONS ACT NO. 1 OF 2000** as amended. That section provides that;

"(4) In the conciliation proceedings a party to the dispute may appear in person or be represented only by a co-employee or by a member, an office bearer or official of that party's organization and, if the party is a juristic person, by a Director or employed •

(5) Notwithstanding subsection (4), a party may be represented by another person in conciliation proceedings if the parties to such proceeding agree to such representation."

[8] The applicant's argument is that the conciliation meeting should have proceeded on the basis that there was no appearance on behalf of the 3rd respondent as neither

its Directors nor its employees were in attendance. Secondly, the legal representative who purportedly was appearing on behalf of the 3rd respondent had no right to make representations on behalf of the 3rd respondent as the applicant did not consent to such arrangement in terms of subsection (4).

[9] The court had occasion to deal with a similar matter in the case of **NOMSA STEWART V. CONCILIATION, MEDIATION AND ARIBTRATION COMMISSION (1st RESPONDENT) AND B & G AUTO SPARES (PTY) LTD t/a SUPER MOTORS (2nd RESPONDENT) CASE NO. 309/05 (IC)**. In that case the 2nd respondent objected to the applicant's representative assisting her during conciliation. The conciliator upheld the objection and the applicant's representative was accordingly asked to leave. The court held at p.4 of the judgement that: **"A strict interpretation of this subsection means that unless there is consent from the other party, a party to the dispute may not be represented by a person not covered under subsection 81(4)."**

[10] The court in that case also made the following *obiter dictum*:

"Having said that, it is for the legislature to revisit the provisions of Section 81(4) and (5) to allow every party to the dispute a representative of choice to facilitate a quick resolution of the dispute."

[11] The position of the law therefore at present, is that no legal representation is allowed at conciliation stage unless the other party agrees.

[12] In this case we are told that there was available on behalf of the 3rd respondent the General Manager/Director Mr. Mike Dickie. It is stated in the answering affidavit that he could not attend the conciliation meeting because he was extremely busy with

the closing down processes which included liaising with the department of Customs and Excise, Income Tax Department and other Government structures. Whether this was a good reason not to attend the conciliation meeting is a matter to be decided by the court after the merits of the case have been addressed by the parties. Presently the court must only answer the question whether it has jurisdiction to entertain this application.

[13] It was argued on behalf of the respondents that this court has no jurisdiction to entertain this application as it will amount to this court reviewing a decision of CMAC. For this argument the respondents relied on the provisions of **SECTION 19(5) OF THE INDUSTRIAL RELATIONS ACT** which provides that:

"A decision or order of the Court or arbitrator shall, at the request of any interested party, be subject to review by the High Court on grounds permissible at common law."

[14] It is clear from this subsection whose decision or order is subject to review by the High Court. It is the decision or order of the Industrial Court or that of an arbitrator. The 1st respondent in this matter was appointed by CMAC as a Commissioner to conduct a conciliation process and not an arbitration process. He was not an arbitrator. At the end of the meeting he did not issue an award but he issued a certificate of unresolved dispute. In terms of the CMAC rules an **arbitrator "means a person who is appointed to arbitrate a dispute under the act and these rules."**

[15] We are unable to give any other interpretation to Section 19(5) other than that it excludes this court from reviewing a decision or order of an arbitrator.

[16] It follows that the point *in limine* will have to be dismissed, and that is the order

that the court makes.

There is no order as to costs.

The members agree.

NKOSINATHI NKONYANE
JUDGE - INDUSTRIAL COURT