IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No.113/2021

In the matter between:

SWAZILAND UNION OF FINANCIAL INSTITUTIONS AND ALLIED WORKERS UNION Applicant

And

ESWATINI ROYAL INSURANCE CORPORATION Respondent

Neutral Citation: Swaziland Union of Financial Institutions And Allied Workers Union (SUFIAW) vs, Eswatini Royal Insurance Corporation (ESRIC) (113/2021) [2022] SZIC 41 (21 April 2022)

Coram: **V.Z. DLAMINI- ACTING JUDGE**
(Sitting with D. Mmango and MT E Mtetwa - Nominated Members of the Court)

LAST HEARD: 11th February 2022

DATE DELIVERED: 21'1 April 2022

SUMMARY: *Applicant instituted an application seeking an order that a consultant's report compiled pursuant to a job evaluation and salary review exercise be referred to an independent expert for analysis and review.*
HELD: *That Applicant failed to establish a clear right for the order sought as the Terms of Reference, which were formulated jointly to commission the job evaluation and salary review do not confer such right neither does a deed of settlement concluded later following an earlier dispute.*

JUDGEMENT

INTRODUCTION

[1] The Applicant, a trade union incorporated and registered in terms of **Section 27** of the **Industrial Relations Act, 2000 (as amended)** and based in Mbabane, filed an application in terms of **Rule 14** of the Court on the 1st April 2021 in which she sought the following orders:

1. **Ordering and directing the Respondent to refer the Deloitte Consultancy report to an independent expert for analysis and or review;**
2. **Ordering and directing the parties to agree on the independent Consultant to analyse and or review the Deloitte Consultancy report;**
3. **Costs of suit against the Respondent;**

4. Further and or alternative relief.

[2] The Respondent, a company incorporated and registered in terms of the Company laws of Eswatini and having its registered office in Mbabane, opposes the application.

BACKGROUND

[3] The facts are principally common cause. The parties have a recognition agreement spanning over decades and in terms of which their relationship is regulated. Furthermore, over the years the parties have concluded numerous collective agreements covering terms and conditions of employment of the Respondent's employees who are both members of the Applicant and those falling within its bargaining unit.

[4] In February 2018, the parties agreed to commission Deloitte Consulting (Consultant) to conduct a job evaluation and salary review exercise with effect from'January 2017. As part dfthe instructions to the Consultant, th parties formulated Terms of Reference and Guidelines (TORs) for the project. During the course of conducting the aforesaid exercise, the Consultant sub-contracted a portion of the work to another consultant known as Emergence Human Capital (Sub-Contractor). The Sub Contractor was required to conduct salary benchmarking to compare pay levels within the Respondent's undertaking against local relevant institutions.

[5] After the Sub-Contractor completed its task, it handed the Salary Benchmarking Report (First Report) to the Consultant for consideration. The Consultant thereafter compiled its own report (Final Report), which covered the whole scope of work. On or about the 30th September 2019, the parties held a meeting with the Consultant for the latter to interpret the Final Report. Following that meeting, a dispute ensued between the parties.

[6] The Applicant alleged that the analysis, findings and recommendations in the Final Report showed that the Consultant did not adhere to the Respondent's remuneration policy as required by the TORs; it accordingly proposed that the Final Report be referred to an independent expert for analysis and review. The Respondent adopted a contrary view to the Applicant's objection; it then sought to implement the Consultant's recommendations despite the Applicant's protestation.

[7] Pursuant to an application by the Applicant to the Court under **Case no. 274/2019,** the Respondent was interdicted by the Court from implementing the Consultant's recommendation and a consent order was granted in terms of which the parties agreed to meet to formally adopt the Consultant's report and commence negotiations on any areas of concern and where there was disagreement, either party had the right to report a dispute to the Conciliation, Mediation and Arbitration Commission (CMAC).

[8] The parties met several times and save for the adoption of the Consultant's report, they failed to reach consensus on the implementation of Consultant's recommendation. The Applicant subsequently reported a dispute for unfair labour practice to CMAC. The dispute was certified as unresolved by CMAC.

POINTS *IN LIMINE*

[9] The Respondent raised points oflaw in *limine* as follows:

9.1 That the Applicant had not established a clear right (which was a prerequisite for the grant of a mandatory interdict). Put differently, the Applicant did not have a right enforceable in law for the referral of the Consultant's report to an independent expert.

9.2 That the Applicant had failed to set out primary facts that demonstrate that the Respondent had refused to act in fulfillment a right possessed by the Applicant; the relief sought was therefore incompetent.

9.3 That the Applicant fell short of showing that it had no other remedy other than to approach the Court in the manner it had done. That the TORs agreed between the parties established an Appeals Committee to address any grievances arising out of the Consultant's report. Furthermore, that if the Applicant's contention was that the

Consultant ignored relevant considerations when compiling the report, then it should have approached the Court and sought an order to review and set aside the report.

9.4 That the subject matter was a dispute of interest which ought to be dealt with through collective bargaining; consequently, the Court lacked the jurisdiction to grant a mandatory interdict.

9.5 That the relief sought was incongruous with the deed of settlement concluded by the parties under **case no. 274/2019.**

ANALYSIS OF ARGUMENTS

[1O] The Applicant forcefully replied the Respondent's points in *limine* firstly by arguing that having failed to raise the points at CMAC; the Respondent was not entitled to do so for the first time in Court. We were referred to the case **ofThabo Mgadlela Dlamini v Civil Service Commission and 3 others (98/2019) SZIC 41 [30 April 2019],** where the Court held that a preliminary objection relating to prescription of the cause of action should be raised at CMAC failing which a party was barred from raising that point in Court.

[11] It was also contended by the Applicant that all the points in *limine* were vitiated by the deed of settlement signed by the parties. According to the agreement, either party had a right to invoke **Clause 17** of the TORs

reporting a dispute to CMAC; consequently, the Respondent was not legally entitled to seek to deviate from the binding TORs and/or Court Order granted under **Case no. 274/2019.** In any event, TORs and Court Order conferred a clear right upon the Applicant to approach the Court pursuant to the issuance of the certificate of unresolved dispute, which confers jurisdiction upon the Court.

[12] In the case **ofThabo Mgadlela Dlamini v Civil Service Commission and 3 others (supra),** the Court embraced the reasoning and conclusion of the Industrial Court of Appeal in the case of **John Kunene v The Attorney General (02/16) [2016] SZICA 08 (14 October 2016).** The principle enunciated in **John Kunene (supra)** was confirmed by the Industrial Court of Appeal in the case of **The Attorney General v Brian Mahommed (13/2019) [2020] (8th May 2020).**

[13] Nevertheless, in the case of **Inyatsi Construction Group Holdings Limited v David Roberts and another (19/2020) [2020] SZICA 04 (July 2021),** the Industrial Court of Appeal did not follow its earlier decisions in **Thabo Mgadlela Dlamini (supra)** and **John Kunene (supra).** It is not necessary for the Court to determine which of the above decisions of Industrial Court of Appeal is binding on it because in all three cases the question for the determination was, at what stage (CMAC or Court) should a party raise the special plea of prescription in view of

the provisions of

Section 76 (2) of the **Industrial Relations Act, 2000 (as amended) (the Act).**

[14] There is nothing in the reasoning of the two previous decisions of the Industrial Court of Appeal suggesting that the Higher Court laid a principle

that any point oflaw must be raised at CMAC failing which a party is *ipso facto* barred from later raising it in Court. In any event, the onus rests on the Applicant to prove that with full knowledge of its rights, the Respondent waived its right to raise the points in *limine.* **See: Happiness Ginindza v Peak Timbers Limited (IC Case No. 80/2007.** Since waiver is a question of fact, the Applicant has failed to prove that the Respondent abandoned its right to raise the points in *limine.*

[15] It must also be understood that an application for determination of an unresolved dispute under **Section 85 of the Act** is not filed in Court as an appeal or review of the conciliation process to the extent that a party may raise an issue that a point of law is being raised for the first time in Court. It is for this reason that **Rule 8 (2) (b)** of the Court provides that the Respondent's Reply to the Statement of Claim shall contain, if any:

> *"A clear and concise statement of any preliminary legal issue which the respondent requires to be determined before the matter proceeds to trial on the merits.* "

[16] We examine the contents of the TORs and deed of settlement later in the judgment suffice to mention at this stage that there is nothing in those documents to show that by raising the points in *limine* the Respondent deviated from the terms thereof.

[17] In the case of **Thokozile Dlamini v Chief Mkhumbi Dlamini and Another (2/2010) [2010] SZSC 3 at page 8,** the Court said the following:

"Now following the celebrated case of Setlogelo v Setlogelo- it is well established that the pre-requisites for an interdict are clear right, injury actually committed or reasonably apprehended and the absence of similar protection by another remedy ..."

[18] The High Court in an earlier decision in **Mntombi Simelane and Another v Makwata Simelane and Others Civil Case No. 4286/09 at page** 7, said the following:

> *"It is my opinion, that of the three requirements set out in the Setlogelo ante, clear right is of the most paramount to such an application. This is because the question of injury actually committed or reasonably apprehended, as well as alternative remedy, are all predicated on the presence o(a clear right to the subiect matter of the dispute. Therefore, the absence ofa clear right*

automatically renders the other ingredients non-existent. " [Our emphasis]

[19] In the case of **MPD Marketing Suppliers (Pty) Ltd v Roots Construction (Pty) Ltd and Another (2709/09) (2012] SZHC at para 47,** the Court stated as follows:

> *"The Applicant to an interdict, be it interim or final in nature, must therefore demonstrate a clear right to the subject matter of the interdict. The right which the interdict seeks to protect must be a legal right. That right must belong to the Applicant. The facts averred in the affidavit of the Applicant must be such as can establish the existence of the legal right.* " (Emphasis added).

[20] The foundation of the job evaluation and salary review exercise was the TORs. These TORs were themselves a product of collective bargaining. The Court has a duty to protect collective bargaining by enforcing the provisions of the TORs, which is a collective agreement of sorts. **See: Swaziland National Association of Teachers v The Ministry of Public Service and others (220/2016) SZIC 11 (February 24, 2017).**

[21] In the event of any dispute regarding the job evaluation and salary review exercise, **Clause 17** of the TORs provides that either party may report a dispute to CMAC. This provision was reaffirmed by the Court under **Case No. 274/2019.** In that case the Respondent was interdicted from

unilaterally implementing the recommendations of the Consultant; this was because **Clause 13** of the TORs expressly provides that implementation shall be by mutual agreement between the parties.

[22] There is no express or implied provision in the TORs that confers upon the Applicant the right to approach the Court to compel the Respondent to refer the Consultant's report to an independent expert for analysis and/or review and/ or to agree on the identity of that independent expert. The deed of settlement signed on the 29th September 2019 did not *ex post facto* confer the right that Applicant contends it has. If anything, the agreement reinforced the notion that the implementation of the Consultant's recommendations should be by mutual consent following negotiations in good faith on any areas of concern.

[23] Over and above the remedy provided in **Clause 17** of the TORs, **Clauses 6.3** and **6.4** of the deed of settlement provide yet another remedy; that individual employees have the right to lodge internal appeals to the Appeals Committee after implementation of the report, if aggrieved. The remedies open to the parties were regulated by the TORs and deed of settlement. The Court is therefore loathe to incorporate other factors as by doing so we would be imposing different terms and conditions which were never agreed by the parties. **See: Magalela Ngwenya v NAMBOARD (IC Case no. 59/2002).**

[24] The fact that the relief sought by the Applicant also appears in the Certificate of Unresolved Dispute does not mean that the Applicant is given carte blanche to obtain that relief sought in Court. After all, in the case of **National Union of Metalworkers of SA & others v Driveline Technologies (Pty) Ltd & another 2000 (4) SA 645 (LAC); (2000) 21 ILJ 142 (LAC) at paragraph 36,** Zonda AJP (as he then was) made the following statement with regards to the term *'dispute':*

> *"In a line of cases stretching over many years, it has been accepted by our courts that a dispute postulates, as a minimum, the notion of expression by the parties opposing each other of conflicting views, claims or contentions ....In Williams v Benoni Town Council 1949 (1) SA 501(W) at 507, Roper J said, among other things, that a dispute exists, 'when one party maintains one point of view and the other the contrary or a different one ...* "

[25] In the absence on an express or implicit right conferred on the Applicant by the TORs and deed of settlement or even the Consultant's report or Remuneration policy to the relief sought, the dispute serving before the Court is one of interest. Apart from the remedies outlined in the TORs and deed of settlement, by extension other remedies are provided by **the Act,** which are arbitration (provided there is consent by the other party) or industrial action. **See: Sections 85 (3)** and **86 of the Act.**

CONCLUSION

[26) In the premises, the Court holds that the Applicant has not established a clear right for the relief sought and based on the above legal authorities, it is unnecessary to determine the other points in *limine* as the first point disposes off the matter.

[27) In the result, the Court orders as follows:

[a] The Application is dismissed.

[b] Each party to pay its own costs.

The Members agree.

V.Z. DLAMINI
ACTING JUDGE OF THE INDUSTRIAL COURT

For Applicant:	Mr. K.N. Simelane (KN Simelane Attorneys)
For Respondent: ·	Mr. Z.D. Jele (Robinson Bertram)