IN THE INDUSTRIAL COURT OF ESWATINI

RULING

Case No. 300/2019

In the matter between:

HLENGIWE MAMBA 1st Applicant

NOMBULELO MASEKO 2nd Applicant

And

SUMMERFIELD BOTANICAL GARDEN & RESORT Respondent

Neutral citation: Hlengiwe Mamba and Another v Summerfield Botanical Garden & Resort [2020] [300/2019] SZIC 133 (11 November 2020)

Coram: **S. NSIBANDE J.P.**

(Sitting with M.P. Dlamini and E.L.B.Dlamini Nominated Members of the Court)

Date Heard: 14 July 2019

Date Delivered: 11 November 2020

RULING

[1] The two applicants are former employees of the respondent, the first applicant having been employed as an assistant chef and the second as a cleaner. They were retrenched by the respondent on 31st March 2019. They did not accept the retrenchment and reported a dispute with the Conciliation, Mediation and Arbitration Commission (CMAC).

[2] The dispute was unresolved and the Commission issued a certificate of unresolved dispute. The applicants thereafter filed an application to Court for the determination of the unresolved dispute. The respondent filed its Reply in opposition thereto and the matter was referred to the Registrar for allocation of trial dates.

[3] The applicants have now filed the present application praying for an order referring the unresolved dispute to arbitration under the auspices of CMAC. The application is opposed by the respondent which has filed its answering affidavit in opposition thereto.

[4] The applicants state the reasons in support of their application in the founding affidavit. They state that facts of the matter are not complex;

that the amount claimed by the applicants is not substantial; that the nature of the claim is also not complex and that the respondent will not be prejudiced by a referral of the matter to arbitrator.

[5] The respondent, in its answering affidavit stated that the applicants themselves have not acted with haste in having the matter heard by the Court and have to date failed to request for a trial date; that the matter gives rise to complex legal issues; that the nature of the respondents defence requires that the matter be heard in Court rather than at arbitration; and that the amount claimed is substantial.

[6] The dispute herein involves retrenchments. The applicants allege that their retrenchment was irregular as to constitute unfair dismissal because they were not consulted by respondent nor was there an objective criteria for the retrenchment and denies that the respondent replaced them within six months of the retrenchment. The respondent denies this and avers that applicants were consulted and that it employed any new staff. It avers further that the applicants were paid in accordance with the law and that no further payments are due to them.

[7] The President has a discretion in such applications in terms of which he must assess whether the matter considered as a whole lends itself to determination by the more flexible and simple process of arbitration. The President must exercise this discretion judiciously whether the respondent appears before him or not. This is so because the legislature in its wisdom, established CMAC as an alternative dispute resolution mechanism and empowered the President with the duty to allow deserving disputes to be dealt with through such mechanism as soon as a respondent filed its reply to the application for the resolution of an unresolved dispute **(see Rule 18 of the Industrial Court Rules 2007)**.

[8] Having read the pleadings in the main application and in the current application it seems to me that the factual and legal issues to be determine are neither complex nor novel.

[9] As indicated in paragraph 6 above, the dispute involves issues retrenchments. The Courts have dealt with a decided numerous cases including retrenchments for financial reasons and issues raising the question of consultations. These issues do not raise any new or novel questions of law in this matter. There are plenty of precedents

from court judgements that can serve as a guide to any arbitrator tasked with adjudicating on such matter.

[10] I take into account also, that the level of qualifications and the experience of CMAC arbitrators in labour law is vastly improved. According to **Nathi Gumede** in his article **"The Attitude of the Industrial Court to CMAC arbitrations,** all CMAC arbitrators are now in possession of the LLB degree and are mostly admitted legal practitioners." The prejudice that the respondent may suffer if any from being deprived access to court against its will would, in my view, be off-set by the qualifications, knowledge and experience of the arbitrators.

[11] Further the amount sought by the applicants is not substantial even in these times of covid -19 economic hardships, regard being had to the fact that the amount claimed is in respect of two applicants and not a single applicant.

[12] Taking into account all the above factors, the circumstances of this case and the interest of justice and fairness, I make the following order:

1 1.1 The matter is referred to arbitration under the auspices of CMAC.

11.2 Each party is to pay its own costs.

For Applicants: Mr. E. B. Dlamini (Labour Law Consultant)

For Respondent: Mr. Z. Hlophe