

DATE HEARD : 18 APRIL 2019

DATE DELIVERED : 24 APRIL 2019

Summary: Applicants instituting urgent application seeking to stop employer from unilaterally varying fixed term contracts of employments. Applicants also allege that employer victimizes and unduly influences employees into signing fixed term contracts of employment and that employer frequently terminates the contracts of employment without following the due processes of the law- Applicants seek declaratory order that they are permanent employees of the Respondent.

The Respondent has raised preliminary points in limine against the Applicants' application namely that the deponent has no locus standi to bring the present application on behalf of the rest of the Applicants and that the matter contains serious disputes of fact which cannot be resolved on the papers.

Held; The points in limine are valid points and the application is dismissed with no order as to costs.

JUDGEMENT

INTRODUCTION

1.0 The Applicants have approached the Court seeking the following relief;

“1. Dispensing with the normal and usual requirements of the Rules of the above Honourable Court, relating in particularly [sic] to forms, service and time limits, and permitting this matter to be enrolled as one of urgency.

2. Extending time of time limits and condoning non-compliance with time limits prescribed by any law, for filing this Application. [sic]

3. That a Rule Nisi do hereby issue, returnable on date to be fixed by the above Honourable Court, calling upon the Respondents to show cause why the following orders should not be made final;

3.1 Declaring that all Applicants employed by the Respondent and continued services beyond three (3) months, entered into tacit and indefinite contract of employment with Respondent, and the contract is valid, perpetually.

3.2 Declaring that unilateral variation of Applicants tacit and indefinite contracts of employment by Respondent, by coercion, undue influencing, or forcing Applicants to sign Fixed Term Period Contract, be null and void.

3.3 Declaring that all Fixed Term Period Contracts given to Applicants by Respondent, after Applicants entered into tacit and indefinite contracts of employment with Respondent, are null and void.

3.4 Restraining and interdicting the Respondent conduct from victimization or dismissing Applicants for joining Trade Union, Swaziland Agricultural and Plantation Workers Union (SAPWU), or exercising their rights in terms of Industrial Relations Act of 2000, Section 198, 100 (1) (a) (b) (c) (d) and (e) or exercising any right

conferred by the Act, or any law of the Kingdom of Swaziland or common law or international law.

3.5 That the costs of this application be granted to the Applicant on the scale as between Attorney and Own Client.”

2.0 The Applicants are current and former employees of the Respondent and they brought the application against the Respondent as a group.

3.0 The Respondent is opposing the applicants’ application and has raised preliminary points *in limine* and also pleaded to the merits of the matter.

BRIEF FACTS

4.0 In their Founding Affidavit, the Applicants allege through their representative, one Dumisa Gilbert Xaba that on the 8th October 2018, all the Applicants who are part of the application joined a union called the Swaziland Agricultural and Plantation Workers Union (SAPWU).

5.0 During the month of November 2018, the Applicants state that they were called to a meeting convened by one Mr. Musa Hlophe and in that meeting they were told to form and join a Workers' Council. During that meeting, the Applicants allege that they were informed by Mr. Musa Hlophe not to join the union (SAPWU) because unions had caused instability within companies and had led to many companies closing down.

6.0 The Applicants allege that they refused to join the Workers Council despite various attempts by the Respondent to force them to join this forum. According to the Applicants, the Respondent terminated the services of a number of employees and also declined to renew the contracts of some employees within the organization. The Applicants further allege as follows in the founding affidavit;

“8.17 Currently many Applicants are being victimized, and threatened by Respondent with automatic unfair dismissal.

8.18 There is a likelihood that all Applicants would be automatically unfairly dismissed, using letters of non-renewal of their unlawful Fixed Term Contracts of Employment.”

7.0 It is further contended by the Applicants in their Founding Affidavit that;

“9.6 Respondent’s conduct of amending Applicants’ tacit contracts and indefinite period employment contracts to fixed term period contracts, committed unilateral variation of Applicants’ employment contracts. Such conduct violated the Employment Act No.5 of 1980, Section 27, the common law, international law and any other.

9.7 Further, the unlawful dismissal of the Applicants is violation of the Employment Act No.5 of 1980, Section 35 (2), Industrial Relations Act No.1 of 2000, Section 30 (2) (3), Section 2 (d) (i) (ii), of the Constitution of the Kingdom of Swaziland, Section 25 (1) and 14 (1) , the Common law and the International Law.

9.8 Furthermore, Respondent violated Legal Notice No.11 of 2018, The Wages Act, 1964 (Act No.16 of 1964), The Regulations of the

Wages (Agricultural Industry) Order Notice 2018 (Under Section 11, 5, 6, 7,8,12, 20 21 and 22.”

8.0 In response to the allegations by the Applicants, the Respondent raised preliminary points of law namely that;

8.1 The application by the Applicants contains serious disputes of fact which cannot be resolved on the papers.

8.2 The deponent to the Founding Affidavit, one Dumisa Gilbert Xaba, lacks the necessary legal capacity to institute and bring the application on behalf of the 37 employees who are all adult and independent legal persons.

9.0 The parties filed substantive heads of argument and further addressed the Court on their respective factual and legal positions in relation to all the issues arising in the matter.

10.0 On the point of disputes of fact, it was argued on behalf of the Respondent that the application was infested with a number of disputes of fact which could not be resolved on the papers. One of such dispute, according to the Respondent, is whether or not the

deponent to the Founding Affidavit, Dumisa Gilbert Xaba, is indeed the Branch Secretary of the union identified in the papers as the Swaziland Agricultural and Plantations Workers Union as alleged in the papers. In the Answering Affidavit, the Respondent has alleged that;

“4.4 As recently as 2018 the Respondent received an application from SAPWU for recognition. Pursuant to this, the Respondent advised the Union that it had to first deal with the issue of the factions which were existing in the union as it was loathe to foster a chaotic business environment at its establishment.

4.5 The dispute between the factions of the union are now the subject of court proceedings before the above Honourable Court. In this regard, I attach copies of an application [for recognition] obtained by the Respondent’s attorneys marked annexure “JFC1”.

4.6 Having taken the position that due to the disruptive nature of the union, the Respondent was not in a position to even consider its application, the union then reported a dispute with the

Conciliation Mediation and Arbitration Commission (“CMAC”).
At the most recent convergence at CMAC, efforts were
unsuccessfully made to conduct a conciliation between the parties.
The Respondent’s opposition is attached hereto and is embodied
in annexure “JFC2” and is attributable to the fact that the
Respondent was adamant that due to the factions involved with
SAPWU, it had failed to meet the threshold of proving that the
faction of SAPWU could correctly apply for recognition.”

11.0 The Respondent contended that all the other substantial issues relied upon by the Applicants for the relief they are seeking have been disputed by it. On the issue of the alleged victimization and unduly influencing the Applicants to sign short term contracts of employment, the Respondent has stated that;

“9.1.2 I further deny that the contracts were signed under duress or through coercion. These contracts have been signed for some time and there have been no complaints raised about them prior to the union entering the picture. In fact, most of the Applicants forwarded their requests to be given contracts to the

**Respondent's management through their respective supervisors;
and**

9.1.3 I further state that some of the Respondents' employees (who are Applicants such as Sibusisi Mabuza, Thandazile Dlamini (the wife of Jabulani Zwane) and the others mentioned in paragraph 6.4.2 above have been furnished with new contracts despite the fact that they want to join the union and I submit that this dispels the idea of victimization.

9.1.5 I further submit that the allegations of duress, undue influence and variations of the contracts alleged by the Applicants serve to justify why the above Honourable Court cannot hear this application and determine it based on the affidavits. Oral evidence has to be led to determine the veracity of the above; and

9.1.6 I submit that in light of the averments in paragraphs 9.1.5 above the Applicant should have foreseen that there will be dispute of facts arising from the allegations they raise and same cannot be resolved on affidavit.”

12.0 In response to all these allegations by the Respondent, the Applicants in their Replying Affidavit have stated that;

“Contents of this paragraph are denied and Respondent is put to strictly prove [sic] thereof.”

13.0 The second preliminary point of law raised on behalf of the Respondent is that the deponent to the Founding Affidavit, Dumisa Gilbert Xaba is legally incompetent to bring the application on behalf of the 37 other employees of the Respondent. This argument is founded on the principle that an adult person cannot institute proceedings on behalf of another adult and independent human being. Linked to this argument was that the 37 employees sought to be represented by the deponent have not even filed confirmatory affidavits to indicate that they are part of the application. Confirmatory affidavits were only filed in the replying affidavit without even seeking the leave of court to do so.

14.0 In addressing the above point of law, the Applicants’ representative argued that there is a distinction between a *de facto* and a *de jure*

organization. The argument by the Applicants' representative was that while it is true that the union SAPWU had not yet been formally recognized as such by the Respondent (*de jure*), however the union was registered and operating on the ground as a matter of fact (*de facto*). It is for this reason, so the argument went, that the union could recruit members and start operating, including representing its members in court proceedings.

15.0 The Applicants' representative decried the fact that the Respondent was relying on technical issues and was avoiding to deal with the substantive issues of complaint by the Applicants. It was the Applicants' further contention that the Court ought to condone the filing of the confirmatory affidavits of the Applicants in the Replying Affidavit as opposed to filing them in the Founding Affidavit.

ANALYSIS OF THE ISSUES AND CONCLUSION

16.0 The Respondent's Attorney referred the Court to a number of legal authorities which ought to be applied to the facts of the present matter. One such case on the issue of the deponent lacking capacity to

institute the application on behalf of the 37 employees is that of **Swaziland Manufacturing & Allied Workers Union and Another v Leo Garments (Pty) Ltd, Case No.387/2008 (unreported)**, where the Court held that;

“On behalf of the respondent, Mr. Simelane argued that the 1st respondent has no *locus standi* and that the application ought therefore to be dismissed. The question of *locus standi* of trade unions has been addressed by the court in numerous judgements. The question of *locus standi in judicio* is governed by the common law. The court has pointed out in these judgements that to have *locus standi in judicio* the union must have a direct or substantial interest in the subject matter of the application or its outcome.”

The Applicants also raised some points *in limine* against the answering affidavit filed on behalf of the Respondent. The argument was that the answering affidavit filed by the Respondent was irregular in that amongst other things, it did not contain sufficient revenue stamps and that all the pages of the affidavit were not initialed.

17.0 The Court was also referred to the case of **Media Workers Union of Swaziland NO v African Echo (Pty) Ltd t/a The Times of Swaziland (161/07) [2007] SZIC 85 (22 June 2007)** where it was stated that;

“It is also not clear what interest does the Union want to protect. If the Union has any interest at all, it is clearly remote and it lies in the fact that the deponent is its member and Union would lose the benefit of the subscriptions if she were to be dismissed. That interest is remote and cannot found *locus standi in judicion* for the union.”

18.0 In the present matter, the deponent to the Founding Affidavit relies on the fact that he is the Branch Secretary of the Union and that this fact alone entitles him to join the 37 co-employees in his cause and institute the application on their behalf. This belief by the deponent is clearly misguided and demonstrates lack of appreciation of the general rules of litigation. If the position of the law is that the Union itself lacks the legal authority to institute an application on behalf of its members, how much more an ordinary employee who does not

even state that as Branch Secretary, he is authorized by the Constitution of the Union to bring the application on behalf of the union and its members?

19.0 Even if there was no dispute as to the recognition of the Union by the Respondent, still the deponent would lack capacity and authority to bring the application on behalf of the 37 employees in his position of being the Branch Secretary. Worse still, the Union is not cited as co-Applicant in the application by the employees.

20.0 The point on lack of *locus standi in judicio* raised against the deponent to the Founding Affidavit is a valid and good point of law and we accordingly uphold it.

21.0 The second point of law to the effect that the matter contains serious disputes of fact is similarly a valid point of law given the circumstances leading to the present dispute between the parties. On the point of disputes of fact, this Court was referred to a number of decided case amongst which is the case of **Gongo Mabuza & 62**

Others v Vusi Dlamini & 2 Others, High Civil Case No.3967/2005 (unreported) where the court held that;

“With absolute clarity, the factual disputes between the two opposing factions are as muddled and unsettled as can be. To even consider an attempt to resolve it on the papers before court, on application procedure, is neigh impossible. As held in *Roomhire v Jeppe Street Mansion 1949 (3) SA 1155 (T)*, this procedure is wholly unsuitable.”

22.0 On the issue of the Applicants seeking to supplement their case by filing their confirmatory affidavits in the Replying Affidavit, the court was referred to the Lesotho High Court Case of **Mohale Tunnel Contractors v Lesotho Security (Pty) Ltd (CIV/APN/490/99 [2000] LSHC (02 February 2000)** where the court had this to say;

“Applicant attempted to supplement his case in his replying affidavit through what he called “confirmatory affidavit” of Andrew Wilson who is styled a Quantity Surveyor of Mohale Matsoku Contractor in an unsigned affidavit which is on page 72 of the paginated record...It is trite law that an applicant is not entitled to file supplementary affidavits with his replying affidavit

for purpose of supplementing the founding affidavits. Applicant could only supplement his case with leave of court after making specific application to that effect. To put this principle in the words of *Hebstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 4th Edition at page 366* “The general rule which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged in it, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated there, because those are the facts that the respondent is called upon to either to confirm or deny ... and where the applicant had failed to allege his *locus standi* to make an application it was held that he could not do so in a replying affidavit.”

23.0 The argument by the Respondent’s representative to the effect that the point of law raised on behalf of the Respondent, in particular the point on disputes of fact, is nothing more than a mere technicality, is flawed and misplaced. This point of law goes to the core of the application and cannot be disregarded as merely a technicality. The court is faced

with a dilemma of determining the question of how or in what manner the Respondent is alleged to have coerced and unduly influenced the employees to sign short term contracts of employment in the face of the denial by the Respondent that it engaged in this type of conduct.

24.0 The Respondent has denied that it coerced or unduly influenced the employees to sign fixed term contracts of employment. It has denied that it is victimizing or threatening to terminate the contracts of employment of those employees seeking to join the union instead of the Workers Council. These issues, no doubt, require oral evidence and cannot be resolved by way of application proceedings.

25.0 There are several other issues traversed in the Founding Affidavit which have been denied by the Respondent including the fact that the deponent is the Branch Secretary of SAPWU within the Respondent's undertaking. It is accepted that there is a dispute involving the recognition of the union by the Respondent pending either at CMAC or the Industrial Court. Outside of being formally recognized as a lawful bargaining entity within the enterprise, this means the cover used by the deponent in seeking to represent and sign an affidavit on

behalf of the 37 employees falls away. The distinction between a *defacto* and *dejure* organization is not applicable to the facts of this matter.


26.0 In totality, our conclusion in the matter is that the application by the Applicants is totally misconceived and cannot succeed in its present form. The Applicants can, if they so wish, report a dispute with CMAC or request the Labour Commissioner to intervene in their dispute as provided for in the law. The points of law raised on behalf of the Applicants against the Respondent's answering affidavit have no substance in that the Applicants rely on the common law position in relation to the attestation of affidavit, whereas the position of the law in this country regulating the attestation of affidavit is to be found in the Commissioner of Oaths Act, 1942. This piece of legislation provides the only guide on how affidavits are to be executed.

27.0 **The court accordingly makes the following orders;**

a) The points *in limine* raised on behalf of the Respondent are upheld with the result that the Applicants' application is dismissed.

b) There is no order as to costs.

The Members agree.



BONGANI S. DLAMINI
ACTING JUDGE OF THE INDUSTRIAL COURT

For Applicants:

Mr. Sibusiso B. Dlamini
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For Respondent:

Mr. Kenneth Motsa
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