IN THE INDUSTRIAL COURT OF ESWATINI

CASE NO: 98/2019

In the matter between:

THABO MGADLELA DLAMINI **APPLICANT**

And

CIVIL SERVICE COMMISSION & 3 OTHERS **RESPONDENTS**

Neutral citation : *Thabo Mgadlela Dlamini v Civil Service Commission & 3 Others [98/2019] SZIC 41 [30 April 2019]*

CORAM:

BONGANI S. DLAMINI : ACTING JUDGE

DAN MMANGO : MEMBER

NKHOSINGIPHILE DLAMINI : MEMBER

DATE HEARD : 23 APRIL 2019

DATE DELIVERED : 30 APRIL 2019

Summary: Application for determination of an unresolved dispute- Respondent raising a point in limine to the effect that dispute is prescribed in accordance with section 76 (2) of the Industrial Relations Act, 2000 (as amended)- Applicant arguing that the point in limine on prescription should have been raised and decided by the Conciliation Mediation and Arbitration Commission ("CMAC" or "The Commission").

Held; The Certificate of Unresolved Dispute is sufficient proof that the matter was conciliated at CMAC. The Industrial Court is seized with jurisdiction to hear and dispose of the matter on the merits once a Certificate of Unresolved Dispute is issued by CMAC.

JUDGEMENT

Introduction

1.0 The Applicant filed and served an application for determination of an unresolved dispute in terms of Section 85 (2) of the Industrial Relations Act, 2000 (as amended) against the Respondent dated 19 March 2019.

2.0 By way of a Notice To Raise a Point of Law dated 11th April 2019, the Respondent has raised the following preliminary point of law against the Applicant's application;

"**The Applicant is time barred in bringing the present application since the dispute was reported outside the time frame prescribed by the Industrial Relations Act 2000 (as amended). The report to the Conciliation Mediation and Arbitration Commission dated 12th September 2017 was reported after the statutory 18 month period had elapsed from the date the issue arose, regard being**

had to Section 76 (2) of the Industrial Relations Act, 2000 (as amended). The issue giving rise to the dispute, being the non-payment of overtime, arose in June 2007. An arithmetic calculation of eighteen (18) months from that date lands on January 2009."

3.0 The essence of the preliminary point *in limine* raised on behalf of the Respondent is to say that this Court lacks the necessary jurisdiction to hear and determine the Applicant's dispute on the merits until the point *in limine* is decided by the Court.

Brief Facts

4.0 The Applicant reported a dispute to the Conciliation Mediation and Arbitration Commission ("CMAC" or "The Commission") during or around the 12th September 2017. The dispute reported by the Applicant as gleaned from the application for determination of an unresolved dispute is for the payment of overtime from the year 2007 to 2011. This fact is articulated in paragraph (9) of the Applicant's Particulars of Claim which is couched in the following manner;

“From the period 2007 to 2011, the Applicant was made to work long and irregular hours without being paid overtime on normal working days, weekends and on holidays.”

5.0 Upon reporting the dispute at CMAC, the matter was conciliated and a Certificate of Unresolved Dispute was issued, prompting the Applicant to lodge an application for determination of an unresolved dispute as spelt out in Section 85 (2) of the Industrial Relations Act 2000, (as amended).

6.0 It was upon being served with the application for determination of an unresolved dispute that the Respondent took the point *in limine*, arguing that the Applicant’s claim of overtime, calculated from 2007 to 2011 is prescribed.

ANALYSIS OF ARGUMENTS AND COURT’S CONCLUSION

7.0 Section 76 (2) of the Industrial Relations Act, 2000 provides;

“**A dispute may not be reported to the Commission if more than eighteen (18) months has elapsed since the issue giving rise to the dispute arose.”**

8.0 The Respondent's argument in essence, is therefore that a dispute should not have been reported to the Commission since a period of eighteen (18) months had elapsed since the issue giving rise to the Applicant's complaint arose.

9.0 The first difficulty that the Respondent faces is that as a matter of fact, a report of dispute was made by the Applicant to the Commission on the 12th September 2017. The reporting of the dispute by the Applicant was accepted by the Commission even though an objection had been raised by the employer to the effect that the dispute was time barred. The Commission was, as a matter of law and procedure, required to determine the point of prescription raised by the Respondent and make a determination thereof.

10.0 The conduct of the Commission of simply 'passing the buck' in the face of an express objection raised by the Respondent constituted a gross irregularity and a lack of appreciation of the role that the Commission is required to play when confronted with an issue touching on the applicability of Section 76 (2) of the Act. We enquired from Counsel appearing on behalf of the Respondent several times on why the failure by the Commission to determine the point or

objection was not challenged by way of a review and we could not get a clear answer.

11.0 By law, the Commission is an independent public body that exercises powers conferred on it by the Industrial Relations Act 2000 (as amended). Those powers include the powers of determining whether or not a report of dispute is in line with Section 76 (2) of the Act. The prescription clause relates to the process or procedure of reporting a dispute **to the Commission** and not any other forum. The Court cannot therefore usurp the powers of the Commission and determine issues that fall within the scope of that institution.

12.0 The Court is not being asked to refer the matter back to the Commission for a determination of this issue but is being asked to determine the issue as though the dispute is reported to the Court for the first time. That determination is not, legally speaking, our call.

13.0 In Section 85 (1) of the Industrial Relations Act, 2000 (as amended), it is provided that;

"**For the purposes of this section, an unresolved dispute means a dispute in respect of which a certificate has been issued under Section 81 (5).**"

14.0 Section 81 (5) of the Act provides;

"**At the end of the twenty-one (21) day period or any further period agreed upon between the parties-**

(a) The commissioner shall issue a certificate stating whether or not the dispute has been resolved;

(b) The commissioner shall serve a copy of that certificate on the Commissioner of Labour and on each party to the dispute or the person who represented a party in the conciliation proceeding; and

(c) The commissioner shall file the original of that certificate with the Commission".

15.0 The crisp question then is; what happens once a Certificate of Unresolved Dispute is issued by the Commission? The answer to this question is to be found in Section 85 (2) which provides that;

"**If an unresolved dispute concerns the application to any employee of existing terms and conditions of employment or the denial of any right applicable to any employee in respect of his dismissal, employment, reinstatement, or re-engagement, <u>either party to such a dispute may refer the dispute to the court for determination</u> or, if the parties agree, to refer the dispute to arbitration."** (under-lined for emphasis)

16.0 It is therefore in terms of Section 85 (2) that the Court acquires jurisdiction to hear the dispute on the merits. The Respondent's Attorney argued strenuously that the issuance of the certificate of unresolved dispute by the Commission does not mean that the dispute was conciliated on the merits. This argument flies in the face of the contents of the certificate. The Commissioner seized with the dispute certified that he or she conciliated the dispute in terms of Section 80 and 81 of the Act. In Item 3 of the certificate of unresolved dispute, the Commissioner endorsed that;

"**The dispute between the parties for which I was appointed as a Commissioner by the Commission on the 2nd August, 2017 *under Section 80 and 81* of the Industrial Relations Act, 2000 (as**

amended) is hereby certified as an unresolved dispute due to the following reasons;

3.1……..

3.2……..

3.3……..”

17.0 The argument by Learned Counsel for the Respondent to the effect that a Commissioner’s duty in conciliation proceedings is limited only to conciliation and not adjudicating points of law is improper and lacking in that even before the process of conciliation can be embarked upon, the first issue for determination, outside of the conciliation process by the Commission, should be whether or not the reporting of the dispute itself is in line with the requirements of Section 76 (2) of the Act.

18.0 We therefore totally agree with the reasoning and conclusion of the Industrial Court of Appeal in **John Kunene v The Attorney General (02/16) 2016 SZICA 08 (14 October 2016)** where it was held that;

“**From a reading of the Industrial Relations Act of 2000 as amended, it is apparent that preliminary objections relating to**

prescription of the cause of action should be raised during conciliation and form part of the record of proceedings. Once the Certificate of Unresolved Dispute is issued, the aggrieved party acquires a right to adjudicate the dispute in Court."

19.0 It is clear in the present matter that the point of prescription was indeed raised during the conciliation proceedings. However the Commissioner turned a blind eye to the point and made no determination on it, save to merely record on the certificate of unresolved dispute that such a point was raised. The main reason for raising an objection is so that a determination can be made on that particular point. The failure by the Commissioner to make a determination on the objection raised by the Respondent amounted to a gross irregularity which the Respondent ought to have challenged by way of a review application or at least through written correspondence to the Commission asking for a correction of that irregularity.

20.0 The acceptance of the Certificate of Unresolved Dispute by the Respondent in its current form without challenging it and seeking to set it aside by way of review means that the Court is seized with

jurisdiction to determine the dispute on the merits as provided for in Section 85 (2) of the Act.

21.0 Having so concluded, we wish to briefly comment on the South African case law provided to us by Learned Counsel for the Respondent touching on this issue. In the cases **of EOH Abantu (Pty) Ltd v CCMA & Another (2008) 29 ILJ 2588** and **Fidelity Guards Holdings (Pty) Ltd v Epstein NO & Others (2000) 21 ILJ 2382 (LAC),** the courts affirmed the principle that where a party raises a jurisdictional point during conciliation, such point must be determined by the conciliating Commissioner. Where the conciliating Commissioner fails to determine the jurisdictional or other point of law, such failure constitutes a reviewable irregularity. However later judgements of the Labour Court of South Africa seem to have altered the position of the law and ushered in a new interpretation of the law. One such case is that of **Bombardier Transportation (Pty) Ltd v Lungile Mtiya NO, Case No: JR 644/2009**, a judgement of the Labour Court of South Africa. The *Bombardier Transportation case* is one of the first cases to challenge the judgement issued by the Labour Court of Appeal in the *Fidelity Holdings case*. That a lower

court can seek to challenge a decision of a higher court is in itself an anomaly.

22.0 The Labour Court in the Bombardier Case summarizes the issues as follows;

"[16] Of course, the issue in the present matter is rather narrower, in the sense that it relates to the appropriate time at which a party to a dispute may raise a challenge to jurisdiction. The crisp issue before the Court warrants restating, and can be expressed as follows-is it a reviewable irregularity for a conciliating commissioner to defer a challenge to the CCMA's jurisdiction to the arbitration phase of the statutory dispute settlement process?

[17] It follows from the approach articulated above that the answer to this question must almost always be in the negative. The approach assumes that while the limited category of true jurisdictional questions lend themselves to determination at the conciliation phase and ought to be dealt with at that point, this cannot be an inflexible rule-the conciliating commissioner must be given a discretion in appropriate circumstances to defer a decision

to the arbitration phase. The present case is a good example. While it may be suggested that the question of territorial jurisdiction is not dissimilar to one that would be raised in respect of the jurisdiction of a bargaining council, a moment's reflection will reveal that the private international law issues raised by the applicant's claim raises the matter to a different level of complexity. Rule 14 must necessarily be read in this light. In other words, the Rule does not mean that all jurisdictional questions raised at conciliation must necessarily be determined by the conciliating commissioner, on pain of a failure to do being regarded as a reviewable decision.

[18] It follows that when in the present matter the commissioner deferred the applicant's jurisdictional challenges to the arbitration phase of the dispute resolution process, she did not commit a reviewable irregularity. It follows too that the certificate of outcome issued by the commissioner was properly issued, and that the dispute between the parties should be enrolled for an arbitration hearing, at which any jurisdictional challenges that the applicant elects to pursue should be determined."

23.0 We respectfully disagree with the conclusion made by the Labour Court of South Africa. Why would a commissioner seized with a matter elect to 'defer' a jurisdictional point that statutorily he or she is required to decide at the stage of reporting the dispute? It is at the reporting stage that the point on jurisdiction should be raised and determined. Once a decision is made to accept the report of dispute by an aggrieved party, it is the end of the matter. If a point on jurisdiction is raised during the conciliation process, technically, the process is not a conciliation because at that stage, there has to be a determination on whether or not the Commission should accept the dispute in view of the prescription period imposed by the legislator. The Commission is not empowered to defer determination of the jurisdictional point to another forum but has a legal obligation to determine the point even before proceeding to conciliate the dispute reported to it on the merits. A Certificate of Unresolved Dispute can only be issued upon determination of the dispute reported to the Commission on the merits and not on any other issue. It is precisely for this reason that the courts have correctly held that the certificate of unresolved dispute confers jurisdiction to the court or arbitration process unless it is set aside by way of review.

24.0 In totality, our conclusion is that the point *in limine* raised on behalf of the Respondent should fail. The Applicant is entitled to have his dispute determined in accordance with the provisions of Section 85 (2) of the Act.

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

a) The preliminary point in limine raised on behalf of the Respondent is dismissed.

b) The Respondent is directed to plead to the merits of the Applicant's claim within 14 days from the date of issue of this judgement.

c) There is no order as to costs.

The Members Agree.

BONGANI S. DLAMINI
ACTING JUDGE OF THE INDUSTRIAL COURT

For Applicant: *Mr. M. Dhladhla (NAPSAWU)*

For Respondent: *Miss. S. Gwebu (Attorney General's Chambers)*