IN THE INDUSTRIAL COURT OF ESWATINI

JUDGEMENT

Case No. 354/2018

In the matter between:

NOSIZO NGWENYA Applicant

and

A M RECRUITMENT SERVICES [PTY] LTD Respondent

Neutral citation: Nosizo Ngwenya vs A M Recruitment [PTY] Ltd [354/2018] SZIC 145/18 (2018)

Coram: X. Hlatshwayo – Acting Judge
(Sitting with D. Mmango and N. Dlamini
Nominated Members of the Court)

Date Heard: 11 December 2018

Date Delivered: 11 March 2019

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[1] The application brought before court was for the following orders;

"1. Ordering and directing the Second Respondent to dispatch and or furnish the Applicant and the court with the Record of Proceedings of the Disciplinary Hearing of the 27th March 2018, together with the full reasons of the Findings and Recommendations within fourteen (14) days of this order;

2. Granting the Applicant leave to supplement and or file his further affidavit if need be having furnished (sic) with the Record of Proceedings and the full reasons of the Findings and Recommendations;

3. Reviewing and or setting aside the Ruling issued by the Second Respondent on the 27th March 2018;

4. Ordering and or directing that the disciplinary hearing be started de novo and that a new chairperson be appointed to preside over the hearing;

5. Costs of this Application be paid by the party or parties opposing the Application;

6. Further and/ or alternative relief"

[2] When the matter first appeared in court, the Applicant requested an interim rule for prayer 1. pending the finalization of the matter. The Respondents opposed the matter by filing a Notice to Raise Points of Law raising the lack of the court's jurisdiction to hear the application of the review of the Chairman's findings.

[3] The Respondent also raised that the matter should be heard as provided by Part V111 of Industrial Act 2000 (IRA) yet the Applicant failed to disclose the reasons why she could not be afforded redress under s65 IRA.

[4] The court could not grant the interim rule upon note that the point of jurisdiction has been raised, and thus ordered the parties to argue the points of law of jurisdiction first before direction may be taken, in the matter.

[5] The Respondent's argument regarding the court's jurisdiction is that the Applicant was an employee who was taken through the disciplinary process to its finality. The argument is that she was given the ruling and thereafter exercised her right to note an appeal, which was also heard and affected by events which do not concern the present case.

[6] The Respondent argues that the case before court is one of unfair dismissal and Part V111 IRA applies to it.

[7] The Respondent also argues that the review application for setting aside of Chairman's ruling, is Applicant's way of circumventing the specified

procedure of going through CMAC. The argument is that when the legislation provided Part V111, it was avoiding the exact mischief and misconduct of the Applicant.

[8] The Respondent further argued that the powers of the court, as laid out in Section 8 Industrial Relations Act do not include powers to review. The argument is that review does not arise at common law as was stated in the ***Alfred Maia v The Chairman of the Civil Service Commission & Others (1070/15) 2016*** **SZAC 25** case. To emphasize its argument, the Respondent cited ***The Attorney General v Sayinile Nxumalo IC 14/2018*** case, in support of the position that there is a statutory restriction of the court's powers. Thus arguing that the previous position, as held in ***The Attorney General v Sipho Dlamini & Another ICA 14/2013*** case, had changed and the matter was prematurely before the court.

[9] The Respondent then addressed the point of administrative justice as raised by the Applicant in its papers and Heads of Argument. It argued that the concept of administrative justice does not arise in the present matter because the Respondent is not an administrative body, and, in dealing with the discipline of Applicant, it was not discharging an administrative function. The submission was that the matter was between an employer and an employee. Again, the court was referred to the **Alfred *Maia*** case in which the ***Chirwa v Transnet Ltd 2008 (4) SA SA 367*** was cited as having

distinguished between disputes arising from contracts rather than administrative process.

[10] The final submission, on behalf of Respondent, was that, even if the court were to hold that there was administrative injustice, the matter would see itself outside of the jurisdiction of the court because matters pertaining to contravention of s33 Constitution Act 2005 are dealt with by the High Court as provided by s35 Constitution Act.

[11] The prayer was that the court should uphold the points and dismiss the matter. The Applicant's response was that the Respondent was raising technical points, which were dilatory. The argument was that the court has always discouraged the piecemeal fashion of dealing with matters under the guise of raising technical points.

[12] The Applicant applied that the court should take the filing of a Notice to Raise Points of Law without an Answering Affidavit as waiver to plead over on the merits and pleaded with the court to be guided by the principle in ***Phakama Mafucula v Thembi Khanyisile Maziya (Bhiya) 258/2015*** that a litigant stands or falls by its Founding Affidavit.

[13] The Applicant submitted that approaching the court was proper especially because CMAC cannot grant the relief it seeks, that is review of the Chairman's Ruling.

[14] The Applicant submitted that the court has jurisdiction to hear the review application, and relied on the principle laid out by Ramodibedi CJ (as he then was) in the case of ***The Attorney General v Sipho Dlamini and Another ICA 14/2013***, in which he made the finding;

"in dismissing the point in *limine*, the court a *quo* held that the Respondents were entitled to invoke the review jurisdiction of the Industrial Court to redress the wrongs alleged without the necessity of reverting to the procedure prescribed in Part V111 of the Act, which requires that disputes should first be reported to CMAC. That court correctly held, in our view, that the Applicants were seeking orders for the review and that CMAC has no review power."

[15] The Applicant was approaching the court because CMAC cannot afford it the relief sought. The Applicant raised the contravention of Section 33 Constitution Act, which results in her grievance. The grievance is also the failure to be provided with the Record of the Hearing together with the reasons, as having them would assist the court to determine if there were gross irregularities or not. The submission is that s33(2) Constitution Act provides for an administrative body to furnish the record for the administrative decision taken.

[16] The Applicant submitted that the provisions of s8 IRA gives this court the exclusive jurisdiction to hear matters between employees and employers,

subject to s17 and s65. The argument is that judicial review was held, in the ***Sipho Dlamini*** case, as included in the jurisdiction of the court. The case, it was argued, clothes this court with all the powers enjoyed by the High Court, only in the context of employee and employer matters.

The Applicant prayed for the points of law to be dismissed and the orders prayed for in the Notice of Motion granted because there was no opposition on the merits.

]17] The court noted that the point of law regarding jurisdiction is not a dilatory technical point. Any decision taken by any court that does not have jurisdiction is a nullity, so the point was correctly raised at the commencement of the matter because the jurisdiction has to be determined first.

[18] The matter before court is that of an employee who went through the whole disciplinary process and got to the outcome of same. The Applicant now seeks a review of the stated outcome, amongst other prayers. The question begging answer is, how is this case different from all other matters of unfair dismissal which have to go through Part V111 procedure?

[19] Matters which do not have to go through Part V111 are matters which are before court solely for determination of a "question of law".

B.A. Garner "Black's Law Dictionary" (Pocket Edition) 1996 defines "question of law" as "a question, to be decided by the judge, concerning the application or interpretation of the law".

[20] The present application, that is seeking "review of a decision" and seeking "direction for production of documents" cannot be rightly said to be "questions of law" seeking the interpretation or application of any law.

It then falls to be accepted that this matter is not correctly placed before this court without a Certificate of Unresolved Dispute as provided in Part VIII of the IRA. This means that the court is presently lacking jurisdiction to hear the matter, and on that point alone, the application stands to be dismissed and for the matter to take the normal course of all other cases similar to it, as stipulated.

[21] ***Hannah CJ in Swaziland Fruit Canners (Pty) Ltd v Philip Vilakati*** is quoted with approval in ***Phylyp Nhlengethwa and Others v Swaziland Electricity Board IC 272/2002*** as follows;

> *" not every party to an industrial dispute is entitled to have the dispute determined by the Industrial Court. Looking at the matter generally, the policy of the Industrial Relations Act is that before a dispute can be ventilated before the Industrial Court, it must be reported to the Labour Commissioner who is obliged to conciliate with a view to achieving a settlement between the parties. Where the*

conciliation is successful machinery exists for the agreement arrived at to be made an order or award of court but where the dispute remains unresolved the Labour Commissioner is obliged to issue a certificate to that effect and then, and only then, may application be made to the Industrial Court for relief"

[22] However for completeness, the arguments about administrative justice, or injustice, as alleged herein, will be briefly addressed.

In ***Swaziland Revenue Authority v Ruth Mkhaliphi SC 43/2017*** the court held that:-

"the Appellant as a statutory body in my view is an administrative authority as envisaged by section 33. In dealing with the public it is bound by the provisions of section 33. However, the Appellantas also an employer and its relationship with its employees is governed by the labour laws of the country that are specifically enacted for this purpose.

Therefore, in my view, while the lofty and laudible principles underlying section 33 may well find expression in the labour laws of the country, section 33 does not apply to the Appellant in its capacity as an employer. Therefore the court a quo misdirect itself in holding that section 33 was applicable."

[23] What is clear *in casu*, is that the Respondent is not a statutory body, and even if it was, it would not have been exercising administrative powers when conducting the disciplinary process against its employee, that is the Applicant. Disciplinary procedures are born out of the employer/employee relationship or contract of employment, and they do not involve administration of the statute meant to be administered or implementation of a mandate for which the administrative body was established.

[24] *In casu*, the submission about administrative injustice is misplaced and misguided.

The points raised by the Respondent are upheld. The application is dismissed.

Each party is to bear its own costs.

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X. HLATSHWAYO-MABUZA
ACTING JUDGE OF THE INDUSTRIAL COURT

I agree

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NKHOSINGIPHILE DLAMINI

I agree

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DAN MMANGO

For Applicant	:	Mr. B. Dube (Malinga & Malinga Attorneys)
For Respondent	:	Mr. S. Dlamini (Musa S. Sibandze Attorneys)