



IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 162/16

In the matter between:

BONGANI NHLEKO

Applicant

And

A.G THOMAS

Respondent

Neutral citation: Bongani Nhleko v A.G Thomas (62/16) [2019] SZIC 55 (04 July 2019)

Coram: **S. NSIBANDE JP**

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

Date Heard: 22 November 2018

Date Delivered: 04 July 2019

Summary: *Application for referral of dispute to CMAC. Held – Disputes of fact likely to arise – Amount sought is substantial – Prejudicial to close the doors of the Court to litigant in the circumstances of this matter. Application dismissed.*

JUDGMENT

- [1] This is an opposed application for the referral of an unresolved dispute between the parties, to the Conciliation Mediation and Arbitration Commission (CMAC) for arbitration.
- [2] The Applicant argued that the matter should be referred to CMAC for Arbitration because the issues for determination are not complex, the amount claimed is not substantial, the matter stands to be resolved quicker at CMAC because of the backlog of cases in the Court system; and that the Respondent will not be prejudiced if the matter is referred to arbitrator.
- [3] The Respondent opposed the application and argued in the opposite, submitting that the issues before Court are complex; that complex issues of fact must be decided from which there is no appeal; that the amount sought is substantial and that the Respondent will be prejudiced if the matter is referred to arbitration at CMAC as the doors of the Court will be closed to it.

[4] The Applicant claims that his dismissal by the Respondent was both substantively and procedurally unfair. He seeks an amount of E89 154.00 for unfair dismissal. Applicant also claims an amount of E42 500 being wages due for the period he was made to stay at home prior to his dismissal. Consequently he claims an amount of E131 654 (One hundred and thirty-one thousand six hundred six hundred and fifty four Emalangeneni).

[5] According to the Applicant, his dismissed took the place in the following sequence:

5.1 In April 2015, while at Mhlume he had an accident in Respondent's truck that he drove. The truck was damaged in the accident and he was told by the Respondent's director to go home and wait to be recalled once the truck had been fixed and was ready to work again.

5.2 Upon checking on the progress with the truck repairs from time to time the Applicant would be told, by the Director of the Respondent that he should keep checking since the truck was not ready. On one such visit to check progress, the Applicant was told by a fellow employee that the truck had been fixed a long while before. He then assumed he had been dismissed.

5.3 He approached the Respondent for a letter confirming his dismissal but the Respondent refused to provide one but he was subsequently advised by the Director that he was no longer welcome back at the undertaking because it had come to his (the Director's) attention that the truck had been driven by an unauthorised person when the accident occurred.

[6] The Respondent denies having dismissed the Applicant and alleges that the Applicant was hired to drive the truck that was involved in the accident; that the truck was extensively damaged and that in the absence of the truck it had no other work for Applicant and his position became redundant. Respondent alleges that when the truck had an accident, it was being driven by an unauthorised person with Applicant's consent.

[7] I have taken note of the cases cited by Applicant in support of the submission that this Court has referred to arbitration cases where the Applicant sought an amount larger than the one current Applicant claims **(Philani Mdluli v P.D.S. Investments Pty Ltd Industrial Court Case No. 162/2014)**

I have also considered that each case, however, depends on its own peculiar facts (**Sydney Mkhabela v Maxi-Prest Tyres Industrial Court Case No. 29/2005**).

[8] On the facts of this matter it seems to me that numerous disputes of fact will arise regarding the circumstances of Applicant's conversations with the Respondent's Director and the circumstances of his dismissal or redundancy. Further, the Applicant's claim in the sum of E131 654. (One hundred and thirty one thousand six hundred and fifty four Emalangenis, in my view, substantial even for an undertaking such as the Respondent. In the circumstances an adverse finding of fact against the Respondent would be of grave consequence since it would have no right of appeal against same.

[9] I am not satisfied therefore that the Respondent will not be prejudiced if this matter is referred to arbitrator. As this Court stated in **Zodwa Gamedze v Swaziland Hospice at Home Industrial Court Case No. 252/2005** "*the potential prejudice of a referral to arbitration arises from one party being deprived against its will from access to a Court of law for determination of the dispute*".

[10] In the premises the application for referral is dismissed. There is no order as to costs.



S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr. B. Phakathi

For Respondent: Ms. B. Charamba