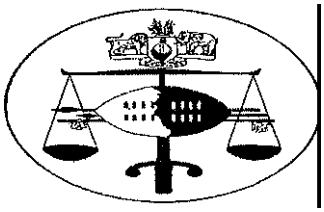

IN THE INDUSTRIAL COURT OF ESWATINI

CASE NO.361/2020

In the matter between:

SIZA KNOWLEDGE DLAMINI Applicant

AND

ESWATINI PARKING RECON TRANSPORTATION SOLUTION (PTY) LTD 1ST Respondent

CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (C.M.A.C) 2nd Respondent

NEUTRAL CITATION: Siza lmowledge Dlamini &Eswatini Parking Recon Transportation Solution (Pty) Ltd (361/2020) [2021] 33/21 (7 May, 2021)

CORAM: **BW MAGAGULA - ACTING JUDGE**
(Sitting with Mr. E.L.B Dlamini & Mr. MDlamini)
(Members of the Court)

DATE HEARD 21 April 2021

DATE HANDED DOWN 07May, 2021

SUMMARY

Respondent has taken points in limine to an application to declare a memorandum of agreement entered into at CMAC. Points in limine without merit, dismissed. The application is dismissed as well. Applicant granted leave to file a fresh application to make the agreement of settlement entered into at CMACan order of Court.

RULING

INTRODUCTION

[1] The Applicant describes himself as a former employee of the Respondent. The Respondent is Eswatini Parking Recon Transportation Solution (Pty) Ltd which carries on business at office No.12 Manzini Shopping mall in Manzini.

[2] The Applicant in his papers has also cited the Conciliation Mediation and Arbitration Commission (CMAC). His basis for citing CMAC is that it conciliated, administered or facilitated the signing of the memorandum of agreement between the Applicant and the 1st Respondent. The said memorandum of agreement is annexed to the application and it appears to be basis of the dispute between the parties.

[3] The 2nd Respondent has not filed any opposing papers. The pt Respondent has elected not to respond to the merits of the application, but only to file a notice to raise points of law.

[4] The ruling will be confined to the points of law raised by the 1st Respondent.

[5] When we heard this matter on the 2ist April 2021, both representatives of the parties indicated that they had submitted comprehensive heads of arguments

and they were in agreement that they wish to dispense with the normal procedure of ventilating oral arguments. We insisted that both counsel should address us, so that if the Court has questions, same could be put to counsel in open Court.

Points of Law

[6] The **1st** Respondent has raised effectively two points of law in its notice dated the 3rd day of March 2021. We will now proceed to analyze same, to assess if they are able to upset the Applicant's application.

Failure to comply with part VIII of the Industrial Relations Act of 2000 as amended.

[7] The 1st Respondent argues that the Applicant's applications fails to comply with the peremptory requirements of part VIII of the Industrial Relations Act of 2000, as amended1. In that, a matter that concerns an employee's terms and conditions of employment or the denial of the right applicable to such an employee in terms of his or her employment, is to be first determined by the Conciliation Mediation Arbitration Commission (CMAC). It can only come to this Court, in terms of section 79 (1) & (2) of the IRA Act.

[8] The Respondent further argues that, the present Applicant's application is one that touches on existing terms and conditions of employment, yet the Applicant has failed to comply with the peremptory requirements of the Act.

[9] We will now consider the relevant section of the Industrial Relations Act that

[1] It will be referred to as the IRA Act in this judgment

the 1st Respondent alleges the Applicant has failed to comply with.

[10] In the notice to raise points of law, the pt Respondent argues that the Applicant has failed to comply the peremptory requirements of part VIII of the Industrial Relations Act of 2000 (as amended). The relevant section that has been cited is section 79 (1) & (2) of the IRA Act, the aforesaid sections states as follows:

79 (I) if there is any question as to whether a dispute that has been reported is one that concerns the-

a) Application to any employee of existing terms and conditions of employment or the denial of any right applicable to any such employee in respect of the employment; or

b) Dismissal, reinstatement or re-engagement of any employee, either party may make an application to the Court for the determination thereof and the Court may determine the matter in summary manner, whether or not by way of hearing witnesses in the matter.

[11] We understand the pt Respondent's argument to be that the Applicant's application falls short of this requirement because the matter has to be first determined by CMAC[2]

[12] We do not read this section to be imposing the prior condition that before an Applicant can approach the Court on the strength of section 79 **(1)** & (2) for the determination of the employee's terms and conditions of employment or the denial of any right applicable to such an employee in tenns of his or her

[2] The Commission for Conciliation Mediation Arbitration Commission

employment, those terms and conditions must first be determined by the Conciliation Mediation Arbitration Commission. The Act does not say so. As we have outlined it above, what the provision of section 79 says, is that if there is any questi n as to whether a dispute has been reported

a) Is one that concerns the application of the employee's existing terms and conditions of the employment and dismissal reinstatement or engagement, either party may make the application to the Court for the determination thereof and the Court may determine the matter in a summary manner. There is nowhere in the section where the section states that CMAC has to be involved. The involvement of CMAC only happens when a report is made under section 76 **(1)** of the **IRA** Act. In that instance, this is what the section states;

76 (1) A dispute may only be reported to the Commission by -

(a)an employer;

(b)an employee;

(c) an applicant for employment in respect of a dispute concerning unfair discrimination under the Employment Act;

(d)an organization which has been recognized in accordance with section 42;

(e) ***a member of a works council;***

(f) a member of a joint negotiating council,

(g)any other organization concerned in the dispute and active in the undertaking where no organization has been recognized in terms of section 42.

(2) 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.

(3) The Commission shall acknowledge receipt of the report and may

(a)request further particulars of any of the matters referred to under section 77(1);

(b)in so far as suitable procedures for settling disputes exist between the parties have not been followed, refer the dispute back to the parties for those procedures to be followed; or

(c)reject the report ifit is frivolous, vexatious or time wasting.

[11] Unless of col)rse the 1st Respondent was refening to the report of dispute that is made under section 76 and 77 but from the reading of the notice to raise points oflaw that is not the issue. The issue is that section 79(1) & (2) has not been complied with.

[12] In our view, the imposition of the involvement of CMAC that the pt Respondent alleges is a peremptory requirement of section 79 of the Industrial Relations Act, is actually not. The involvement of CMAC is not required in terms of section 79

[13] In our view, this point is ill conceived. It has been improperly taken out of context in the matter at hand. It must accordingly fail.

Dispute of fact

[14] The 1st Respondent also argues that the present matter is maned with material disputes of facts which cannot be determined by this Court on motion

proceedings. The argument is further that the issues raised in the papers raise a material disputes of facts, which the current proceedings falls short of dete1mining, without the need for oral evidence to be led.

[15] The Applicant in its notice of motion basically seeks about eleven prayers. We will not belabor this judgment by enunciating each and every one of them, as they fully appear in the notice of motion. We also do not wish to make an opinion regarding the elegance in which these prayers have been drafted. In essence, what the Applicant seeks are mostly declaratory orders, including that the memorandum of agreement that he signed with the 1st Respondent on the 16th of October 2020, be declared to have been repudiated or rejected by the 1st Respondent. The memorandum is also part of the documents before Court.

[16] What further is apparent on the papers is that the pt Respondent has not responded to the merits of the application. We are therefore deprived of the version of the 1st Respondent, which would have enabled us to ascertain the facts that 1st Respondent alleges are too far apart from those of the Applicant; We are therefore handicapped to even get to dissect the extent of the disparity and the facts when there is only one version of facts, which is that of the Applicant.

[17] The 1st Respondent has cited the case **ofNokuthula N.Dlamini vs Goodwill Tsela**[3] **.** The Court in that decision, which we align ourselves with, stated that

[3] **Case (11/2012) [2012] 18 SZSC**

the established and tried judicial practice which now determines the approach of the Courts worldwide, is to be found in a long line of cases across the jurisdiction. A Court cannot decide an application on the basis of opposing affidavits that are irreconcilable or in conflict on the material facts.

[18] The key word that is used by the Court is on the basis of opposing affidavits. This necessitate that the parties should have filed a full set of affidavits before Court. That is not the case in the matter at hand. The 1st Respondent elected not to file an answering affidavit, only a notice to raise a point of law was filed. The first thing that any Court would do, when determining whether there is a dispute of fact is to look at the affidavits themselves. What do we look at, if there is only one affidavit, which is the founding affidavit of the Applicant. Where do we get the material to consider whether the facts which ordinarily should have been set out on the answering affidavit of the 1st Respondent, would be materially at variance with those of the Applicant, so as to render the disputes between the two affidavits to be material, which would then attract the ***ratio decidendi*** as espoused in the Nokuthula N. Dlamini case. The Court in the Nokuthula decision proceeded to state that, where the material facts to the issue to be determined are not in dispute, the application can be properly dete1mined on the affidavits. Again, the catch words used by the Court here are facts and affidavits. In our interpretation, the reference to facts mean the full set of facts by both parties. That is only where the Court can then apply its mind to ascertain if the facts are materially at variance with those of the Applicant.

[19] The cited decision clearly states that the Court has a duty to carefully scrutinize the nature of the dispute with a microscopic lens, to find out if the

fact being disputed is relevant or material to the issue for determination. In the sense that, is it so connected to it in a way, that the detennination of such issue is dependent on or influenced by it.

(20] When applying this principle to the matter at hand, we come to the conclusion that is not privy to the facts that are being disputed by the 1st Respondent. The latter has not filed an answering affidavit. There is no material to ascertain from the relevance or materiality to the issue for detennination. Let alone whether those facts are connected to the issue in any way? The detennination of such an issue is dependent on those facts or influenced by them. In the absence of the version of the facts by the Respondent, where do we get the material to work on?

[21] We agree with the legal principle enunciated in the Nokuthula Dlamini cited by counsel of the 1st Respondent. Unfortunately, it does not support the 1st Respondent's points of law. That decision, presupposes that there must be a full set of affidavits, which is not the case in the matter at hand. This point is also misplaced and should fail as well.

[22] In light of the fact that the 1st Respondent's points of law have failed, ordinarily, this Comt would grant the prayers sought in the Applicant's application. However, we have difficulty to do so. The nature of the pray rs sought, are not supported by facts in the founding affidavit. The requirements of a declaratory order have also not been traversed by the Applicant.

[23] The Courts have dealt with declaratory orders, as far back as the Roman Dutch

law era. In the matter of **Geldenhuys** & **Neethling vs Beuthin4,** in a unanimous decision of the Court of appeal, his Lordship Ines CJ, stated the position to be the following;

"As to the power of the Court to grant declarations of right where such rights have been interfered with, there can be no manner of doubt .....there, however consequential relief is also gained; and, I have been unable to discover any Roman Dutch authority sanctioning the issue of a declaratory order where there has been no interference with the right sought to be declared.

[24] The above authority was also sighted with approval in the matter of **Martha Nokuthula Makhanya** & **3 others vs Sarah B. Dlamini**[5]

[25] The *ratio decidendi* of the judgment is that, the Courts place an importance that before a declaratory order can be granted by the Court, the Applicant must demonstrate that there has been an interference with the right sought to be declared. The Applicant must prove some infringement of those rights.

[26] It is apposite for us at this juncture to consider the nature of the declaratory orders that the Applicant seeks in his application. This can be found in the notice of motion of the Applicant. For instance, prayers 1 is captured as follows;

1.1 Declaring that the Memorandum of Agreement signed by Applicant and 1' [1] Respondent, administered or facilitated by 2[1111] Respondent, on

- 1918 ad 426

[5] Supreme Court of Swaziland Civil appeal Case No.23/16

the 16//' day of October, 2020 hereby is and be repudiated or rejected by JS' Respondent

[27] Other than the fact that this prayer has been *inelegantly* drafted, on closer look, what the Applicant seeks is for the Court to declare that the memorandum of agreement that was signed by him and the 1st Respondent must be declared to have been repudiated and rejected by the 1st Respondent. In fact, the Applicant seeks that we declare that another party who is not him, repudiated or rejected the memorandum of agreement. First, the Applicant brings another issue into the prayer, the issue of repudiation and he makes an impression that it is the 1st Respondent that has repudiated the agreement. At the same time, he wants us to make a declaration that the memorandum of agreement that has been signed by both parties is being rejected by the 1st Respondent. The manner in which prayer has been crafted, is not only confusing, but it also convulates facts and legal principles.. It also bring repudiation of the agreement into play all in one. This makes it difficult to understand the import of the order sought, as a result of clumsy manner in which this prayer has been drafted. The subsequent prayers suffer from the same fate.

[28] In terms the law of contract, there are two types of breaches that can occur where a party defaults in terms of its obligations. The first is what can be refeIT'ed to as a normal breach. "Where. a term, agreed to and set out in the agreement is breached by one of the parties, either not performing at all or performing defectively. The second is a breach refeIT'ed to as anticipatory breach, also lmown as repudiation. The latter takes place before performance is due and may take the form of a statement that the party concerned is not

going to carry out the agreement. Where a party to an agreement breaches its

obligation by the innocent party has an election to either reject the repudiation and enforce the performance thereof or accept the repudiation and cancel the agreement. The general rule is that where innocent party elects to reject the repudiation and enforce performance, they cannot change their mind, unless a new ground for breach arises[6]

[29) The Applicant before Court has not demonstrated that it wishes to accept the alleged repudiation by Respondent and cancel the agreement. Whether in fact the first Respondent has repudiated the agreement, is another issue that has not been determined.

[30) The basis for the Applicant to allege that the 1st Respondent has repudiated the memorandum of agreement facilitated by the 2nd Respondent, is found in the Applicant's affidavit on paragraph C (iii) where the Applicant states the following;

On or about the 19th day of October 2020, when Applicant returned to the work place with the intention to work in accordance to the memorandum of agreement dated 1611 October 2020. Respondent repudiated or rejected the memorandum of agreement by giving Applicant a letter of re- engagement instead of reinstating the Applicant in accordance with the memorandum of agreement".

[6] See Primal Construction CC v Nelson Mandela Bay Metropolitan Municipality (1075/16) [2017]

[31] The Applicant has gone ahead and buttressed his assertion by annexing the letter from the pt Respondent marked, annexure "D". It appears that the 2nd Respondent imposed a condition which was not in the memorandum of agreement, which stated that the Applicant cannot sta1t work until he signs a latter of re engagement.

[32] In as much there is an element of truth in the Applicant's allegation that the 1st Respondent now seeks to comply with the memorandum conditionally, by imposing conditions that were not included in the initial agreement that was signed by the parties. But, he talces it too far to then translate that act into an act of repudiation.

[33] In the matter at hand, ifwe strip this matter of all verbiage, the essence of the Applicant's case is to declare that by its letter of the 16th October 2020, the Respondent repudiated the memonmdum of agreement. What in fact the Applicant seeks, is a declaratory, that the whole agreement to be repudiated on the basis of an alleged breach. There are numerous problems that comes with that route that the Applicant wants to take. He has not demonstrated that prior to coming to Court, 1st Respondent had repudiated the agreement. Even if he had done so, it would be impermissible for the Applicant to resort to the common law remedy of a declaratory order, when there is an adequate remedy provided for in the **Industrial Relations Act of 2000 (as amended).** The Act provides in detail of what the parties should do once a memorandum of agreement is signed at CMAC.

[34] Section 84 (1) (b) of the Act provides as follows;

"(l) if a dispute has been determined or resolved, either before or after

conciliation, the parties shall with the assistance of the commissioner-

a) Prepare a memorandum of agreement setting (SIC) the terms upon which the agreement was reached;

b) lodge the memorandum with-

!) **The commissioner shall lodge it with the Court.**

[35] There is clearly a distinction. It is important at this juncture to appreciate the difference between lodging an agreement with the Court for registration", and lodging a settlement agreement with the Court, in order for it to be made an order of Court.

[36) President P.R Dunseith *as he then was,* in the matter of **Zandile Ntshangase vs Pasadas restaurant**[7]**,** stated that it has been the practice of the Industrial Court for many years, to grant judgments on settlement agreements recorded in writing after conciliation at CMAC. Provided that such settlements have the effect of resolving the reported disputes in whole or in part. The settlement thereby acquires the effect of an order of Court and may be executed upon if either party fails to comply with it.

[37) It is also important at this point to make a comparison of the old section 84 (1) of the Industrial Relations Act which prior to the amendment referred to a memorandum of agreement being lodged with the Court for registration. The new section 84 (1) b merely refers to the memorandum being lodged with the Court and does not state the purpose of such lodging.

[7] Case no.211/2007

[38] Section 84 (2) of the Act was not affected by the amendment and it provides that upon registration, the memorandum shall have the same force and effect as a registered collective agreement. Judge President Dunseith in the cited decision that we have cited above8, enunciated the position of the law clearly where he stated in paragraph 14 of the judgment that a registered collective agreement, by no means has the status or effect of an order of Court, registration is an administrative act not a judicial act.

(39] It is on that basis that we are not satisfied that the Applicant can choose to approach this Court for a declaratory order when he should have simply approached this Court to, first register the memorandum of agreement that was signed by the parties. Second, in the event that the First Respondent resiles from the agreement, he could then enforce the agreement.

[40] To approach this Court for a declaratory that a memorandum of agreement be repudiated, which has not yet followed the nonnal procedure of being registered as a Court order, is resorting to a remedy that is outside the remedies provided for in the IRA ACT. It is also tantamount to imposing a common law remedy, when a legislative remedy is available. In any event, we do not see how the declaratory order will give relief to the Applicant. It is on that basis that, despite having dismissed the *points in limine,* we are not inclined to grant the application as it stands. The prayers are not only confusing, but Applicant has failed to set out a clear case for a declaratory order. The Application in its current form is dismissed in its entirety. Exercising our

[8]zandile Ntshangase vs Pasadas Restaurant IC Case NO. 211/200715

discretionary powers, we however grant the Applicant leave to approach this Court with a fresh application to make the memorandum of agreement signed at CMAC an order of Court. Once that is done, then the Applicant is at liberty to enforce the provisions thereof. In that way, we are of the view that the Applicant would be obtain effective relief quicker, than the route he has chosen to follow in the current application.

ORDER

a) The 1st Respondent's points of law are dismissed.
b) The Applicant's application is dismissed

[41) We make no order as to costs

The Members agree.

)8.W. MAGAGULA
ACTING JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT: *MR. SIBUSISO DLAMINI (SIBUSISO B.DLAMINI)*
FOR RESPONDENTS: *MR. HMAGAGULA (ROBINSON BERTRAM)*