

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 487/08

In the matter between:

JUANITA BERNADETTE BALKISSON

APPLICANT

and

**WATERFORD SCHOOL TREASURY
ASSOCIATION T/A WATERFORD KAMHLABA
(UWC)**

RESPONDENT

CORAM:

**S. NSIBANDE JOSIAH
YENDE NICHOLAS
MANANA**

**JUDGE PRESIDENT
MEMBER
MEMBER**

**P.M. SHILUBANE B.
MAGAGULA**

**FOR APPLICANT FOR
RESPONDENT**

RULING ON APPLICATION TO AMEND

6th MAY, 2009

1. The Applicant applied to court for determination of unresolved disputes, alleging that she had been unfairly dismissed and that no reason was given for her dismissal in her letter of termination. Verbally she was advised that her approach to drama "*was damaging and potentially damaging.*" She viewed that such reason could not be considered a fair ground for dismissal in terms of section 36 of the Employment Act of 1980.
- b) The Respondent in its reply pleaded that the Application services were terminated at a time when she had not become an employee to whom section 35 of the **Employment Act of 1980** applied. It was alleged she was

terminated within the probationary period.

- c) It is common cause that in terms of her letter of appointment, Applicant was employed from the 1st of January, 2008 and that her services were terminated in writing on 14th April, 2008. The Applicant's letter of appointment states that her contract of employment was subject to one term probation. The term is said to have started on 22nd January and ended on 18th April 2008, some four days after the Applicant's services were terminated.
 - d) The Applicant has filed notice of application for leave to amend her application. She wishes to delete paragraphs 5 up to 15 of her application for determination of an unresolved dispute and replace them with new paragraphs as set out in the notice of application for leave to amend.
 - e) The paragraphs Applicant seeks to amend, deal primarily with factual issues relating to her recruitment and arrival at the Respondent college (paragraph 5 & 6) as well as events that arose shortly after her arrival at the Respondent college and which she appears to have found significant in her eventual dismissal (paragraph 7 -10). Paragraphs 12 & 13 relate to events that occurred immediately before and after the Applicant's dismissal. Paragraph 14 deals with the allegation of unfair dismissal and sets out reasons why the Applicant considers her dismissal to be unfair.
6. The Respondent opposes the application on the grounds that:
- f) The notice of application to amend is irregular because the Respondent has not been advised of what it may do if it intends to oppose the application and the time limits for doing so have also not been stated.
 - g) The Applicant has not tendered costs to be occasioned by the Respondent by the intended amendment (sic), nor has the Applicant stated why the proposed amendment is not included in her initial application.
 - h) The Applicant seeks to introduce new facts which were not included in her report of dispute filed with the Conciliation, Mediation and Arbitration Commission, dated 17th April, 2008. In terms of the **Industrial Relations Act** of 2000, before a matter can be brought

to this court, it must have been conciliated upon by the Conciliation, Mediation and Arbitration Commission.

7. When the matter was argued, the Respondent abandoned the first two grounds of opposition and sought only to argue the third ground - that of introducing new facts which had not been conciliated on. The Respondent's complaint concerned, in particular, paragraph 8 of the proposed amendment which reads:

'Alternatively to paragraph 7 hereof if it is found that the applicant's termination was before the expiry of applicant's period of probation then applicant avers that such termination was unfair and unlawful given, that:

- i) *The Respondent before terminating the applicant's employment never met the applicant for purposes of monitoring and evaluating the employee's performance and suitability and to provide guidance.*
- j) *If the Respondent had grounds to be concerned that applicant was not performing to standard or may not be suitable for the position respondent should have notified the applicant of the concerns and given the applicant an opportunity thereto. Respondent never gave applicant an opportunity to respond to the allegations that applicant was not suitable for the position offered to her."*

The court will therefore confine itself to this aspect of the Respondent's opposition.

8. The parties were in agreement that general principle in respect of amendments is that the grant or refusal of an application for amendment of pleadings is a matter that lies exclusively within the court's discretion.

See **Lucky Mahlalela & Another v Gilfillan Investment (pty) Ltd (High Court Case No. 2369/00)** and **Phephile Dlamini vs Conco Swaziland Industrial Court Case No. 64/2004**

9. In the case of **Phephile Dlamini** supra the Court quoted with the approval, the following passage from the case of **Moolman v Estate Moolman & Another 1927 CPD** at page 29:

"The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which can not be compensated by costs or in other words unless the parties cannot be put back for purposes of justice in the same position as they were when the pleading which is sought to amend was filed.

k) Mr. Shilubane for the applicant submitted that the application to amend was not mala fide and the Respondent will suffer no prejudice should the amendment be allowed.

l) Mr. Magagula for the respondent contended that the amendment would prejudice the Respondent in that it would introduce new facts that were not conciliated upon and that the court could not take cognisance of matters not reported in terms of Part VIII of the **Industrial Relations Act**.

m) While the Respondent does not set out, in its objection to the application, clear and concise grounds upon which the objection is founded, in argument before court it appeared to suggest that the proposed paragraph 8 seeks to introduce new facts that were not conciliated on. These facts can only be that Applicant now states in the alternative that if it is found that her termination was before the expiry of probation then her termination was unfair and unlawful because she had not been monitored and evaluated prior to the dismissal nor was she given an opportunity to respond to allegations of poor performance or unsuitability for the position.

n) The Certificate of Unresolved Dispute attached to the Applicant's papers identifies the nature of the dispute between herself and the Respondent as *"alleged unfair dismissal."*What the Applicant pleads in her original papers is an allegation of unfair dismissal. She states in paragraph 14 that her dismissal was unfair for the reason that

"14.1.2 ... since she had served her probation she had accordingly been employed and therefore entitled to the full protection of the law;

14.1.3... since she was not engaged in a supervisory technical or confidential capacity, she had been employed at the end of three months....

14.1.4 No reasons the termination were communicated in the letter of

*dismissal. Verbally, the applicant was informed that the reasons for the termination were that her approach to drama was "damaging & potentially damaging". In terms of Section 36 of **The Employment Act of 1980**, this reason cannot be considered fair on the ground for a dismissal"*

- o) It appears to the court that the issue of probation and the completion or otherwise thereof was pleaded by the Applicant in the papers she now seeks to amend. In her report of dispute she states *7 was employed on the 1st January, 2008. I had to be on a probation period of three months. Three months lapsed and I was not confirmed but continued working under the impression that I had been impliedly confirmed but, on the 14th April, 2008 my services were terminated by the Respondent through a letter dated 14th April, 2004. There were no reasons which were advanced to me that gave rise to my termination of employment.*
- p) At conciliation the Respondent raised the issue of the probation period and again in its reply, the Respondent alleges that the applicant's services were terminated within the probation period. The Respondent alleges that the Applicant's performance and compatibility was assessed and that the period of probation was longer than three months because the Applicant had been appointed in a supervisory position.
- q) The amendment appears to the court to have been necessitated by the Respondent's reply as articulated above. In our view the Applicant is not introducing new facts which were not conciliated on because the matter regarding probation was put in issue in the report of dispute.
- r) The facts regarding the length of the probation appeared for the first time in Respondent's reply. The nature of the amendment arises in our view from a dispute that was reported by the Applicant. The Conciliation, Mediation & Arbitration Commission conciliated on a dispute that was reported by the applicant regarding her unfair dismissal in a circumstances wherein she believed she had served her period of probation and completed same. The court is satisfied that the amendment arises from a dispute that was reported by the Applicants, conciliated upon by CMAC and certified as unresolved. In the premises, the court may take cognisance of same.
- s) The Court considers that it is in the interests of justice, that the amendment be

granted with an appropriate order as to costs. The Respondent's may filed reply to the amended application and will suffer no prejudice that cannot be addressed by an appropriate order as to costs.

- t) The court makes the following order:
- a) **The Applicant's application for an amendment of its application is granted**
 - u) **The Applicant is to deliver her amended application within 7 days hereof**
 - v) **The Respondent is to deliver a reply to the amended application within 14 days of receipt of same.**
 - w) **The Applicant is ordered to pay all costs arising from and attendant upon the amendment.**
 - x) **No order is made in respect of the costs of the application to amend.**

The members agree.

S. NSIBANDE
PRESIDENT OF THE INDUSTRIAL COURT