IN THE INDUSTRIAL COURT OF ESWATINI

Case No. 192/18

In the matter between:

MANDLA MDLULI Applicant

And

SWAZI MOBILE Respondent

Neutral citation: Mandla Mdluli v Swazi Mobile *(192/2018)* [2019] *SZIC 25* (26 March 2019)

Coram: **S. NSIBANDE JP**

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

Heard: 31 November 2018

Delivered: 26 March 2019

RULING

[1] On 18th July 2018 the Applicant applied to the Industrial Court for the determination of an unresolved dispute arising from the termination of his services by the Respondent, on 1st November 2017. He alleges that his dismissal was unfair and unreasonable because he had not been on probation at the time of his dismissal because the probation period had not been fixed at the time of his employment as envisaged by **Section 32** of **the Employment Act 1980**; that even if it were to be said he had lawfully been on probation, the period of probation had lapsed when the Respondent purported to terminate services in terms of **Section 32(1)** of **the Employment Act 1980**; that the Respondent was not entitled to invoke clause 3.1 of the Contract of Employment to terminate the Applicant's services because his performance had not been found to have been unsatisfactory; and that even if the Applicant's services had been found to have been unsatisfactory, the termination was not preceded by any consultation; and that therefore the termination of his services was not in accordance with **Sections 36 and 42(2) (b)** of **the Employment Act 1980**: The Applicant claims an amount of E180 000 as compensation for unfair dismissal and E15 000 as Notice Pay. He also seeks costs of suit.

[2] The Respondent opposed the application and filed its Reply thereto. In the reply the Respondent denies that Applicant was dismissed unfairly and avers that it

was entitled to exercise its discretion not to retain his services of the at the end of the period of probation because Applicant was unsuitable for the position. The Respondent further denies that Applicant was not afforded an opportunity to state his case regarding the Respondent's intention not to retain him.

[3] The Applicant has now applied to the President of the Industrial Court to have the pending unresolved dispute referred to arbitration under the auspices of the Conciliation Mediation and Arbitration Commission (CMAC) in terms of **Section 85 (2) (b)** of the **Industrial Relations Act 2000 (as amended)**. It was argued, on behalf of the Applicant that:-

3.1 this Matter presents no complex legal issues for determination; that the legal issue that arises had to do with question of the rights of employees that are on probation or have completed probation and that this question is not novel, the Courts having previously heard and decided such matters on numerous occasions;

3.2 there are little or no disputes of facts foreseeable in the matter since the facts are largely common cause. It followed therefore that no complex dispute of facts was likely to arise from the facts of this matter;

3.3 the claim of E195 000 (one hundred and ninety five thousand Emalangeni) is not substantial regard being had to the Respondent enterprise; that even if

the amount is found to be substantial, CMAC arbitrators have adjudicated on matters wherein the claim was in excess of one million Emalangeni; and

3.4 the Respondent will suffer little prejudice if any at all, if the matter is referred to CMAC for arbitration because the arbitrators at CMAC now hold LLB degrees and some are legal practitioners who qualify to be appointed as Judges. They will therefore be in a good position to adequately handle a claim such as this one.

[4] The Respondent opposed the application and argued in the opposite that:

4.1 there exists material disputes of fat that need the seniting of the Court rather than arbitration;

4.2 have are complex issued to be adjudicated upon such as the interpretation of **Section 32 of the Employment Act of 1980** and that the Respondent stands to be prejudiced if the matter is referred to CMAC;

4.3 the amount claimed is substantial particularly for a company as young as the Respondent that is less than 2 years in existence.

[5] The celebrated case of **Sydney Mkhabela v Maxi Prest Tyres, Industrial Court Case No. 29/2005** was cited by both parties in support of their arguments

regarding the considerations the President is expected to make when considering whether or not to refer a matter to arbitration.

[6] In argument, the Applicant's representative emphasized that the facts of the matter were largely common cause; that there was a written contract of employment that settles the date of employment that settles the date of employment; that the issue regarding the dismissal of and/or refusal; to offer employment to probationary employees was not a novel issue; and that there would be no prejudice to the parties of the matter was referred to arbitration.

[7] I have considered the arguments of the parties, particularly that there may be complex factual issues arising from the matter ad that there are also legally complex issues relating to the interpretation of **Section 32 of the Employment Act 1980.** In my view both the factual and legal issues anticipated by the Respondent are outstated. I say so because – (i) the date of employment is clearly captured in the contract of employment; (ii) the period of probation is set out at paragraph 2 of the Contract of employment; (iii) the date of termination is not in dispute.

[8] I do however consider that there may be factual findings regarding the issue of the termination itself and whether the Applicant was informed timeously of the intention not to retain him and whether he was consulted regarding his suitability for the post. An adverse finding on this issue may not be appealable to the detriment of the Respondent. I also find that even for the Respondent the claim made is substantial. In the circumstances I do not consider that this matter is lands itself to benefit from the robust justice of CMAC arbitration but that the parties would benefit from the more formal judicial determination of the Industrial Court.

[9] In the circumstances the application for referral of the unresolved dispute to CMAC is refused. There is no order as to costs.

For the Applicant: Ms. Q. Dlamini

For the Respondent: Mr. H. Mdladla