

THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO.301/10

In the matter between:

GCINA GAMA

APPLICANT

And

**THE SPECIALIST PESTS
CONTROL (PTY) LTD.**

RESPONDENTS

D. MAZIBUKO

JUDGE

A.M. NKAMBULE

MEMBER

M.T.E. MTETWA

MEMBER

N.D. JELE

FOR APPLICANT

F. MDLULI

FOR RESPONDENT

JUDGMENT - 23rd FEBRUARY 2011

Amendment of pleadings. Party amending must show that the proposed amendment is to clarify or amplify issues. Amendment will

fail if it would contravene or circumvent statutory or common law provision or would result in a miscarriage of justice.

1. The Applicant Mr. Gcina Gama was employed by the Respondent on the 10th August 2005 as a gardner and/or cleaner. The Applicant alleges that he was dismissed from work on the 18th January 2010.

2. In the Applicant's papers before Court the Respondent is described as the SPECIALIST PEST CONTROL (PTY) LTD, a limited liability company established in terms of the statutory laws of the Kingdom of Swaziland. In this judgment the Respondent will also be referred to as THE SPECIALIST for the sake of convenience.

3. About 21st June 2010 the Applicant instituted proceedings against the Respondent under Rule 7 of the Industrial Court Rules. The Applicant claimed payment of benefits arising from an allegedly unfair dismissal from work. The Court papers filed by the Applicant were accompanied by a certificate of unresolved dispute dated 17th May 2010. The said certificate is marked annexure **A**. The filing of a certificate of unresolved dispute is in compliance with the mandatory requirement of Rule 7 (4)(d).

4. About 21st July 2010 the Respondent defended the matter by filing a Reply. About the 27th July 2010 the Applicant filed a notice of intention to amend the citation of the Respondent in her papers before Court.

5. In particular the Applicant proposed to amend her papers by removing the substantive Respondent as described in paragraph 2 above (THE SPECIALIST) and substitute same with another entity. The proposed Respondent is DU TOIT HOLDINGS (PTY) LTD t/a The Specialist Pest Control. In this judgment the proposed Respondent will also be referred to as DU TOIT HOLDINGS.

6. The Applicant has not given reasons for the proposed amendment. The Respondent is opposing the proposed amendment. The Respondent gave 2 reasons for his opposition namely;

"(a) The company, DU TOIT HOLDINGS is not trading as THE SPECIALIST PEST CONTROL instead it is trading as THE SPECIALISTS.

(b) The certificate of unresolved dispute attached to the main application is therefore also rendered extremely defective and this honorable [honourable] court can not entertain a matter which was not properly conciliated in terms of the law."

7. The Industrial Relations Act No. 1 of 2000 as amended (Act) has established a body corporate whose main function is to attempt to resolve disputes reported to it between employer and employee. The body corporate namely Conciliation, Mediation and Arbitration Commission (CMAC) is enjoined by the Act to attempt to resolve disputes between employers and employees through conciliation, mediation and arbitration (section 64 (1) (b) and (c) of the Act). In the

event that CMAC fails to resolve the dispute before it , it shall issue a certificate of unresolved dispute as directed by section 85 (1) as read with section 81 (6) (a) of the Act.

8. Upon release of a certificate of unresolved dispute by CMAC , either party to the dispute may refer the matter to Court for determination (section 85 (2) of the Act). The party who refers the matter to Court for determination is obliged by the Rule 7 (4) (d) to attach a certificate of unresolved dispute to his Court papers . The said rule reads as follows;

7(4) "The statement of claim ***shall contain*** -

(a)

(b)

(c)

(d) in the case of applications for determination of an unresolved dispute under section 85 of the Act, **a copy of the certificate of unresolved dispute issued by the Commission [which] shall be annexed;**

9. A certificate of unresolved dispute (as in annexure **A**), provides inter alia the following essential information;

- (a) the nature of the dispute before CMAC,
- (b) the identity of the parties to the dispute,
- (c) the reason CMAC failed to resolve the dispute,
- (d) the date the matter was declared unresolved.

10. The Applicant proposes to remove the existing Respondent (THE SPECIALIST) from the lawsuit and replace her with the proposed Respondent namely DU TOIT HOLDINGS . The proposed Respondent is also described in the Applicant's pleadings as a legal entity registered as a private limited liability company. The proposed Respondent exists independently of the substantive Respondent. The substantive and the proposed Respondents are two (2) separate companies each enjoying juristic personality.

11. The matter has been brought to Court by the Applicant. The Applicant has prayed that the Court should make a ruling that the Applicant was unfairly dismissed from work. The Applicant is further claiming payment of benefits arising from an allegedly unfair dismissal. The Respondent (THE SPECIALIST) admits the dismissal but denies that it is unfair. The Reply therefore raises a dispute of fact. When the Court hears the matter it will have to make a determination on a question of fact.

12. The Applicant bears the onus to prove that the matter which he has brought to Court for determination has gone through the mandatory CMAC dispute resolution process as required in section 64 (1) (b) and (c) of the Act.

13. The relevant portion of section 64 (1) reads as follows;

"64 (1) The Commission **shall** -(a).

(b) attempt to resolve , through **conciliation**, any dispute referred to it in terms of this Act;

(c) where a dispute referred to it remains unresolved after conciliation, **arbitrate** the dispute if-

(i) this Act requires arbitration ;

(ii) this Act permits arbitration and both parties to the dispute have requested that the dispute be resolved through arbitration; or

(iii) the parties to a dispute in respect of which the Industrial Court has jurisdiction consent to arbitration under the auspices of the Commission;..."

(emphasis added)

14. It is common cause that the proposed Respondent (DU TOIT HOLDINGS) did not take part in the CMAC dispute resolution process. It is only the substantive Respondent (THE SPECIALIST) that participated in that process. That fact is also confirmed by the contents of the certificate of unresolved dispute (annexure **A**).

15. If successful, the proposed amendment will enable the Applicant to prosecute before Court his claim for unfair dismissal against DU TOIT HOLDINGS without going through the mandatory CMAC dispute resolution process. As aforementioned, the Applicant's claim requires the Court to make a determination on a question of fact on whether or not the dismissal was fair. The Industrial Court has no jurisdiction to

make a determination on a question of fact on a dispute which has not been conciliated upon and finalized before CMAC. The proposed amendment will have the effect of contravening and circumventing section 64 (1) (b) and (c) of the Act.

16. Furthermore, the proposed amendment if successful, will have the effect of contravening Rule 7 (4) (d). As explained in paragraphs 3 and 8 above the provision of Rule 7 (4) (d) are peremptory. The proposed Respondent (DUTOIT HOLDINGS) did not participate in the conciliation process at CMAC in the dispute which the Applicant reported. The Applicant will fail to produce a certificate of unresolved dispute in which (DU TOIT HOLDINGS) is featured as an employer. Annexure **A** mentions only THE SPECIALIST (substantive Respondent) as employer. The absence of a certificate of unresolved dispute in which DU TOIT HOLDINGS is mentioned as employer will not only contravene Rule 7 (4) (d) but will also render the matter before Court fatally defective.

17. The identity of the Applicant's employer in the pleadings should correspond with the identity of the Respondent in the certificate of unresolved dispute. The Applicant has proposed to amend his pleadings by removing the substantive Respondent (THE SPECIALIST) and replacing her with DU TOIT HOLDINGS (the proposed Respondent). The Applicant has not indicated an intention to replace the certificate of unresolved dispute with another. The only certificate that has been filed is annexure **A** which has been mentioned in paragraph 3 above.

18. The proposed amendment has the potential to render the Applicant's particulars (statement of claim) excipiable. The amended particulars of claim will reflect the proposed Respondent (DU TOIT HOLDINGS) as employer. The certificate of unresolved dispute (annexure **A**) will still reflect the substantive Respondent (THE SPECIALIST) as employer. That would result in an irregular and contradictory set of pleadings filed by the Applicant. That contradictory set of pleadings will render the Applicant's case fatally defective.

19. It is the practice of the Court to grant an amendment whose effect is to assist one or both parties to state their respective cases in their pleadings more clearly and fully. An amendment should amplify and clarify but not confuse the issues in the pleadings.

The Court has a discretion when dealing with an application to amend. The Court should however exercise its discretion judicially.

20. The amending party has a duty to demonstrate to the Court that, after the amendment, his pleadings will be legally compliant, procedurally sound and will not result in a miscarriage of justice. The Court will not grant an amendment whose effect is to render the pleadings excipiable, irregular or would either contravene or circumvent a statutory or common law provision or would result in a miscarriage of justice.

21. The Court was faced with a related situation in the matter of NTOKOZO MAVUSO vs A & M. ENTERRISES (PTY) LTD. I. C. case No. 318/2007. At paragraph 8 the Court stated as follows;

“It is trite law that a new party cannot be substituted in legal proceedings by a mere amendment of the citation

The Court agrees with the principle stated in this case.

22. The Court has already made a finding that the proposed amendment will contravene and circumvent some provisions in the Act and the rules of Court. In addition, the proposed amendment will render the Applicant's particulars of claim self contradictory, irregular and excipiable. If granted the proposed amendment will result in a miscarriage of justice. In this case, the injustice that might occur, if the amendment is allowed, is one which cannot be compensated by a postponement or an order for costs. For these reasons the proposed amendment cannot succeed.

23. In the matter of WILFRED A. RUDD AND OTHERS vs DELOITTE AND TOUCHE (PTY) LTD I.C. case no. 282/1999 the Court dealt with a similar principle. The Applicant reported a labour dispute before the Commissioner against DELOITTE AND TOUCHE, a firm of Charters Accountants practicing in partnership. An attempt to conciliate failed. The Applicants thereafter took the matter to Court for determination.

23.1 In their papers in Court the Applicants cited the Respondent as DELOITTE AND TOUCHE (PTY) LTD a limited liability company duly incorporated and registered in Swaziland.

The Respondent challenged the jurisdiction of the Court to hear the dispute on the basis that the dispute before Court had not gone through the conciliation process.

23.2. It was argued before Court that the Respondent who was cited and appeared before the Commissioner (the partnership) is different from the Respondent who is cited in the Court papers (the Company). As a result, in terms of the rules the Court has no jurisdiction to hear the matter.

23.3. The Court upheld the objection raised by the Respondent. The Court stated the following;

"... from a juristic point of view, Deloitte and Touche (Pty) Limited has a sperate [separate] legal persona from the partnership known as Deloitte and Touche."

This Court agrees with the principle as stated in the DELOITTE AND TOUCHE case.

24. In terms of Rule 23 (5) a party may apply to Court for leave to correct an error or defect in the manner a party is cited in the pleadings. The rule reads as follows;

"The court may, if a party is incorrectly or defectively cited, on application and on notice to the party concerned, correct the error or defect and the court may make an order as to costs where appropriate".

24.1. Correcting an error or defect in the citation of a party is not the same thing as removing that party as a litigant in the lawsuit and replacing her with another party, who all along was not a litigant. The correction referred to in Rule 23 (5) should be of assistance either by clothing the party concerned with the missing detail or rid the party of unnecessary and misleading detail while the said party retains its status as litigant. The correction therefore should complete the name or description of the amending party without introducing a new litigant in its stead.

24.2. The amendment before Court is designed to remove the substantive Respondent (THE SPECIALIST) as a litigant and replace her with a new entity (DU TOIT HOLDINGS). The Applicant does not seek to correct an error in the name or citation of the substantive Respondent (THE SPECIALIST). Instead the Applicant intends to remove the substantive Respondent completely as a litigant and introduce a complete stranger in the pleadings (DU TOIT HOLDINGS) to take over the duties and liabilities of the substantive Respondent in the lawsuit. The Applicant is indirectly and irregularly delegating the liability of THE SPECIALIST in this lawsuit to DU TOIT HOLDINGS.

The Applicant's conduct is contrary to the spirit of Rule 23 (5). The application to amend fails also on this ground

25. The Applicant has not stated the reason for the proposed amendment. The difficulties that the Applicant is facing in his application are foreseeable and could have been avoided. A careful reading of the Act and the rules would have brought these difficulties to the Applicant's attention. It is fair that the Respondent be compensated for the costs incurred in resisting the amendment.

26. The Court accordingly orders as follows;

- (a) The application to amend is dismissed.
- (b) The Applicant is to pay the Respondent's wasted costs.

The members agree.

**D. MAZIBUKO
JUDGE OF THE INDUSTRIAL COURT**