



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No. 335/2021

In the matter between:

HILDA DLAMINI

Applicant

And

SWAZILAND RANCHES LTD t/a TAMBANKULU ESTATES Respondent

Neutral Citation: Hilda Dlamini vs. Swaziland Ranches Ltd t/a Tambankulu Estates (335/2021) [2023] SZIC 22 (04 April 2023)

Coram: **V.Z. DLAMINI – JUDGE**
*(Sitting with Mr. D. Mncina and Mr. D.P.M. Mmango –
Nominated Members of the Court)*

LAST HEARD: 07 March 2023

DELIVERED: 04 April 2023

Summary: The Applicant filed an application for the determination of an unresolved dispute claiming compensation for unfair dismissal following termination of her services after a retrenchment process. Instead of filing Replies Respondent filed a special plea of non-joinder contending that the application seeks to challenge the retrenchment agreement it concluded with the Applicant's organization; consequently, the organization (Staff Association) should have been joined.

Held: Test for non-joinder reaffirmed. Cause of action is the alleged unfair dismissal of the Applicant by the Respondent; no relief is sought against the Staff Association nor are the terms of the alleged agreement being challenged, more so because it has not been produced in Court. Applicant's claim is not unique as this jurisdiction is replete with similar cases that were decided by the Court since its inception.

RULING

INTRODUCTION

[1] The Applicant instituted in application for the determination of an unresolved dispute on the 22nd November 2021 in which she claimed compensation for unfair dismissal. In response to the application, the Respondent filed a special plea of non-joinder on or about the 9th February 2022. After numerous

postponements, the Court directed the parties to file Heads of Argument addressing the special plea.

SPECIAL PLEA OF NON-JOINDER

RESPONDENT'S ARGUMENTS

- [2] The Respondent contends that the Applicant's services were terminated pursuant to a retrenchment process that culminated in a retrenchment agreement, which was negotiated by her organization, the Tambankulu Staff Association. The Applicant never objected to the terms of the aforesaid agreement and as such she was paid her terminal benefits in accordance with the terms thereof. Furthermore, the Respondent argues that as the Applicant appears dissatisfied with the retrenchment agreement, she has however not repaid the terminal benefits prior to filing her claim.
- [3] According to the Respondent, the Staff Association has a direct and substantial interest in the matter because it was a consenting party to the retrenchment process and the payout to Applicant which forms the basis of the application. The Respondent argues further that the application is fatally defective for non-joinder of the Staff Association which is a necessary party to the proceedings.
- [4] Counsel for the Respondent further submitted that in essence, the Applicant was challenging the terms of the agreement and as such the Staff Association was entitled to defend the validity of the agreement as well as its integrity. Furthermore, counsel contended that the Staff Association would be adversely affected by the judgment of the Court in the main matter. On the legal

postponements, the Court directed the parties to file Heads of Argument addressing the special plea.

SPECIAL PLEA OF NON-JOINDER

RESPONDENT'S ARGUMENTS

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- [3] According to the Respondent, the Staff Association has a direct and substantial interest in the matter because it was a consenting party to the retrenchment process and the payout to Applicant which forms the basis of the application. The Respondent argues further that the application is fatally defective for non-joinder of the Staff Association which is a necessary party to the proceedings.
- [4] Counsel for the Respondent further submitted that in essence, the Applicant was challenging the terms of the agreement and as such the Staff Association was entitled to defend the validity of the agreement as well as its integrity. Furthermore, counsel contended that the Staff Association would be adversely affected by the judgment of the Court in the main matter. On the legal

principles of non-joinder, the Respondent's attorney relied on the case of **Swaziland Development and Savings Bank v Phineas Butter Nkambule (129/2015) [2018] SZHC 123 (12th June 2018)**. He further prayed that the special plea be upheld with costs.

APPLICANT'S ARGUMENTS

- [5] The Applicant's representative submitted to the contrary that the special plea is ill-conceived because the basis of the Applicant's claim is neither the alleged agreement for retrenchment nor the alleged payout. According to the Applicant's representative, the Applicant's claim is predicated on procedural irregularities that occurred during her retrenchment and the substantive fairness of the retrenchment as well as the legal validity of the process following an order of Court setting it aside.
- [6] It was the representative's contention that the Staff Association had no direct and substantial interest in the matter and would not be adversely affected by the order that the Court would grant in the main application. For the test of non-joinder, the Applicant's representative relied on the case of **Amalgamated Engineering Union v Minister of Labour 1949 (3)** [no full citation]. He prayed for the dismissal of the special plea with costs.

ANALYSIS

- [7] A decision that illuminates the test of *non-joinder* was delivered by *MLAMBO J.A.* (as he then was) in the South African Supreme Court of Appeal in the case of **Gordon v Department of Health KwaZulu –Natal (2008) (6) SA 522 (SCA)**. At page 529, paragraph 9 *MLAMBO J.A.* observed as follows:

“The issue in our matter, as it is in any nonjoinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject-matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned. In the Amalgamated Engineering Union case (supra) it was found that ‘the question of joinder should . . . not depend on the nature of the subject-matter . . . but . . . on the manner in which, and the extent to which, the court’s order may affect the interests of third parties’. The court formulated the approach as, first, to consider whether the third party would have locus standi to claim relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be res judicata against him, entitling him to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance. This has been found to mean that if the order or ‘judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests’ of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined.” [Underlining added].

- [8] *BLACK’S LAW DICTIONARY 4th Edition* defines the term “subject-matter” as, “The subject, or matter presented for consideration; the thing in dispute; the right which one party claims against the other...”

[9] In the present matter, the subject matter or cause of action is the termination of the Applicant's services by the Respondent which she claims was unfair; consequently, she claims twelve (12) months compensation for unfair dismissal. No relief is claimed against the Tambankulu Staff Association nor is the alleged retrenchment agreement challenged; it is inconceivable that the Staff Association would be required to defend a claim for unfair dismissal of its member.

[10] With regards to the alleged agreement, the Respondent is in an invidious position because none was produced for the Court to examine its terms in light of the Respondent's submission that the Applicant's claim is an affront to the agreement. If the Respondent feels that the application is intended to indirectly challenge the retrenchment agreement, which has not been shown so far, it is at liberty to subpoena the Staff Association's officials as witness during trial.

[11] In any event, this jurisdiction is replete with decided cases of the Court where employees challenged alleged procedural irregularities that occurred during retrenchment exercises that were found to be fair and payment of terminal benefits accepted by employees prior to approaching the Court. The Applicant's claim is therefore not unique.

CONCLUSION

[12] Based on the above reasons, the special plea falls to be dismissed with costs. The special plea was frivolous; the Respondent neither filed its Replies to the Applicant's Statement of Claim nor annexed the alleged retrenchment

agreement to the special plea to try and persuade the Court that the special plea was sound.

[13] In the result, the Court orders as follows:

[a] The Respondent's special plea of non-joinder is hereby dismissed.

[b] The Applicant is awarded costs of the special plea.

The Members agree



V.Z. DLAMINI

JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT : Mr. A. Fakudze
(Labour Consultant)

FOR RESPONDENT : Mr. S. Dlamini
(Magagula & Hlophe Attorneys)