

IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION

HELD AT NHLANGANO NHO 185/07

In the matter between:

SMAWU: Muzi Simelane Applicant

And

Nhlangano Spar Respondent

CORAM

Arbitrator	Khanyakwezwe
Khumalo	
For Applicant	Chris Nene
For Respondent	Philemon
Tsabedze	
Nature of Dispute	Alleged Unfair
Dismissal	

RULING ON POINTS IN LIMINE

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1. DETAILS OF HEARING AND REPRESENTATION

1.1 This arbitration hearing was held at the Conciliation, Mediation and Arbitration Commission (CMAC) offices situated at Nhlangano on the 8th December 2008 in order for the arbitrator to make a ruling on the Parties' points in limine. Prior to Parties raising their preliminary points on the 8th December 2008, this case had been postponed twice, namely: both on the 7th November 2008 and 28th November 2008 respectively.

1.2 The Applicant in this dispute is Mr. Muzi Simelane and was represented by the official of the Swaziland Manufacturing and Allied Workers Union (SMAWU) Mr. Chris Nene. Mr. Chris Nene shall herewith be called the Applicant's representative or simply Mr. Nene. The Respondent in this matter is Nhlangano Spar Supermarket; a juristic person that was represented by its Branch Manager, Mr. Philemon Tsabedze who will simply be addressed as the Respondent's representative or simply Mr. Tsabedze.

2. BACKGROUND TO THE DISPUTE

2.1 This dispute pertains to an allegation by the Applicant that he was unlawfully dismissed by the Respondent from employment.

2.2 However, even before the Parties were walked through the pre-arbitration hearing process by the arbitrator, the Respondent made an application to the effect that he was withdrawing his consent to proceed with arbitration and rather preferred that his matter be heard by the Industrial Court of Swaziland. The Applicant's Representative strongly objected to such a withdrawal, arguing that he was not in favour of it.

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Such developments pertaining to this matter necessitated that a meeting be scheduled on the 8th December 2008 in order for evidence and arguments to be heard.

2.3 On another note, the Applicant's representative made an application on the 7th November 2008 to the effect that the CMAC arbitrator must recuse himself from presiding over this matter. However,

when Mr. Nene was called upon to make his submissions on the matter of recusal, he simply stated that he was now withdrawing his Application. In that case, the issue on which a ruling on preliminary issues relates to the issue of withdrawal by the Respondent's representative.

3. SUMMARY OF EVIDENCE AND ARGUMENT 3.1 RESPONDENT'S CASE

3.1.1 In a letter addressed to the Secretary General of SMAWU, hereinafter referred to as NS1, Mr. P. Tsabedze, the Branch Manager of Nhlango Spar Supermarket stated as follows:

"Kindly be informed that after reconsidering the merit of the matter, the management of Spar Nhlango have felt that they should withdraw the consent in having the matter decided through arbitration under the authority of CMAC. If the applicant wishes to pursue the matter he should do so through the industrial court".

3.1.2 The Respondent's representative further stated that at the time he consented to arbitration under the auspices of CMAC, he was not aware that he reserved the right not to go the arbitration route. It was the submission of the Respondent's representative that had he known about the

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Industrial Court alternative, he would have surely opted for it. The Respondent's representative also argued that his dislike for arbitration under the ambit of CMAC can be explained, in part, by a remark that was passed by one of the Commission's commissioners to the effect that black managers are usually a disgrace once they assume senior managerial positions in business and that was something that did not go down well with him and hence his preference for the Industrial Court to arbitration.

3.1.3 On another note, Mr. Tsabedze stated that arising from the unpleasant experience of conciliation, coupled with his lack of confidence in the Commission, he consulted and was advised to withdraw his consent and meet the Applicant in the Industrial Court.

3.2 APPLICANT'S CASE

3.2.1 The Applicant's representative took exception to the fact that it was not within the personal knowledge of Mr. Tsabedze that it was not necessarily compulsory for him to consent to arbitration. Mr. Nene argued that two options were presented by the Commissioner of the day to them; either to consent to arbitration, or in the absence of any agreement, goes the Industrial Court route.

3.2.2 In accordance with SW1, the Applicant's representative stated as follows:

"...It would be folly of us to agree for the withdrawal of an agreement that the company chose to voluntarily enter into with CMAC and for that reason we urge the Commission to do the honourable thing and proceed with

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arbitration and stop entertaining the after thoughts of NHO Spar Supermarket as both parties were sober and sane but not insane when consenting..".

3.2.3 In essence, Mr. Nene stated that this matter had reached a point of no return and hence it must proceed to arbitration under the auspices of CMAC.

4. ANALYSIS OF EVIDENCE AND ARGUMENT

4.1 I wish to draw the attention of the Parties to section 85 (2) of the Industrial Relations Act, 2000 (as amended) which, partly, reads as follows:

"...either part [party] to such a dispute may refer the dispute to the court for determination or, if the parties agree, to refer the dispute to arbitration..."

4.2 Mr. Tsabedze argued that if he had known that opting for arbitration was but one of the two options, he would have chosen the Industrial Court route. I believe that Mr. Tsabedze is economical with the truth in that it is in black and white that arbitration is a live option for the parties only if parties elect not to refer their dispute to the court. Besides, the evidence of Mr. IMene remains unchallenged in that there is no evidence disputing the fact that the Commissioner that presided over this matter clearly stated that parties had the liberty to choose either arbitration or the Industrial Court option. I have no doubt in my mind that it was within the personal knowledge of Mr. Tsabedze that arbitration was a voluntary option at the disposal of the Parties.

4.3 Time and again Mr. Tsabedze stated that in addition to the advise he solicited for himself, he also argued that he lacked confidence in CMAC and that all started from his conciliation encounter with CMAC. I must

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unequivocally and categorically state that conciliation proceedings are an off the record proceedings and therefore it is unacceptable that reference must be made to them. In addition to that, arbitration proceedings are supposed to be heard for the first time and hence a hearing de novo. It stands to reason therefore that evidence that derives from conciliation proceedings is inadmissible.

4.4 Clearly, Mr. Nene has flatly refused to reach an understanding that the agreement between the parties be nullified and I see the request of Mr. Nene not seeing the light of day. I may hasten to mention that it would have a different story if both Parties had reached some consensus. It is my view that the matter has reached a point of no return and can be determined at arbitration under the auspices of CMAC.

5. RULING

I rule that the Respondent's application to withdraw from arbitration under the auspices of CMAC is dismissed and the matter must proceed to arbitration.

DATED AT NHLANGANO THIS 5TH DAY OF FEBRUARY 2009.

KHANYAKWEZWE KHUMALO CMAC COMMISSIONER

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