



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No 244/2023

In the matter between:

NOMPHUMELELO MASIKA

Applicant

And

**NONTSIKELELO DLAMINI N.O
WEAR WELL CLOTHING (PTY) LTD**

1st Respondent
2nd Respondent

Neutral citation: Nomphumelelo Masika v Nontsikelelo Dlamini N.O and Another Swazi Observer (Pty) Ltd (244/23) [2024] SZIC 09 (08 February, 2024)

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

DATE HEARD: 12th December, 2023

DATE DELIVERED: 08th February, 2024

SUMMARY: Application before Court seeking condonation for late filing of review application for a Memorandum of Agreement signed at the Conciliation, Mediation, Arbitration Commission (CMAC)- application is opposed- 2nd Respondent raised points in limine- non joinder- conciliation proceedings may not be disclosed (CMAC Rule 20)

Held –

- 1. Point in limine on non joinder upheld.***
- 2. Applicant ordered to join the Conciliation, Mediation, and Arbitration Commission (CMAC) as a party.***
- 3. No Order as to costs.***

RULING ON POINTS IN LIMINE

- [1] The Applicant is Nompumelelo Masika an adult LiSwati female of Sicelwini in the District of Manzini.
- [2] The 1st Respondent is Nontsikelelo Dlamini Commissioner at CMAC and is cited herein in her official capacity as the Conciliating Officer who presided over the proceedings sought to be reviewed and corrected or set aside of herein.
- [3] The 2nd Respondent is the Applicant's former employer, and whose full and further particulars were not provided to the Court.
- [4] The present proceedings seek condonation for the late filing of a review application of a Memorandum of Agreement. The Applicant further seeks the correction and setting aside of the Memorandum of Agreement. The

Applicant has now approached the Court seeking an Order in the following terms:

4.1 Condoning the late filing of Review Application of the Memorandum Agreement, conciliation at CMAC ref no. SWMZ 279/23;

4.2 Calling upon the Respondent to show cause why such proceedings should not be reviewed and corrected or set aside; and

4.3 Calling upon the Conciliation Officer, to dispatch, within fourteen days of receipt of the notice of motion, to the Registrar the record of such proceedings sought to be reviewed and corrected or set aside and the reasons as she is by law required or desires to give or make, and to notify the Applicant that she has done so.

4.4 Costs of suit if matter is opposed.

4.5 Further and/or alternative relief.

[5] The Applicant's Application is opposed by the Respondent and an Answering Affidavit was duly filed and deposed thereto by Mr. Mahmudur Rahman the Respondent's Director. The Applicant thereafter filed its Replying Affidavit.

- [6] The matter came before Court on several occasions and postponed to facilitate the filing of pleadings in the matter. On the 6th December, 2023 the 2nd Respondent filed a notice to raise points *in limine*. The parties agreed on the filing dates for the outstanding pleadings, and heads of arguments. The matter was allocated the 14th December, 2023 for argument on the points in limine as raised by the 2nd Respondent, and was accordingly argued on the 14th December, 2023 and judgment reserved.

ANALYSIS OF FACTS AND APPLICABLE LAW

- [7] The Respondents has raised some points *in limine* through a notice to raise points filed by it on the 6th December, the points as raised were non joinder, conciliation proceedings may not be disclosed (CMAC Rule 20). The parties agreed that the Court would deal with the points *in limine* first, and accordingly the Respondent was first to make submissions.

Non joinder

- [8] It was the Respondent's averment that the matter before Court revolves around a Memorandum of Agreement that was reached and signed between the parties on the 25th July, 2023 during conciliation at **CONCILIATION, MEDIATION, ARBITRATION COMMISSION (CMAC)**.

- [9] The nature of the dispute that led to the matter being at CMAC was that of automatic unfair dismissal of the Applicant. It was the Respondent's averment that after conciliation of the matter, the parties entered into the Memorandum of Agreement, which is found from pages 13-14 of the Book of Pleadings.

- [10] It was its submission that the parties entered into the agreement, during conciliation after the Commissioner had listened to submissions from both parties and duly endorsed a Memorandum of Agreement at the instance of both parties. The Applicant now seeks to set aside the Memorandum of Agreement. It was its averment that the Applicant in the agreement was offered her job back, and accordingly the matter was resolved and settled.
- [11] It was its argument that it is on these grounds that it was challenging the Applicant's application, as the agreement was entered into amicably and voluntarily without any duress. On the point *in limine* on non-joinder, it was its submission that the Applicant's application is defective, because she has failed to join the Commission, as a party to the proceedings. It was the Respondent's submission that the 1st Respondent cannot be sued without citing the Commission, this is because on the 25th July, 2023, when the 1st Respondent conciliated over the matter, she did so in terms Section 81 of the **Industrial Relations Act 2000 (as amended)**, in her professional capacity.
- [12] It was its further submission that in terms of section 62(2) (a), the Commission may sue, and be sued in its own name. It was its averment that the party that the Applicant is required to sue is the Commission and not the Commissioner, as she has been appointed by the Commission to act on its behalf, thus rendering the application before Court defective, and accordingly it should be dismissed.

[13] On the second point *in limine* it was its argument that in terms of the **CMAC RULES IN PARTICULAR RULE 20 (1) (2),**

“(1) Conciliation proceedings are private and confidential and are conducted on a without prejudice basis. A person shall not refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing. (2) A person, including a commissioner, shall not be called as a witness during any subsequent proceedings in the Commission or any court to give evidence about what transpired during conciliation.”

[14] The 2nd Respondent argued that conciliation proceedings are private and confidential, and further conducted on a without prejudice basis. It averred that no person may refer to anything said at conciliation proceedings during any subsequent proceedings unless the parties agree in writing. Further it was its argument that the Applicant’s application is bad in law and must be set aside and/or dismissed forthwith it is vague and embarrassing and lacks certain necessary averments to disclose a cause setting aside the Memorandum of Agreement dated the 25th July, 2023, therefore on these points *in limine* the application should be dismissed with costs.

[15] In rebuttal it was the Applicant’s submission that the matter in which the 2nd Respondent has instituted its plea for non joinder is unprocedural, as filing of same was out of time, as the 2nd Respondent failed to raise same in its Answering Affidavit, and only raised the points *in limine* after all the pleadings had been closed. Further it was its submission that in terms of the

Industrial Court Rules, 2007 in particular Rule 14 (8) which provides as follows;

“The answering affidavit shall; contain the information required in subrules 14 (4)9a), (b) and (c) and must clearly and concisely set out-

(a) any preliminary legal issues which the Respondent wishes to raise;

(b) which allegations in the founding affidavit are admitted and which are denied;

(c) all material facts and legal issues upon which the Respondent relies in its defence.”

The 2nd Respondent was required to raise the points in limine in its Answering Affidavit and not on notice. Further it was its argument that the point *in limine* as raised by the 2nd Respondent should have been preceded by an application for condonation on good cause shown, therefore same is defective.

- [16] The Applicant proceeded to submit that the 2nd Respondent acquiesced to the citation of the parties in the proceedings, as appears in its Answering Affidavit in the book of Pleadings at page 20 paragraph 4, and the 2nd Respondent cannot now blow both hot and cold. It was further her submission that the 1st Respondent was cited in her official capacity, which renders the 2nd Respondent's special plea for non joinder a technicality that cannot be countenanced by the Court to dispose of its application. In support of the argument the Applicant referred the Court to the case of;

MADVUBADLE INVESTMENT (PTY) LTD V HEAVY PLANT CENTRE (PTY) LTD (576/20) SZHC 260 and the case of, **SWAZI MTN**

**LIMITED V PRESIDING JUDGE OF THE INDUSTRIAL COURT
AND OTHERS (325/16) [2016] SZHC 33.**

[17] The Applicant proceeded to argue that the Commission waived its legal interest as it failed to comply with the statute establishing it and its obligation to lodge the Memorandum of Agreement with the Court as required by law. Further it was its submission that the Commission has been notified of all processes pertaining to the proceedings and has not filed any papers opposing same. It was her averment further that being so, the Commission cannot be joined as a party in the proceedings as its only interest is not a direct and substantial one in the order as sought, but a financial interest as the 1st Respondent's employer. In support of this argument the Court was referred to the case of, **SWAZILAND DEVELOPMENT AND SAVIBNGS BANK V PHINEAS BUTTER NKAMBULE (129/2015) [2018] SZHC 123.**

[18] In closing it was its argument that the raising of the points *in limine* by the 2nd Respondent is merely a delaying tactic, and abuse of the Court process, it was the Applicants argument that she has a right to pursue her Constitutional right to be afforded a fair hearing. It was her prayer therefore that the points *in limine* as raised by the 2nd Respondent be dismissed with costs.

APPLICABLE LAW

[19] In law the answer on whether or not a party has an interest in proceedings, is determined on whether or not the impugned decision can be carried into

effect without adversely affecting that particular party. **HERBSTEIN AND VAN WINSEN, CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA, 4th, 1997;**

“The right of a defendant to demand the joinder of another party and duty of the court to order such a joinder or to ensure that there is waiver of the right to be joined are limited to cases of joint owners; joint contractors and partners; and cases in which the other party has a direct and substantial interest in the issues involved and in the order that the court might make.”

[20] In the case of **ALMAGAMATED ENGINEERING UNION V MINISTER OF LABOUR 1949 (3) SA 631 AT 637**, the learned Judge stated the following;

“If a party has a direct and substantial interest in the order the Court might make in the proceedings, or if such order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined.”

The same sentiments were shared in the case of, **SABELO MDUDUZI MASUKU N.O V MERIDIEN RESERVES PTY LTD APPEAL CASE NO 24/00,**

“The Court will not for instance issue a decree, which will be a brutum fulmen because some person, who will have to co -operate in carrying it into effect, will not be bound by it.”

[21] The Courts have suggested two tests in order to decide whether a third party has a direct and substantial interest in a matter. The first is to consider whether the third party would have *locus standi* to claim relief concerning the same subject matter. The second, to examine whether a situation could arise in which, because the third party has not been joined, any order the Court might make would be *res judicata* against him, entitling the third party to approach the Court again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first instance.

[22] The Applicant has forwarded two arguments against the point *in limine* as raised by the Respondent on *non-joinder*, it is her argument that the Respondent has failed to raise the point *in limine* in its pleadings and filed a notice to raise points after pleadings had been closed. It was her further argument that there is no need to cite the Commission as it has cited the 1st Applicant in her official capacity as a Commissioner.

[23] In the case of **COMMISSIONER OF POLICE V MKHONDVO AARON MASEKO CIVIL APP NO.3/11**, the Court stated:

“...non joinder is a matter that no Court even at the latest stage in the proceedings can overlook, because the Court of Appeal cannot allow orders to stand against persons who may be interested, but who had no opportunity to state their case.”

Meaning that the issue of non-joinder may be raised at any time during the proceedings and the Courts are required not to overlook the point when so

raised. So, the Applicant's argument that the 2nd Respondent has raised the point *in limine* after the filing of pleadings falls away, as the Court cannot overlook the raising of the point *in limine*.

[24] The Court further looked at **Section 75 of the Industrial Relations Act 2000 (as amended)** which provides:

“(1) No action or proceedings may be instituted against-

(a) a member of the Governing Body;

(b) an employee of the Commission;

(c) a member of any committee established by the Governing Body;
and

(d) any person whom the Governing Body has contracted to do work for the Commission;

For or in respect of any act or omitted to be done in good faith in the exercise of that person's function under this Act.

(2) the persons referred to in subsection 1(a) to (d) shall not disclose to any person or in any Court any information, knowledge or document acquired in the course of performing their function except on an order of any Court.”

[25] The Applicant concedes that it has not cited the Commission as a party to these proceedings, but argues that the Commissioner was served in her

official capacity, and by virtue of citing the 1st Respondent in her official capacity the Commission is aware of the proceedings before Court. From the book of pleadings, it is evident that the 1st Respondent was served with the pleadings at one of the Commissions offices on the 21st September, 2023. However, despite this, the Court cannot lose sight of **Section 75 of the Industrial Relations Act (supra)**, and the fact that the Commission in itself has not been served. This is in light of the fact that any order that may be issued by the Court will require it to be executed by the Commission. The Court as it has been stated above will be reluctant to issue out an order that may prejudice a party not brought before Court. Therefore the 2nd Respondent point *in limine* of non-joinder is accordingly upheld.

[26] It appears to be settled law now that the effect of non joinder in law is not to result in the dismissal of the whole matter. In the case of, **PIET ZACHARIA EBERSOHN N.O V SWAZILAND DEVELOPMENT AND SAVINGS BANK AND ANOTHER CASE NO 65/2015**, the Court held:

“It would appear to be settled law now that the effect of non joinder in law does not result in the dismissal of a matter. Non joinder is dilatory in that the Court may still stay the proceedings until the party is joined or given notice of the proceedings.”

The Court associated itself with this legal position, upholding the point *in limine* on mis joinder does not result in the dismissal of the entire matter. The Applicant is therefore ordered to join the Conciliation, Mediation, and

Arbitration Commission as a party to the proceedings. The Court will not deal with the remaining point as raised by the 2nd Respondent.

[27] The Court accordingly makes an Order in the following:

- 1) The point *in limine* as raised by the 2nd Respondent on non joinder is upheld.
- 2) The Applicant is directed to join the Conciliation, Mediation, and Arbitration Commission (CMAC) as a party to the proceedings.
- 3) There is no order as to Costs.

The Members Agree.



B. NCCAMPHALALA

ACTING JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

FOR APPLICANT: T. Mabuza (Labour Consultant)

FOR RESPONDENT: V. Magagula (Demhleta Legal)