



**IN THE INDUSTRIAL COURT OF ESWATINI**

**JUDGMENT**

Case No. 176/2018

In the matter between:

**HLONIPHILE NGWENYA**

Applicant

And

**MKHAYAKUDZE INVESTMENTS**

Respondent

**Neutral citation:** Hloniphile Ngwenya v Mkhayakudze Investments [2018]  
*SZIC 107* (09 October 2018)

**Coram:** **S. NSIBANDE JP**

(Sitting with N.R. Manana and M.P. Dlamini Nominated  
Members of the Court)

**Date Heard:** 24 September 2018

**Date Delivered:** 09 October 2018

## **JUDGMENT**

- [1] The Applicant has approached the Court for an order directing that the unresolved dispute between herself and the Respondent that is currently pending before Court be referred to arbitration under the auspices of the Conciliation, Mediation and Arbitration Commission (CMAC).
- [2] The unresolved dispute between the parties arises from what Applicant considers to have been her constructive dismissal from the Respondent's employ on 29<sup>th</sup> March 2018. She is claiming terminal benefits, twelve months wages as compensation for unfair dismissal, leave pay and overtime pay. Her total claim amounts to E65 834.53 (Sixty-five thousand eight hundred and thirty-four emalangeneni fifty three cents).
- [3] The application for referral is based on two points namely that the issues for determination are not complex and that the claim is not substantive. The application is opposed and the Respondent, in its papers submits the converse - that the amount sought is substantial and the issues involved are complex.
- [4] The referral application came to Court on three (3) occasions and on all three occasions there was no appearance for or by the Respondent. I have, nevertheless considered the papers filed on behalf of the Respondent in coming to this decision.

[5] I have considered that the issue of constructive dismissal is not a novel issue but is one that has been considered by our Court on numerous occasions. A number of judgments delivered by our Court are instructive on what principles are considered in a claim for constructive dismissal. Such cases may provide a guide to an arbitrator should the matter be referred as applied for (**See: Simon Nhlabatsi v VIP Protection Services (IC Case No. 84/2002); Timothy Mfanimpela Vilakazi v Anti Corruption Commission and Others (IC Case No. 232/202)**). I do not consider that there are complex factual issues herein. The Applicant bases her claim for constructive dismissal on these issues - a demotion, being overworked without remuneration/or compensation and being refused annual leave. It seems to me that the issues raised are not factually complex. Whether one has worked overtime or has taken leave is a matter of record with limited room for disagreement. That may also be the case with the issue of the alleged demotion. I do not envisage that there could be too many factual disputes arising from that given that the Applicant's duties before and after the alleged demotion are well known between the parties.

[7] Coming to the amount claimed by the Applicant, I note that an amount of E16565.31 (Sixteen thousand five hundred and sixty – five Emalangenani thirty one cents), is claimed in respect of overtime and leave days, leaving an amount of E49 269.22 being in respect of terminal benefits and compensation for unfair dismissal. The amount of overtime and leave pay is capable of

easy calculation in terms of the relevant statutes and is due as of right once it is established that the Applicant worked the hours or days claimed. The amount claimed for terminal benefits and compensation is, in my view is not substantial. In any event the improved qualification of CMAC arbitrators (as set out in (**“the attitude of the Industrial Court on Labour Arbitration Referrals – by Nathi Gumede 4<sup>th</sup> July 2012)”**) means that any prejudice that Respondent stands to suffer if the matter is referred to CMAC for arbitration stands to be off-set by the appointment of an experienced and qualified arbitrator.

[8] Having assessed the particular and peculiar circumstances of this matter and for the reasons set out above I order that:

- 1. The unresolved dispute between the parties be and is hereby referred to CMAC for arbitration.**
- 2. The Executive Director of CMAC is hereby directed to appoint who is arbitrator attorney with at least 5 years post-admission experience in labour law matters.**
- 3. Each party to pay its own costs.**

  
**S. NSIBANDE**

**PRESIDENT OF THE INDUSTRIAL COURT**

**For Applicant:** Mr. S. Dlamini

**For Respondent:** Mr. Makhosi C. Vilakati Attorneys (not before Court)

