



IN THE INDUSTRIAL COURT OF ESWATINI
RULING

Case No. 76/19

In the matter between:

NONHLANHLA S. DLAMINI

Applicant

And

AVENG INFRASET SWAZI (PTY) LTD

Respondent

Neutral citation: Nonhlanhla S. Dlamini V Aveng Infraset Swazi (Pty) Ltd
(76/2019 [2020] SZIC 16 (21 February 2020))

Coram: **S. NSIBANDE JP**

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

Heard: 18 September 2019

Delivered: 25 February 2020

RULING

[1] The Applicant, an adult Swazi female of Tambankulu Estate in the Lubombo Region asserts that she was an employee of the Respondent, Aveng Infraset (Pty) Ltd, a company registered in terms of the company laws of Eswatini and carrying on business at Matsapha Industrial Sites in the Manzini Region.

[2] Applicant asserts that she was in the Respondents employ from 4th June 2004 until 16th August 2017 when she was dismissed. She considers that her dismissal was unfair both substantively and procedurally in that;

2.1 having been accused of having failed to carry out reasonable and lawful instructions, having misrepresented facts and having had a poor work performance, the Respondent failed to prove the said allegations at the disciplinary enquiry.

2.2 the sanction imposed was harsh and contravened the provisions of the Respondent's disciplinary code;

2.3 the Chairperson of the disciplinary hearing found the Applicant guilty and recommended her dismissal and then went on to himself, dismiss the Applicant;

2.4 Applicant was not given an opportunity to be heard at an appeal hearing despite that she noted one.

[3] The Respondent denied that Applicant's dismissal was unfair and avers that she dismissed after committing some misconduct which was proven at a fair disciplinary hearing; that the sanction given to Applicant after she was found guilty was in terms of the disciplinary code of the Respondent; that even though she was given an opportunity to arrange a date for the hearing of her appeal (once it came to Respondent's attention), she refused to do so stating that she was not entitled to leave her new employment to attend the appeal hearing.

[4] The Applicant has now made application to the President for an order referring the unresolved dispute between the parties to arbitration under the auspices of the Conciliation, Mediation and Arbitration Commission (CMAC).

[5] In her founding affidavit Applicant states her reasons in support of her application. She states that even though the amount claimed – E294 155.01 appears to be substantial the legal issues and the facts of the matter are not complex; that the Respondent will suffer no prejudice if the matter is referred to arbitration; that the backlog of cases at the Industrial Court prejudices her in that she has to wait three to four years before the Court hears her matter.

[6] In her submission before Court the Applicant argued that:

6.1 CMAC has a number of experienced legal practitioners with vast experience in Labour Law who can be appointed as arbitrator in this matter and that the Court could direct the Executive Director to appoint a practitioner with experience to arbitrate;

6.2 The amount sought seems substantial however, whether the matter is determined by the Court or by an arbitrator the Respondent can only appeal on matters of law and not fact so that if the Court gets matters of fact wrong the consequences are the same as the arbitrator getting the facts wrong.

[7] The Respondent opposes the application and argues that there are a number of complex factual issues that may arise in the matter, that unfair dismissal itself is a complex matter, that the amount sought is substantial and that the parties have no control over who is chosen as arbitrator, and finally that the Applicant has herself delayed in prosecuting her claim and can not now complain of the backlog.

[8] I have taken note of the submissions by both parties, the pleadings in the main application and in the application for referral and the cases cited by the parties. I am of the view that there may well be facts that are complex that may arise from

this matter. While the issues raised herein are not novel, there appears to me to be many matters in which the parties will disagree particularly on the Applicant's failure to follow instructions, and on her poor work performance. An adverse finding of fact may prejudice the Respondent in that it can not appeal on same. As this Court states **Zodvwa Gamedze v Swaziland Hospice at Home IC Case No. 252/2005**, the potential prejudice of a referral to arbitration arises from one of the parties being deprived against its will from access to a Court of law for determination of the dispute. Where a party faces a substantial claim it is even more prejudicial to subject such party to adjudication by an arbitrator not of his choosing and render the decision of such arbitrator final on all issues of fact (**Sydney Mkhabela v Maxi Prest Tyres Case No. 25/2005**).

[9] It appears also that the Applicant has not treated her claim with due expedition. She was dismissed in August 2017 and only filed her application for the determination of an unresolved dispute in March 2019. When the matter was argued, the parties had yet to hold a pre-trial conference despite Respondent having filed its Reply in April 2019. The Applicant can not plead for an early hearing by way of arbitration when she has herself delayed an expeditious hearing by the Court.

[10] For the above reasons the application to refer the matter to arbitration is refused.

There is no order as to costs.

[11] The Applicant argued further that the Respondent had been sold and that in the event that the referral was refused she sought an earlier date because she may find herself without remedy. The Respondent denied that it had been sold. While we are unable to conclude on the truthfulness of the Applicant's assertions on the evidence available our view is that she has plenty remedies available to her in the event that she is of the considered view that the Respondent will close without settling her claims. The Applicant is free to pursue those options.



S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicants: Mr. Luke Simelane (L.M. Simelane & Associates)

For Respondent: Mr. N.E. Ginindza (N.E. Ginindza Attorneys)

