IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

Case No. 19/2022

In the matter between:

SWAZILAND UNION OF FINANCIAL INSTITUTIONS AND ALLIED WORKERS UNION Appellant

And

ESWATINI ROYAL INSURANCE CORPORATION Respondent

Neutral citation: Swaziland Union of Financial Institutions and Allied Workers Union v Eswatini Royal Insurance Corporation [19/2022] [2023] SZIC 03 (21 February 2024)

Coram: **S. NSIBANDE J.P. N. NKONYANE JA AND A.M. LUKHELE JA**

Date Heard : **05 December 2022**

Date Delivered: **21 February 2024**

Summary: *Collective bargaining – Salary review and job evaluation agreement – Demand that Terms of reference give rise to real right that can be adjudicated upon.*

Held *– Right remains right of interest enforceable only through Industrial Action in terms of the Industrial Relations Act.*

S. NSIBANDE J.P

JUDGMENT

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1. This is an appeal from the judgment of His Lordship V.Z Dlamini AJ (as he then was) in Industrial Court case No. 113/2021 which was handed down on 21st April 2022. The appellant, Swaziland Union of Financial Institutions and Allied Workers Union, was the applicant in the Court a quo and the present respondent, Eswatini Royal Insurance Corporation, was the respondent then. I will refer to the parties as the Union and the employer/Corporation henceforth.

2. **BACKGROUND**

The union is registered in terms of the Industrial Relations Act, 2000 (as amended) and is recognised by the Corporation as the employee representative at its undertaking.

3. In February 2018 the parties agreed to commission Deloitte Consulting (the consultant) to conduct a job evaluation and salary review exercise with effect from January 2017. The parties further agreed on the Consultant's terms of reference and guidelines for the exercise. At the end of the exercise, the consultant prepared its report and on or about 30th September 2019 met the parties to interpret the report. The appellant was unhappy with the report and alleged that the analysis, findings and recommendations showed that the consultant had not adhered to the respondent's remuneration policy as required by the terms of reference. It therefore sought that the final report be referred for analysis and review by an independent expert. In pursuit of this goal, the appellant approached the Court a quo seeking the following orders against the Respondent;

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 an independent Consultant to analyse and/or review the Deloitte Consultancy report;*

3. *Costs of suite against the Respondent.*

4. *Further and/or alternative reliefs.*

4. In its opposition to the application in the Court a quo, the respondent raised the following points of law;

4.1 *That the Applicant had not established a clear, right for the referral of the Consultant's report to an independent expert;*

4.2 *That the Applicant had failed to set out primary facts that demonstrated that the Respondent had refused to act in fulfillment [of] a right possessed by the Applicant;*

4.3 *That the Applicant fell short of showing that it had no other remedy other than to approach the Court in the manner that it had done.*

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

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

5. Having heard the parties, the Court *a quo* came to the conclusion that the Applicant had ***"not established a clear right for the relief sought and [that] based on the above legal authorities it is unnecessary to determine the other points in limine as the first point disposes of[f] the matter."***

6. Being dissatisfied with the Court *a quo's* decision the appellant launched this appeal on the following grounds:

1. The Court a quo erred in law in finding that the Appellant had no clear right to the Orders it sought either in terms of the Terms of Reference or the Deed of Settlement (Court Order). The Court a quo made this Order or finding of a lack of a clear right, despite finding, in paragraph 6 of the Judgment that there was a dispute between the parties of whether the Consultant's report adhered to the Respondent's Remuneration Policy as per the Terms of Reference.

2. The Court a quo erred in law in finding that clauses 6.3 and 6.4 of the Deed of Settlement, provided the Appellant with

alternative remedies to the Appellant's right or remedy to report a dispute provided for in the Terms of Reference and /or Deed of Settlement.

3. *The Honourable Court a quo erred in law in holding that the dispute between the Appellant and the Respondent was one of interest and thus the Appellant had other remedies provided by the Industrial Relations Act.*

4. *The Court a quo erred in law in holding that there was no express or implied provision in the Terms of Reference that conferred upon the Appellant 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 Court a quo ought to have found that the Appellant had a right in law conferred by the Terms of Reference and/or Deed of Settlement to report a dispute and implied to the exercise of such right, the Appellant was entitled to pray for any order for the resolution of the dispute.*

7. **GROUND ONE – CLEAR RIGHT**

The appellant took issue with the *Court a quo's* finding that it had no clear right to the orders sought, either in terms of the Terms of Reference or the Deed of Settlement entered into by the parties and made an order of the Court under Case no. 247/2019. It was the appellant's submission that clause 17 of the Terms of Reference gave each party the right to report a dispute to the CMAC, in case of disagreement; that this right had been exercised by the appellant, and that the dispute that had arisen had been declared as unresolved; and that the parties had settled the unresolved dispute and the Deed of Settlement had been endorsed by the *Court a quo*; that should the parties fail to reach consensus on any aspect of the report, then either party had the right to invoke clause 17 of the Terms of Reference and Guidelines by reporting a dispute to CMAC.

8. The appellant contended that while the terms of reference do not provide remedies or specify how disputes are to be resolved, should they arise, the appellant, in exercising its right to report a dispute, was entitled to seek a remedy in Court once that dispute was declared unresolved. Put another way, despite the silence of the

Terms of Reference on remedy, it was within the contemplation of the parties that the right to report a dispute would mean a right to the resolution of that dispute.

9. **AD GROUND 2 – ALTERNATIVE RELIEF**

The appellant submitted that the *Court a quo* erred in law in finding that the appellant had an alternative remedy in terms of clauses 6.3 and 6.4 of the deed of settlement signed by the parties and endorsed as an order of Court under **case no. 274/2019**. It was submitted that in terms of clause 6.3 of the Terms of Reference, the appellant acquired a right to invoke clause 17 of the Terms of Reference and not a remedy available to the appellant as a party to the collective bargaining instrument – the terms of reference.

10. **AD GROUND 3 – DISPUTE OF INTEREST**

The appellant submitted that the *Court a quo* erred in law in holding that the dispute between the parties was one of interest. It was submitted on behalf of the appellant that the parties foresaw and /or contemplated the nature of the dispute that may arise between them when they formulated the terms of reference and agreed that such

dispute be referred to CMAC, that the agreement that such dispute that this right did not refer to the individual rights of the employees but was a right attached to the appellant. Once the parties had failed to reach consensus on the report, it was submitted, the appellant was entitled to report a dispute. The dispute having been unresolved, the appellant was further entitled to approach the Court a quo for a resolution of the dispute. The remedy said to be the appellant's alternative remedy was not such remedy as it was a remedy available to individual employees and would be referred to CMAC thus excluding that it would be dealt with by means of other remedies provided for in the **Industrial Relations Act** or by means of industrial action; that the terms of reference had to be enforced as they were a collective agreement of sorts as said by the *Court a quo* itself at paragraph 20 of its judgment. In this regard the appellant cited the following cases – **Swaziland Railways Staff Association v Swaziland Railways Case No. 345/2012** and **Swaziland National Association of Teachers (SNAT) and Three Others v The Ministry of Public Service and another ZC Case no. 323/17** for the proposition that once an employer and her employees sign a

Collective Agreement, it becomes part of the terms and conditions of employment between them.

In a nutshell, the appellant's submission in this regard was that the Terms of Reference constitute an agreement that gave the parties rights without specifying remedies; that by agreeing to the terms of reference and agreeing that any dispute arising out of the salary review exercise be referred to CMAC, the respondent had agreed to a resolution of such dispute that was similar or the same to that of a dispute of right either through CMAC or through the Courts, as the case may be.

11. **AD GROUND 4**

The appellant submitted that the *Court a quo* erred in law in holding that there was an express or implied provision in the Terms of Reference that conferred upon the appellant 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 to agree on the identity of the independent expert.

Further, that the Honourable *Court a quo* in making such finding erroneously neglected to consider that, implied to a report of a

dispute or exercise of such right, is the seeking of an outcome or a prayer for the resolution of that alleged dispute. The Terms of Reference obligate the parties to refer a dispute to CMAC and in terms of the Report of Dispute form, in particular clause 6.3 of the Report of Dispute Form, found at page 83 of the record, a litigant or Applicant at CMAC is required to state the outcome that he or she requires from Conciliation; that is exactly what the Applicant did at CMAC, and after the dispute was declared unresolved, approached the Honourable *Court a quo* to seek the same outcome or prayer, which in any event, was not necessarily supposed to appear or be specified in the Terms of Reference.

12. **THE REPSONDENT'S CASE**

The Respondent commenced its submissions with the assertion that the Deloitte Consultancy Report was in accordance with the Terms of Reference and that it had achieved the mandate sought. In so far as the respondent was concerned, the parties had agreed on a process to be followed in respect of the salary review and the Terms of Reference were a product of that agreement. It was the respondent's

submission that the appellant had no right to seek that it be forced by the Court to agree on another expert reviewing the Deloitte report.

13. The main thrust of the respondent's submission both in its heads and before Court was that the appellant had sought a mandamus being a mandatory final interdict, directing the respondent to agree to submit the Deloitte report for quality assessment by another consultant. The submission was that the appellant had failed to satisfy the requirements for the grant of a mandatory interdict. It was argued firstly, that the appellant had failed to show that it had a right to have the Deloitte report reviewed by another consultant and that that right had been unlawfully infringed by either the respondent or the consultant or that a threat to infringe that right had been made. It was submitted that this right had to be established clearly and not be subject to debate or conjecture or speculation. The Court was referred to the matter of **Mantombi Simelane v Makwata Simelane High Court Case No.4286/2009** and **MPD Marketing Supplies (PTY) LTD v Roots Construction (PTY) LTD and Another High Court Case No. 2709/2009**.

14. The respondent's submission was that the appellant did not have a clear right to have the Deloitte report referred to another consultant; that it had been a party to the agreement that appointed Deloitte as the consultant to undertake the salary review exercise and that, that agreement did not provide any other remedy save for the appeals process agreed upon. The submission was that the appellant had failed to establish the source and nature of that right – whether it was founded in contract, statute or any other source of law.

15. With reference for the case of **Diepsloot Residents and Landowner's Association v Administrator Transvaal 1994 (3) SA 336,** it was submitted that the appellant had to show that it had a clear right to a mandatory interdict compelling the respondent to refer the Deloitte report to an independent expert for review. It was further submitted that no such right was established and proved by the appellant.

16. The respondent continued to set out other requirements for the grant of a mandatory interdict which, it submitted the appellant had failed to

satisfy, i.e. the presence of an injury actually suffered or reasonably apprehended; and the absence of an alternative remedy.

17. The thrust of the appellant's case is that the Terms of Reference and the Deed of Settlement in case 247/2019 establish the appellant's clear right that the Terms of Reference giving the right to the appellant to invoke Clause 17 thereof by reporting a dispute to the Conciliation Mediation and Arbitration Commission (CMAC) gave the appellant a right to seek an alternative that could be enforced by the Court. Further that the Terms of Reference constitute a type of collective agreement that the Court a quo was enjoined to protect.

18. The *Court a quo*, in dealing with the points raised by the respondent took the attitude that the establishment of a clear right was most paramount to an application for an interdict and that the absence of a clear right automatically rendered the other requirements non-existent. Consequently, once it found that the appellant had not established a clear right for the relief it sought it did not consider whether the other pre-requisites were present. In paragraph 26 of its judgment, the Court a quo concludes that *"[26] ... 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 in limine disposes off (sic) the matter."*

19. A distinction has always been drawn in law between disputes of right which can be adjudicated or arbitrated upon and disputes of interest which must be resolved by negotiation or, failing agreement, industrial action. This distinction is expressly drawn by our **Industrial Relations Act 2000** (as amended). The pertinent section of the Act, **Section 86 (1)** provides that *"... any party to a dispute may take a lawful action by way of a lock out or a strike if:-*

(a) the dispute has been certified as an unresolved dispute under Section 81 (5);

(b) the dispute concerns a matter other than one referred to in Section 85 (2) ;

(c) ...."

19. **Section 85 (2)(a)** provides that; *"If the unresolved dispute concerns the application to any employee of existing terms and conditions of employment, reinstatement or re-engagement either part (sic) to such*

a dispute may refer the dispute to the Court for determination or if the parties agree, refer the dispute to arbitration."

20. Ordinarily, issues pertaining to salary reviews and job evaluations do not involve existing terms and conditions of employment nor do they involve reinstatement or re-engagement. These are issues that are usually the subject matter of negotiation between an employer and her employees. It is normally through collective bargaining that an employer will undertake a salary review and job evaluation exercise.

21. In *casu*, the Employer and employees (represented by the appellant) agreed that a salary review and job evaluation exercise would be undertaken by the employer. They agreed on the Terms of Reference of the exercise and further agreed on remedies available to each party in case there were disagreements thereon (through both the Terms of Reference and the deed of settlement entered into under **case No. 274/2019**). One would conclude that the parties entered into a collective agreement governing how the salary review and job evaluation exercise would unfold. This agreement included how disputes arising from the exercise would be addressed and/or

dealt with. It would be this collective agreement that would found the right to the relief the appellant sought in the *Court a quo.* In the matter of **Gauteng Provinsiale Administration v Scheepers and Others (2000) 21 ILJ 1305 LAC**, the Labour Appeal Court held that unless the employees could locate a right to higher remuneration in contract, collective agreement or statute, the dispute was one of interest, a dispute relating to proposals for the creation of new rights or the diminution of existing rights (paragraph 9).

22. In *casu*, the terms of reference and clauses 6.3 and 6.4 of the deed of settlement provide the rights open to the appellant as well as individual employees of the respondent should they be aggrieved by the exercise. These consist of reporting a dispute to CMAC, by the appellant or undertaking the internal appeal process by aggrieved individual employees. No other remedy is awarded by the terms of reference or the settlement agreement consequently, the right sought by the appellant is not located in law, contract or statute therefore adjudication is not appropriate for the resolution of such dispute.

23. That the parties agreed to refer disputes to CMAC does not entitle the Court to infer that parties intended that whatever disputes arose could

be adjudicated upon in the event conciliation failed and that any other solution thereto could be sought despite the agreements entered into in terms of the Terms of Reference and the settlement agreement. It is not for the Court to impose any conditions not agreed to by the parties. Where the dispute remains unresolved, the appellant is entitled to invoke the provisions of **Section 86** of the **Industrial Relations Act. 2000** (as amended) (see **Swaziland National Association of Teachers (SNAT), Swaziland National Association of Government Accounting Personnel (SNAGAP), Swaziland Nurses Association (SNA) and The National Public Service and Allied Workers Union (NAPSAWU) V The Ministry Of Public Service And The Attorney General N.O. Industrial Court Case No 323/17** neutral citation **Swaziland National Association Teacher And Others v The Ministry Of Public Service And Another (323/2017) [2017] SZIC 137 (November 2017)**.

24. In the circumstances the appeal cannot succeed and we make the following order:

24.1 The appeal is dismissed.

24.2 Each party is to pay its own costs.

S. NSIBANDE JP

I agree

A.M. LUKHELE JA

I agree

N. NKONYANE JA

For Appellant: Mr K. N. Simelane
(K.N. Simelane Attorneys)

For Respondent: Mr. Z.D. Jele
(Robinson Bertram)