



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 280/19

FUNEKILE THANDIWE HLANDZE

Applicant

And

SIPHOFANENI FILING STATION

Respondent

Neutral Citation: Funekile Thandiwe Hlandze v Siphofaneni Filling Station (280/19) [2019] SZIC 115 (22 November 2019)

Coram: V.Z. Dlamini AJ

(Sitting with D.P.M. Mmango & E.L.B Dlamini,
Nominated Members)

Heard: 05 November 2019

Delivered: 22 November 2019

RULING

INTRODUCTION

1. On the 19th September 2019, the Applicant filed an application for determination of an unresolved dispute with the Court. At present, the material facts relied upon and relief sought in the application are not relevant.
2. In its Replies, the Respondent raised a point *in limine* that the matter was *lis pendens* on account of an application launched by the Respondent with the Conciliation Mediation and Arbitration Commission (CMAC) in terms of Rule 16 of the CMAC Rules.

SURVEY OF ARGUMENTS

3. Mr. Kunene, who appeared for the Respondent submitted that after CMAC issued the certificate of unresolved dispute on the 26th August 2019, the Respondent filed an application with CMAC on the 27th August 2019 in terms of which she seeks an order directing the Commissioner who issued the certificate to invite the parties for further conciliation.
4. The Respondent's counsel further contended that as long as the application pending before CMAC has not been determined by the Commissioner that retains jurisdiction, the Court cannot entertain the application serving before it.
5. Mr. Kunene referred the Court to the case of **Mahlalela and Another v Swaziland Posts and Telecommunications Corporation and Others IC Case No: 671/2009** where the special plea of *lis pendens* was applied. Counsel also referred to the case of **Boniface Dlamini v Swaziland United Bakeries IC Case No: 200/2002** as authority for the principle that a Commissioner appointed by CMAC to

conciliate retains jurisdiction even after issuing the certificate of unresolved dispute.

6. Mr. Kunene prayed that the point *in limine* be upheld and the matter be referred back to CMAC for further conciliation.
7. Mr. Vilakati who appeared for the Applicant argued in *contra* that since the dispute that was reported to CMAC was certified as unresolved, the Applicant was entitled to file the application for the determination of an unresolved dispute with the Court.
8. Mr. Vilakati referred the Court to the provisions of **Section 85(2) of the Industrial Relations Act of 2000 (as amended)**, which read:

“If the unresolved dispute concerns the Application to any employee of existing terms and conditions of employment or denial of any right applicable to any employee in respect of his dismissal, employment, reinstatement or re-engagement of any employee either party to such a dispute may refer the dispute to the Court for determination or, if the parties agree, to refer the dispute to arbitration.”

9. It was further contended by Mr. Vilakati that Rule 16 of CMAC Rules does not require a party to make an application to the Commission for further conciliation, but it is the Commissioner’s discretion to invite the parties for further conciliation after the dispute has been certified as unresolved. Since the Commissioner did not exercise the discretion in terms of Rule 16(2) of the CMAC Rules and the certificate is still in force, the matter was properly before Court.

10. Lastly, Mr. Vilakati insisted that should the Court dismiss the point *in limine*, the Respondent should be ordered to pay costs because the Applicant had incurred costs in opposing the point.
11. In reply to the Applicant's prayer for costs. Mr. Kunene argued that as a Court of equity, the Court is generally reluctant to punish a litigant that seeks to resolve the dispute amicably. In any event, the Court has a discretion to grant costs.

ANALYSIS

12. In the case of **Gcina Mahlalela and Another v Swaziland Posts and Telecommunication Corporation (supra)** at **paragraph 7**, the Court said the following:

"The function of CMAC is inter alia, to attempt to resolve a dispute that has been reported to it. This task may be achieved through Conciliation, Mediation and Arbitration in accordance with the Act. There are time limits provided in the Act within which CMAC may attempt to resolve a dispute. A dispute which remains unresolved shall be certified an unresolved dispute in writing by CMAC. On the certificate of unresolved dispute CMAC shall state the reasons which prevented the matter from being resolved. It is after a dispute has been certified unresolved by CMAC that an interested party may refer the dispute to Court for determination. A certificate of unresolved dispute is written confirmation from CMAC that she (CMAC) is no longer

seized with jurisdiction to resolve the dispute...
(Emphasis added).

13. It is common cause that *in casu* CMAC issued a certificate of unresolved dispute in respect of the dispute that has been referred to this Court for determination. The certificate settles the debate as to whether the Court has jurisdiction to entertain the matter.

14. For the sake of completeness, Rule 16 of the CMAC Rules reads as follows:

“(1) The Commission or a Commissioner may contact the parties by telephone or by other means, prior to the commencement of the conciliation in order to seek to resolve the dispute.

(2) The Commissioner appointed to resolve the dispute may contact the parties by telephone or by other means after a certificate has been issued indicating that the dispute is not resolved, in order to assist in resolving the dispute”.

15. Rule 16 (2) of the CMAC Rules is an extension of **Section 81(6) of the Act**, which reads as follows:

“Notwithstanding the issue of a certificate that the dispute is not resolved, the commissioner appointed in terms of section 80(1) retains jurisdiction over the dispute until it is settled”.

16. At a glance, there appears to be a conflict between **Section 81(6)** (supra) and **Section 85(2)** (supra) at paragraph 8 of

the ruling, but our view is that there is none. The fact that the Commissioner retains jurisdiction even after a certificate is issued does not oust the jurisdiction of the Court. If **Section 81 (6)** ousted the Court's jurisdiction, the legislature would have expressly promulgated so.

17. Section 81(6) simply confers power on the Commissioner to conciliate even after a certificate has been issued. The rationale is that the **Industrial Relations Act** places a premium on the amicable resolution of labour disputes. It is trite that, the fact that a Court is seized with jurisdiction to entertain a matter is no bar to the parties amicably resolving it provided it is before judgment. See: **ERASMUS. H. J, et al (2004) SUPERIOR COURT PRACTICE. JUTA & CO. CAPE TOWN.**

18. In Swaziland Fruit Canners (Pty) Ltd v Vilakati P and Another 1987-1995 (2) Swaziland Law Reports 80 at 81G - I, the Court observed as follows:

"...It is most desirable that Industrial disputes be settled, if possible by means of conciliation rather than determined in the more formal surrounds of a Court and no doubt the existence of a statutory conciliation procedure saves the Industrial Court from hearing many time consuming cases which are capable of resolution with the assistance of a neutral and expert third party..."

19. On the question of costs Section 13(1) of the Act reads as follows:

"The Court may make an order for payment of costs, according to the requirements of the law and fairness and in so doing, the Court may take into account the

fact that a party acted frivolously, vexatiously or with deliberate delay bringing or defending a proceeding”.

- 20.** In the case of **The Minister of Public Service N.O. and Others v Swaziland National Association of Teachers ICA Case No: 3/17 at paragraph 73**, the Court said the following:

“It is trite that on the question of costs the Industrial Court enjoys a more lateral discretion whether to award costs and will do so reservedly in well-considered circumstances where it deems a costs award appropriate. Even more stringently the Industrial Court is to consider and award costs on a punitive scale. In the latter instance costs are to be awarded in extraordinary circumstances on the high level scale as at a rate between an attorney and own client and only where the conduct of a litigant is so egregious and so reprehensible as to warrant the censure and disapproval of the Court”.

- 21.** The Respondent’s counsel submitted that the motive for raising the point *in limine* was to have a shot at amicably resolving the dispute in view of its allegation in the main application that the Applicant failed to exhaust internal remedies.
- 22.** Mr. Kunene submitted that the issue was raised before the Commissioner, however the latter proceeded to conciliate and thereafter issued the certificate of unresolved dispute. Notwithstanding that the Respondent had a different recourse to challenge the Commissioner’s decision to proceed with conciliation, the Court has no reason to doubt the *bona fides* of Respondent’s action, albeit misconceived.

23. In the result, it is hereby ordered as follows:

23.1 The point of law *in limine* raised by the Respondent is hereby dismissed.

23.2 There is no order as to costs.

The Members agree

**V.Z. DLAMINI
ACTING JUDGE OF THE INDUSTRIAL COURT OF
ESWATINI**

For the Applicant: Mr. F. Vilakati

For the Respondent: Mr. S. Kunene