

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.671/2009 CASE NO. 665/2008

In the matter between:

GCINA MAHLALELA

1ST APPLICANT

**LUNGILE MASUKU
APPLICANT**

2ND

And

SWAZILAND POSTS AND

TELECOMMUNICATIONS CORPORATION

1ST RESPONDENT

MPHILISI MNTSHALI NO

2ND RESPONDENT

NATHI DLAMINI NO

3RD RESPONDENT

CORAM:

D. MAZIBUKO: JUDGE

A.M. NKAMBULE: MEMBER

M. MTETWA: MEMBER

MR. B.S.DLAMINI: FOR APPLICANT

MR. Z.D. JELE: FOR RESPONDENT

RULING ON A POINT OF LAW 25th JUNE 2010

Application for review of employer's decision to terminate employment contract, review proceeding reported to CMAC by employee, employee thereby submits herself to CMAC jurisdiction, Act allows no concurrent jurisdiction with CMAC, Certificate of unresolved dispute mandatory before Court exercises jurisdiction on same dispute, absence of certificate of unresolved dispute fatal to employee's case.

[1] There are 2 (two) matters before Court which were consolidated and were argued at the same time namely cases No. 665/09 and 671/09. The order to consolidate these matters

was granted by Court with the consent of the parties. The application to consolidate the matters was based on convenience. The facts, the cause of action and the question of law is materially similar in both cases.

[2] The Applicants filed an application for relief as follows:

"1. That the decision and proceedings of the 1st Respondent terminating applicant's employment services with the former be and is hereby reviewed, corrected and /or set aside as being invalid.

2. That an order be and is hereby issued reinstating the applicant to the same position he held prior to his dismissal

3. That an order be and is hereby issued directing the 1st Respondent to pay to the applicant all arrear salary and benefits from the date of dismissal to date of conclusion of this matter.

4. Costs of application.

5. Further and /or alternative relief."

[3] The matter is opposed by the Respondent both on technical points and on the merits. The Respondent has raised several points of law. One point which stands out and calls for immediate attention is the one challenging the jurisdiction of the Court to hear the matter. Before the Court can deal with a matter before it, the Court must satisfy itself that it has jurisdiction to hear the matter. The question of jurisdiction is so important that the Court has to raise it *mero motu* if it has not been raised by any of the parties before Court.

[4] The Respondents argue that the Industrial Court (Court) has

no jurisdiction to hear the matter. It is alleged that the matter before Court is pending before CMAC, between the same parties, based on the same question of law and fact which will be determined by the Court when the Court hears this application. Before CMAC the Applicants sought the same relief as that which they seek in the application before Court. Since CMAC being a competent forum, is seized with jurisdiction in the matter, the Court cannot have concurrent jurisdiction to hear the same matter until CMAC disposes of same. BY CMAC is meant the Commission, Mediation and Arbitration Commission established in terms of action 62 (1), (2) as read with section 64 (1) (b), (c) of the Industrial Relations Act, No 1/2000 as amended (Act). According to the Respondents when the Applicants launched their application before Court on or about the 25th November 2009, the matter was still pending at CMAC. In paragraph 6.2 of their affidavit the Respondents state as follows;

"At the time of deposing to this affidavit, the matter was still pending before CMAC having been adjourned to the 16th December 2009. In the dispute before CMAC, the Applicant is seeking exactly the same relief as that which is sought in the present proceedings."

[5] According to the Respondents, in November 2009 an attempt was made by CMAC to resolve the dispute that had been reported by the Applicants but this exercise was not finalised. The matter was then adjourned to 16th December 2009 for further negotiation. There is no indication in the affidavits before Court as to what happened at CMAC on the 16th December 2009 concerning the dispute.

5.1. The Respondents' answering affidavit was deposed to on the 11th December 2009. It is therefore understandable that the answering affidavit could not mention events that

took place at CMAC on the 16th December 2009.

5.2. The Applicants' replying affidavit was deposed to on the 2nd January 2010. In their replying affidavit the Applicants do not deal with this allegation of 16th December 2009. The Applicants have neither admitted nor denied the allegation that conciliation was adjourned at CMAC to 16th December 2009. The Applicants had an opportunity in their replying affidavit to either admit or deny that allegation regarding the 16th December 2009 but did neither of the 2 (two). When a litigant is given an opportunity but fails in his/her affidavit to deny an allegation made in the opponent's affidavit that failure is treated as an admission.

[6] The Applicants concede in their founding affidavit that they had previously reported to CMAC as a dispute the same matter which they have brought to Court on application. Further, the Applicants concede that the dispute which they reported to CMAC as well as the application before Court is between the same parties, based on the same facts and involves a determination of the same question of law. The Court is satisfied that the matter that is before Court on application is the same matter that was reported by the Applicants to CMAC as a dispute. In paragraphs 14 and 15 of their founding affidavit (which are quoted in full in clause 6.1 of this judgment) the Applicants have made that point clear.

6.1 The Applicants deny though that CMAC is seized with jurisdiction in the matter. The Applicants further deny that the Court is not seized with jurisdiction in the same matter as alleged by the Respondents. The Applicants aver that CMAC previously exercised jurisdiction in the matter especially at the time when the dispute was reported. It is further alleged that CMAC attempted to resolve the dispute

and on the 24th November 2009 CMAC declared the dispute unresolved. According to Applicant the jurisdiction that CMAC had in the matter came to an end on the 24th November 2009. This was the date when CMAC declared the dispute unresolved. As from the 25th November 2009 the Court acquired jurisdiction in the matter since the CMAC jurisdiction came to an end the previous day. The Applicants state as follows in paragraphs 14 to 15 of their founding affidavit;

"I may also mention that the 3rd Respondent failed to give reasons for upholding the second respondents findings which itself renders the ultimate decision subject to review.

The matter was reported to the Conciliation, Mediation and Arbitration Commission and was certified as an unresolved dispute on the 24th November 2009."

6.2 Based on the preceding quotation, the Applicants argue that the decision of the 2nd and 3rd Respondents (to terminate the services of the 1st and 2nd Applicants) was reported as a dispute to CMAC for the latter to review and set aside the decision to terminate. Further, the Applicants argue that CMAC certified the dispute as unresolved on the 24th November 2009. The latter allegation was repeated by the Applicants in paragraph 6 of their replying affidavit. The Applicants state as follows;

"I deny that the matter was not dealt with under Part VI11 of the Industrial Relations Act, 2000. It is particularly sad and unfortunate that the 1st Respondent can depose to such untruth as the 1st Respondent is well aware that the matter was

conciliated and declared to be unresolved as at the 24th November 2009.

The only issue that prevented a certificate of unresolved dispute to be issued was leave pay which the 1st respondent promised to calculate and pay to the applicant. All other issues were declared to be unresolved as at the 24th November 2009, with the 1st applicant being represented by Mr Z.D. Jele when that declaration of the matter being unresolved was made. The certificate of unresolved dispute has since been issued and I annex same hereto marked as "GM1"

6.3 What is missing from the Applicants' founding affidavit is the manner the alleged CMAC decision to certify the dispute as unresolved was communicated to the Applicants. The Applicants' allegation has not been confirmed by CMAC. The Applicants' allegation is introduced to Court to prove the truth of its contents. The Applicants' intention is to prove that CMAC as a matter of fact declared the dispute unresolved as at the 24th November 2009. As a result the Court was seized with jurisdiction in the same matter as at the 25th November 2009. That allegation by Applicants is hearsay and it is inadmissible. It is a statement allegedly made by CMAC who is not a party before Court and is not a witness and which statement is introduced to prove the truth of its contents. The learned authors have defined hearsay as follows;

"Oral or written statements made by persons who are not parties and are not called as witness are inadmissible to prove the truth of the matters stated..."

Evidence 4th edition (Butterworths) 1988 page 623.

Another statement of law on hearsay is stated as follows by the learned authors;

"... hearsay evidence is not permitted in affidavits. It may accordingly be necessary to file affidavits of persons other than the applicant who can depose to the facts. Indeed this is very often done."

Herbstein and Van Winsen; The Civil Practice of the High Courts of South Africa, 5th ed. (Juta), 2009 at page 444.

- 6.4 The Applicants' allegations concerning CMAC are objectionable on another ground. The only instrument provided for in the Act in terms of which CMAC can communicate its decision to declare a dispute unresolved is a certificate. The Court cannot accept the Applicants' allegations concerning CMAC in the absence of a certificate of unresolved dispute. The importance of the certificate of unresolved dispute is dealt with in clause 7 and 8 of this judgment.
- (a) In the preceding quotation (recorded in clause 6.2 of this judgment) the Applicants concede that the dispute was not fully conciliated as at the 24th November 2009. The item of leave pay alleged to be due to the Applicants was not finalised on the 24th November 2009. The issue regarding leave pay was subject to some calculations which had to be done at a later date. The deferred calculation caused the matter to stand over for a later date. This delay further prevented the certificate of unresolved dispute from being issued.

(b) According to the version of the Applicants the item of leave pay had not been certified unresolved by CMAC as at the 24th November 2009. It appears clear also that this item had not been resolved between the parties as of that date. The issue of leave pay was therefore pending before CMAC subject to an attempt by CMAC to resolve at a later date once the calculations are made available. The Applicants' evidence seems to confirm the Respondents' allegations that the dispute before CMAC was not finalised on the 24th November 2009. Instead the matter was adjourned to 16th December 2009 as alleged by Respondents. It is noted that in their replying affidavit the Applicants did not deny the Respondents' allegation that the dispute before CMAC was not finalised in November 2009 but was adjourned to the 16th December 2009 for further conciliation.

6.7 Based on the aforementioned quotation, what appears clear in the Applicants' argument is that CMAC is alleged to have issued a certificate of unresolved dispute. Though the Applicants allege to have annexed a copy of the certificate to the replying affidavit marked GM1, no such certificate was annexed. The only item marked GM1 is a letter annexed to the founding affidavit dated 3 June 2009 addressed by 1st Respondent to 1st Applicant. The alleged certificate of unresolved dispute was not brought to the attention of the Court and was not attached to the Applicants' papers before Court as alleged by the Applicants.

6.8 In the aforementioned quotation the Applicants argue that CMAC could not issue a certificate of unresolved dispute due to deferred calculations relating to the leave pay. That means that the certificate of unresolved dispute depended on the availability of the calculations on leave pay. In the same quotation the Applicants aver that the certificate of

unresolved dispute has been issued and that they (Applicants) have annexed a copy in their replying affidavit. What is missing from the replying affidavit is whether the deferred calculations were made available to CMAC. If so was the issue of leave pay resolved or was it one of the items that remained unresolved?. The Court has not been informed as to what date was the certificate of unresolved dispute issued. If the deferred calculations were not made available, it is not clear to the Court how could CMAC have proceeded to conclude conciliation in the absence of material evidence. The Applicants' evidence as quoted above indicates that the deferred calculations were material to the matter before CMAC hence the latter could not conclude conciliation on the dispute before it on the 24th November 2009 especially on the leave pay item. This creates doubt as to whether conciliation did take place as alleged by the Applicants. If conciliation did take place and was concluded there is doubt whether or not a certificate of unresolved dispute was issued. The Court is not persuaded by the Applicants' allegations. The Court is not satisfied that it has jurisdiction in the matter. Since the alleged certificate of unresolved dispute is not before Court, the Court is unable to declare that CMAC jurisdiction has ceased.

[7] The function of CMAC is *inter alia*, to attempt to resolve a dispute that has been reported to it. This task may be achieved through Conciliation, Mediation or Arbitration in accordance with the Act. There are time limits provided in the Act within which CMAC may attempt to resolve a dispute. A dispute which remains unresolved shall be certified 'unresolved dispute' in writing by CMAC. On the certificate of unresolved dispute CMAC shall state the reasons which prevented the matter from being resolved. It is after a dispute has been certified unresolved by CMAC that an

interested party may refer the dispute to Court for determination. A certificate of unresolved dispute is written confirmation from CMAC that she (CMAC) is no longer seized with jurisdiction to resolve the dispute. The Act provides as follows in section 85 (1)

"(1) For the purposes of this section, an unresolved dispute means a dispute in respect of which a certificate has been issued under section sic [81 (6)]."

[8] When the Applicants reported a dispute at CMAC, their conduct gave CMAC jurisdiction over their matter. While CMAC is seized with jurisdiction the Act allows no other forum to exercise concurrent jurisdiction. Upon acquiring jurisdiction CMAC will continue to exercise jurisdiction on the dispute until she (CMAC) issues a certificate of unresolved dispute. Once the certificate is issued, the Court may begin to exercise jurisdiction over the same matter that had been referred to CMAC. The Court finds that the absence of a certificate of unresolved dispute is fatal to the Applicants' case.

[9] The above stated is not the end of the Applicants' argument. In paragraph 6 of the replying affidavit the Applicant states as follows;

"In any event, the application before Court is one for review under the common law. Such an application has nothing to do with the provisions of the Industrial Relations Act, 2000 as amended. Such powers of review are exercised by the above Honourable Court in terms of Section 8 (3) of the Industrial Relations Act which powers of review are similar to the review powers bestowed upon the High Court of Swaziland."

The Applicants' argument in the preceding quotation seems to

suggest that the provisions of the Act are not relevant to the dispute which has been brought on application to Court. The Applicants appear to have lost sight of the fact that they gave CMAC jurisdiction over their review matter together with ancillary relief when they reported that matter as a dispute at CMAC. Once a party reports his/her dispute to CMAC that party has to follow the rules of procedure at CMAC and the provisions of the Act in having her dispute resolved. The Court cannot exercise its jurisdiction in a matter that is already subject to the jurisdiction of CMAC or any other competent forum. The Applicants have to let their dispute run its course at CMAC until a certificate of unresolved dispute is issued. The learned authors Herbstein and Van Winsen (supra) page 438 state as follows;

"If the Court is not satisfied on the facts stated in the application that it has jurisdiction, it will not entertain the proceedings."

[10] For the reasons stated above the point challenging jurisdiction of the Court is well taken and is upheld. The

Court will not hear the other points of law in the absence of jurisdiction. The Court makes the following order;

(a) The Court declares that it has no jurisdiction to hear this matter in the absence of a certificate of unresolved dispute.

(b) The application is dismissed with costs.

(c) The Applicants may re-launch their application once jurisdiction is established.

The members agree.

DUMSANI MAZIBUKO
JUDGE OF THE INDUSTRIAL COURT