

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No 253/2023

In the matter between:

THENJIWE DUBE

1st Applicant

NICHOLAS MASANGO

2nd Applicant

**AMALGAMATED TRADE UNION
OF SWAZILAND**

3rd Applicant

And

PREMIER ESWATINI

Respondent

Neutral citation: Thenjiwe Dube and Two Others v Premier Eswatini [253/23]
[2024] SZIC 06 (31 January 2024)

Coram: **NGCAMPHALALA AJ**
*(Sitting with Mr. M.P. Dlamini and Mr. E.L.B. Dlamini,
Nominated Members of the Court)*

Date Heard: 8th December, 2023

Date Delivered: 31st January, 2024

SUMMARY: The Applicants have moved an application before Court for an order compelling the Respondent to undertake a salary review-3rd Applicant, the union dissociated itself from the proceeding stating it is not a party to the proceeding- remaining Applicants filed a notice to amend- the Respondent was opposed to the application and filed a notice to object.

Held – The 1st and 2nd Applicant’s Notice to Amend is hereby dismissed- there is no order as to costs.

RULING ON OBJECTION TO AMENDMENT

- [1] The 1st Applicant is Thenjiwe Dube an adult Liswati female of Maliyaduma in the Manzini District currently residing at Matsapha in the district of Manzini, an employee of the Respondent, and union committee secretary.
- [2] The 2nd Applicant is Nicholas Masango, an adult male of Lavumisa in the Shiselweni District, currently resident at Matsapha Manzini district, an employee of the Respondent and the union committee chairman.
- [3] The 3rd Applicant is Amalgamated Trade Union of Swaziland, whose full particulars are unknown to the Court as same were not provided.
- [4] The Respondent is Premier Swazi (Pty) Ltd, a company duly established in accordance with the company laws of the Kingdom of eSwatini, having its principal place of business situate at King Mswati 111 Avenue, Matsapha industrial Town in the Manzini District.

[5] **BRIEF BACKGROUND**

The present proceedings came before this Court on the 5th October, 2023 seeking an order in the following terms:

5.1 Declaring that the Respondent has an obligation to embark on a salary review for employees falling within the bargaining unit;

5.2 Compelling the Respondent to undertake salary review for employees falling within the bargaining unit;

5.3 Costs of this application to be granted against the Respondent;

5.4 Granting Applicants further and/or alternative relief as the honourable Court deems fit.

[6] The Applicants application was opposed by the Respondent and a notice of intention to oppose was filed by the Respondent on the 5th October, 2023. On the date of the hearing of the matter on the 5th October, 2023, the 1st and 2nd Applicant were represented by Mr. Alex Fakudze, whilst the 3rd Applicant by Mr. Derrick. Dlamini. The 3rd Applicant which is the union, distanced itself from the proceedings, or having any knowledge of the proceedings, and as a consequence thereof they stated that they would not be a party to the proceedings before Court. The matter was accordingly postponed to the 19th October, 2023 to allow the 1st and 2nd Respondent to attend to the anomaly as raised by the 3rd Applicant. Several other postponements of the matter were granted and on the 26th October, 2023 the 1st and 2nd Applicant filed a notice

to amend the application, which was opposed by the Respondent. An objection was accordingly filed by the Respondent, and it was agreed between the parties that the objection application of the amendment notice be argued. The matter was postponed to the 8th December, 2023, on which date the matter was argued, and the ruling by the Court accordingly reserved.

ANALYSIS OF FACTS AND APPLICABLE LAW

APPLICANT'S SUBMISSION

- [7] The first to give evidence was the 1st and 2nd Applicant, it was their submission that the application before Court is for the amendment or variation of the citation of the parties in the application dated the 11th September, 2023. It was their evidence that they seek to remove the 3rd Applicant from the proceedings.
- [8] It was their submission that the removal of the 3rd Applicant from the proceedings is necessitated by the act of the 3rd Applicant, which on the 5th October 2023, through its representative distanced itself from the proceedings. It was their submission that upon the 3rd Applicant distancing itself from the proceedings before Court, they then attended to the amendment of the citation of the application at the instance of the Respondent, who insisted that the said citation be amended.
- [9] An application was made from the bar that the 3rd Applicant be removed from the citation, but in a turn of events same was opposed by the Respondent who insisted that the 1st and 2nd Applicants file a formal application before the

Court. A notice to amend was then filed by the Applicant, and the Respondent in turn filed a notice of objection to the filing of the notice to amend, stating that the procedure as used by the Applicants to amend their paper was irregular and improper. It was the 1st and 2nd Applicants submission that the Respondent insists that the proper process to use is to remove the matter, and file a fresh application before the Court. It was the 1st and 2nd Applicant's argument that it is permitted to move an application to remove a party to an application, as long as there are reasons. As authority, the 1st and 2nd Applicant referred to the case of, **TQM TEXTILE SWAZILAND (PTY) LTD V MOTSA MAVUSO ATTORNEYS AND OTHERS CASE NO. 9/17.**

[10] It was their submission that the principle in the above case is found on page 20, paragraph 54, wherein the Court dealt with the principle and circumstances wherein amendments of citations of pleadings may be allowed. It was their submission that the Court in determining whether an amendment may be allowed stated that the test to be applied is whether the other party will suffer any prejudice. It was the Applicants argument that in the present- proceedings no prejudice will be suffered by the Respondent.

[11] In conclusion it was the Applicants submission is that the law permits for the amendment or variation of the citation by removing or withdrawing a party from the proceedings, and it was its prayer that the Court find in its favor and allow for the amendment of the application by removing the 3rd Applicant from the proceedings.

RESPONDENT'S SUBMISSION

[12] The Respondent began its submission by stating that in the present matter the 1st and 2nd Applicant did not file an application for the amendment of the citation as submitted by its Counsel, but instead they filed a notice to amend the citation, and the objection is taken to the notice as filed by the Applicants instead of filing a proper application. It was its submission that the significance of this, is that in the case of **TQM TEXTILE SWAZILAND (PTY) LTD V MOTSA MAVUSO ATTORNEYS AND OTHERS CASE NO. 9/17** upon which the Applicant seeks to rely on, a proper application was filed, and an affidavit sworn to in respect of the amendment, and reasons for the amendment given. It was its averment that this is not what has transpired in the present application.

[13] It was the Respondent's submission that the present application before Court, as brought by the 1st and 2nd Applicant is defective. It averred that the application is defective in that they have failed to file supporting and/ or confirmatory affidavits giving reasons for the amendment, or an affidavit from the 3rd Applicant in support of the application, as required by the Rules of Court. In other words, no authority was received from the 3rd Applicant to be enjoined in the present proceedings. This was in itself confirmed by the 3rd Applicant's representative who stated that they were not party to the proceedings.

[14] It was its submission that in an attempt to remedy this position, the 1st and 2nd Applicant proceeded to file the notice to amend, in terms of which they seek to:

“Amend the citation of the application by removing the 3rd Applicant as a party to the proceedings”.

It was its argument that it objects to this amendment, is on the grounds that, the 1st and 2nd Applicant seeks to remove the union being the 3rd Applicant as one of the Applicants, and that can only be achieved by notice of motion. Further a Founding Affidavit cannot be amended by notice, as an affidavit cannot be amended in terms of **Rule 28** of the **High Court Rules**, without an application being filed. Lastly the proper way to remove the 3rd Applicant is to withdraw the application before Court, and serve the Respondent with a fresh application, that does not have the 3rd Applicant as a party.

[15] It was its further argument that the 1st and 2nd Applicants reliance on **Rule 23** of the **Industrial Court Rules**, is misguided. This is because Rule 23 provides for the correction of incorrectly or defectively cited parties, yet in the present application the 1st and 2nd Applicants seek the entire removal of the 3rd Applicant as a party to the proceedings. It was its submission that there is a need for the interpretation of Rule 23 (5), primarily because this provision is misconstrued to mean litigants may delete parties from the proceedings as they please, without filing a proper application and supporting affidavit, in support of the amendment, and further state reasons for the amendment.

[16] It was its further argument that in the Applicants Founding Affidavit page 20, paragraph 1.4, the Deponent is the 1st Applicant, who stated that she is duly

authorized to file the application on behalf of all the Applicants. This averment by the 1st Applicant if the amendment of the citation as prayed for by the 1st and 2nd Applicant were to be granted, would render the Founding Affidavit inconsistent with the notice of motion.

[17] It was its submission that it cannot be ignored by the Court, that when the 1st Applicant deposed to the affidavit, she stated under oath that she had the required authority to institute the proceedings for the other Applicants. This means that certain averments as contained in the Founding Affidavit will be rendered untrue, should the deletion or removal of the 3rd Applicant be permitted. In essence if the amendment were to be allowed by the Court, there would arise a need for the Founding Affidavit to be amended so as to align it with the Notice of Motion in particular the prayers, as prayed for by the Applicant as the prayers will render the matter incompetent, as the prayers not only talk to the 1st and 2nd Applicant, but the membership of the 3rd Applicant in the bargaining unit. Therefore, if the Union is no longer a party to the proceedings, the prayers as of the notice of motion are rendered incompetent.

[18] In conclusion it was the Respondent's submission that the proper manner that should be used by the Applicant is the filing of a fresh application before the Court. In support of its argument the Respondent referred the Court to the case of, **TSELA V MAZIBUKO (7/20190 [2019] SZICA 11**. It was its prayer that the notice of amendment by the Applicants be dismissed with costs.

APPLICABLE LAW

[19] In terms of **Rule 23 of The Industrial Court Rules, 2007**, which makes provision for the amendment of citation of a party, in particular Rule 23 (5); *“The Court, if a party is incorrectly or defectively cited, on application and on notice to the party concerned, correct the error or defect and the Court may make an order as to costs where appropriate.”*

From the reading the Court will only issue an order to correct an error or defect in citations, where either of the parties is incorrectly or defectively cited.

[20] When it comes to interpretation the Court in the case of, **NATAL JOINT MUNICIPALITY PENSION FUND V ENDUMENI MUNICIPALITY 910/2010 [2012] 2 ASCA 13**, the proper approach to interpretation was adopted, in paragraph 18 which reads;

“The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provisions in light of the document as a whole, and the circumstances upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighted in the light of all these factors. The process is objective not subjective. A

parties as cited. In the present application the 1st and 2nd Applicant wish to remove the 3rd Applicant from the proceedings completely, who has stated that they were not aware of the proceedings before Court, and are not a party to the application.


[23] As correctly argued by the Respondent, the act of removing the 3rd Applicant has a significant and adverse effect on the Affidavit as filed by the Applicants, and the prayers as prayed for. The 1st and 2nd Applicant if the Court were to grant in their favour, would further be required to amend the Affidavit as filed, to align it with the prayers as appears in the notice of Motion. Failure to do so would amount in the 3rd Applicant suffering prejudice as the prayers would also affect its members in the bargaining unit. Thus, it is evident that the remaining Applicants will be required to file an application of amendment of the pleadings and the prayers themselves, and in the process drag the matter which is not in the interest of both parties.

[24] Having considered the evidence of both parties, and the law on interpretation, the Court finds that Rule 23 (5) does not apply in the present matter. The 1st and 2nd Applicant's Notice to Amend dated the 24th October, 2023 is therefore dismissed. The 1st and 2nd Applicant may if they wish to pursue the matter file a fresh application. There is no order as to costs.

[25] The Court therefore makes the following order:

- 1) The 1st and 2nd Applicant's Notice to Amend dated the 24th October, 2023 is dismissed
- 2) There is no order as to costs.

The Members Agree.



B. NGCAMPHALALA
ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

FOR APPLICANT: Mr. A. Fakudze

FOR RESPONDENT: Mr. V. Mbingo
(Robinson Bertram)