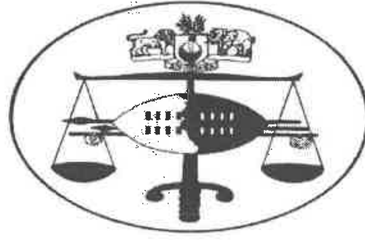

IN THE INDUSTRIAL COURT OF ESWATINI

RULING

Case No. 188/17

In the matter between:

DUMISANI DOCTOR TSELA Applicant

And

WELILE MAZIBUKO Respondent

Neutral citation: Dumsane Doctor Tsela v Welile Mazibuko *(188/2017)* [2019] *SZIC 28* (26 March 2019)

Coram: **S. NSIBANDE JP**

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

Heard: 13 December 2018

Delivered: 26 March 2019

Summary: *Labour Law – Amendment of pleadings to introduce a new Respondent.*

Held: Amendment to introduce new Respondent not in keeping with rules and will fail where it contravenes statutory law provisions – Party not at conciliation can not be joined as litigant – Application for amendment dismissed.

RULING

[1] On 13th June 2017, the Applicant launched an application for the determination of an unresolved dispute between himself and the Respondent, one Welile Mazibuko. Applicant alleged that he had been employed by the said Welile Mazibuko on or about the month of January 2014 and had been unlawfully suspended on 10th August 2016. He claims an amount of E105 823.80 made up of claims for unlawful deductions (E 19 900.00); unlawful suspension (E60 000); unpaid work on public holiday; (E583.38); unpaid annual leave; (E540.41); unpaid compassionate leave (E7500.00); travel and subsistence allowance (E4500.00); uniform and gumboots (E4500.00); and protective clothing (E3000.00).

[2] The Respondent opposes the application and denies ever employing the Applicant and claims that the Applicant was employed by one Asamfesh Investments (Pty) Ltd which was also the Respondent's employer. The employment was for a specific project and was expected to end at the completion of that project. He accordingly filed his Reply setting out his defence and the matter was eventually referred to the Registrar for the setting of a trial date.

[3] On 24th July 2018, the Applicant filed an application for amendment in terms of which an application for amendment would be made on the same day. The amendment sought to be made was –

"(i) to add A Works Civils to the 2nd Respondent; and

(ii) to add "back pay for unlawful suspension" to be Applicant's claims so that it reads – "back pay of wages for Unlawful Suspension, from date of issue of Judgment of main application to date which Applicant was unlawfully suspended."

[4] On 2nd August 2018 the Respondent served a Notice of Objection to the application for amendment. The objection was premised or three grounds – (1) that the application for amendment did not give the Respondent a period within

which he can object to the amendment as envisaged by the rules: (ii) that the amendment seeks to introduce a 3rd party to the dispute whereas that 3rd party was never cited as one previously and did not partake in the conciliation of the matter; and (iii) the application for amendment was not served on the proposed 2nd Respondent as envisaged by **Rule 23 (5)** of the **Industrial Court Rules 2007**.

[5] On the same day – 2nd August 2018 – the Applicant served what it termed Notice for Leave to Amend in terms of which he sought the same amendments set out in the application for amendment filed earlier on 24th July 2018. It appears that on the 24th July 2018, the matter was called in Court as per the Applicant's Notice and the Respondent noted his objection to the proposed amendment.

[6] When the matter was heard, the Applicant argued that leave to amend had been granted on 24th July 2018. There is no indication of such an order in the file nor did the Applicant amend and serve the amended pleadings on the Respondent. The Respondent denied that leave to amend had been granted by the Court. In the circumstances we came to the conclusion that the Court had not granted leave to amend on 24th July 2018 and that the application to amend remained pending.

[7] At the hearing of the matter both parties raised issue with the form of each others pleadings. The Applicant complained that the Notice to oppose the amendment was not proper since it was not stamped by the Registrar, whilest the Respondent complained that the form of the notice to amend was not in terms of the rules of Court particularly **Rule 23** of the **Industrial Court Rule 2007**.

[8] In terms of **Rule 23 (5)** *"the Court may, if a party is incorrectly or defectively cited, on application and on notice to the party concerned, correct the error or defect and the Court may make an order as to costs where appropriate."*

[9] It was the Courts view that the issues raised by the parties were ill advised. The notice opposing the amendment that was in the Court files was stamped and the Applicant's application in substance set out what the Applicant sought to achieve to the understanding of all parties. In other words, the substance of the application to amend was proper. Consequently the Court ordered that the matter be argued.

[10] The Applicant's application to amend seeks to introduce A Works Civils (Pty) Ltd (**the Company**) as a party to the litigation ie as 2nd Respondent, on the basis that the Applicant worked for the Company even though it had not been

registered at the relevant time. It was argued that *de facto* the Respondent (Mazibuko – now sought to be called the 1st Respondent) worked under the banner of the Company and employed the Applicant to work for the Company.

Secondly Applicant sought to extend the period of the claim for unlawful suspension up to the date of payment. In other words, it was alleged that the Applicant remains suspended without pay and it was submitted that he ought to be able to amend his pleadings to include future dates pending the finalisation of the matter in Court.

[11] The Respondent's submissions were that firstly, the application had not complied with **Rule 23 (6)** of the **Rules of Court** because the Company *(A/Works Civils (Pty) Ltd)* had not been served with a full set of pleadings as envisaged by that rule;

Secondly, that the company, which exists independently of Mr Mazibuko the Respondent; was not a party at conciliation and can not at this stage be included or joined in the litigation. The Court was referred to the **Dlamini v Dlamini and 2 Others Industrial Court Case No. 2/2013** where the Court said:

"The Industrial Court does not normally have jurisdiction to entertain a dispute that has not been first referred to CMAC and certified unresolved. The

question that the Industrial Court must ask therefore is whether the dispute has been dealt with by CMAC by way of conciliation."

[12] We align ourselves with the sentiments of the Court as quoted above. We also align ourselves with the judgement of **Nderi Nduma JP** in **Wilfred Rudd and 3 Others v Deloitte and Touche (Pty) Ltd Case No. 282/99** where he quoted **Justice Parker (in Elmort B. Mamba v Tracar Limited Industrial Court Case No. 84/97)** saying

..." to remove Tracar Limited and substitute Swaki as the Respondent would have the effect of introducing a new party into the proceedings. That also cannot be done unless Swaki has been given due notice of the introduction and has consented there too"

See also: **Gcina Gama v The Specialist Pest Control (Pty) Ltd 301/2010**. Although the Applicant does not seek to substitute one party for another, *in casu,* he seeks to add a party that was never at conciliation, one he has not served with a full set of pleadings and one that has not consented to being joined to the litigation. It seems to us that the amendment seeks to include a whole new litigant to take over or at the very least share the liabilities of the substantive Respondent. His conduct is contrary to spirit of **Rule 23 (6)** of the rules of Court. In the circumstances the application to amend is dismissed.

[13] It is also our view that the Applicant ought to have fore-seen the problems he would face with the application to amend. A reading of the rules and precedents would have brought these difficulties to bear. Consequently we find that the Applicant is liable for the costs incurred by the Respondent in resisting the amendment.

[14] **We make the following order –**

(a) The application to amend is dismissed

(b) Costs of the amendment application are awarded to the Respondent.

The members agree.

S. NSIBANDE
PRESIDENT OF THE INDUSTRIAL COURT

For the Applicant: Mr Sibusiso Dlamini

For the Respondent: Mr Simo Simelane