



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 2/2013

In the matter between:

MANDLA DLAMINI

Applicant

And

THOMAS DLAMINI N.O.

1st Respondent

**CONCILIATION MEDIATION AND
ARBITRATION COMMISSION**

2nd Respondent

PEAK TIMBERS (PTY) LTD

3rd Respondent

Neutral citation: *Mandla Dlamini v Thomas Dlamini N.O. & Two Others*
(2/2012 [2013] SZIC 22 (July 26 2013))

Coram: NKONYANE J,
(Sitting with G. Ndzinisa & S. Mvubu
Nominated Members of the Court)

Heard : 12 JULY 2013

Judgment delivered: 26 JULY 2013

Summary:

The Applicant instituted an application for determination of an unresolved dispute. The certificate of unresolved dispute categorized the dispute as constructive dismissal whereas in his papers he claimed that he was unfairly dismissed following an unfair retrenchment process. The 3rd Respondent, the former employer of the Applicant, raised a point of law that the matter was not properly before the court as the dispute before the court was not the one that was conciliated upon at CMAC.

Held—The court is not bound by the categorization of the dispute by the Applicant or the CMAC Commissioner. The court will look at the record of the conciliation process to ascertain whether the essential dispute between the parties has been conciliated.

Held—Once the court satisfies itself that the dispute before it was in fact the dispute that was conciliated at CMAC, the court will grant an order for the amendment of the certificate.

**JUDGMENT
26.07.13**

[1] The Applicant initially launched an application for determination of an unresolved dispute under case No. 264/01. He was claiming that he was unfairly dismissed by 3rd Respondent.

[2] A certificate of unresolved dispute was annexed to the Applicant's application. In terms of the certificate of unresolved dispute the nature of

the dispute between the parties was characterized as “constructive dismissal.”

[3] The 3rd Respondent filed its Reply to the Applicant’s application dated 19th July 2010. The Applicant did not file a Replication to the 3rd Respondent’s Reply.

[4] The 3rd Respondent thereafter filed a Notice to Amend its Reply dated 20th June 2012 and stamped by the Registry Office with a date stamp showing 21st June 2012. In the Notice to Amend, the 3rd Respondent raised three points in *limine*, namely;

- “1. *The application currently serving before court, is not properly before the Honourable Court which does not have jurisdiction to entertain it in that, the dispute reported to the Conciliation Mediation and Arbitration Commission under dispute Number SW MB94/10 was one characterized and described as “constructive dismissal.”*

2. *The dispute currently before the court is a dispute based upon an allegation that the Applicant was dismissed in an unfair retrenchment.*

3. *The dispute therefore currently before court is not the same dispute and cause of action as that which was reported to CMAC and that the court may not take cognizance of same.”*

[5] The points in *limine* raised by 3rd Respondent were never argued in court. There is therefore presently no court’s ruling or judgment on the points in *limine*. In the meantime, on 05th September 2012, the Applicant wrote a letter to the Executive Director of CMAC requesting that the certificate of unresolved dispute be amended to reflect that the nature of the dispute is unfair dismissal and not “constructive dismissal”. The Applicant stated that it was through his mistake that he wrote on the report of dispute form that the nature of the dispute was “constructive dismissal.”

[6] The CMAC Commissioner who was handling the conciliation process refused to amend the certificate of unresolved dispute and stated his reasons in his ruling as follows;

“1. *...I hereby state that I as the Commissioner who conciliated over this matter, am not in a position to amend the certificate of unresolved dispute Number 227/2010 issued on the 30th March, 2010.*

2. *The parties may approach the Industrial Court of Swaziland if they (parties) are desirous that this certificate of unresolved dispute be amended. This is because the matter is now subjudice.*

3. *I wish to state that the only time I can amend the certificate of unresolved dispute is when the court has issued a directive on same.”*

[7] This negative reply or ruling by the CMAC Commissioner led the Applicant to institute the present review proceedings on Notice of Motion and he is applying for an order in the following terms;

- “1. *The decision of the First Respondent of the 18th day of December 2012 under CMAC Ref: SW MB94/2010 is hereby reviewed and set aside;*

2. *The First Respondent is ordered to consider the merits of the application for amendment of the certificate of unresolved dispute moved by the Applicant dated the 5th day of September 2012;*

3. *The costs of this application be borne by the Respondents jointly and severally, one paying for the other to be absolved;*
4. *The Applicant is granted such further and/or alternative relief as the above Honourable Court may deem fit in the circumstances.”*

[8] The application is opposed by 3rd Respondent. No papers were filed by 1st and 2nd Respondents. The crux of the 3rd Respondent’s opposition appears in the following paragraphs of 1st Respondent’s Answering Affidavit:

“11.3 The Notice to amend has not been opposed by the Applicant and in the circumstances the pleadings are deemed to have been amended.

11.4 The question of what dispute is before the Industrial Court and what dispute was conciliated upon is now therefore a matter pending before the Industrial Court.

11.5 For 1st Respondent to amend the certificate would be tantamount to “pulling the rug from under the Industrial Court’s feet”, and rendering an issue which is pending before the court academic.

- 11.6 *I therefore submit that the 1st Respondent was correct in declining to amend the certificate on the basis that the matter was pending before court.”*
- [9] On behalf of the Applicant it was argued that;
- 9.1 *The dispute before the court is based on allegations of unfair dismissal as a result of an unfair retrenchment.*
- 9.2 *Although the Applicant in the report of dispute form wrote that the dispute that he was reporting was based on “constructive dismissal”, the dispute that was in fact conciliated upon between the parties was that of unfair dismissal.*
- 9.3 *The application for the amendment of the certificate of unresolved dispute is not pending before the court.*
- 9.4 *It was therefore a misdirection on the part of 1st Respondent to rule that the matter pertaining to the amendment of the certificate was subjudice.*

[10] On behalf of the 3rd Respondent it was argued that;

10.1 *The application for the amendment of the certificate of unresolved dispute is not pending before the court.*

10.2 *The only matter pending before the court is that of an application for determination of an unresolved dispute emanating from an alleged unfair dismissal because of an unfair retrenchment.*

10.3 *The 3rd Respondent raised points in limine and the court has not yet made a ruling on the points raised in limine.*

10.4 *The Applicant by filing the present review proceedings is conceding the merits of the point in limine and is seeking to have the mistake rectified indirectly.*

10.5 *The 1st Respondent correctly applied his mind and made a finding that the matter was lis pendens although being not a lawyer, he said the matter was subjudice.*

[11] **ANALYSIS OF THE EVIDENCE AND SUBMISSIONS:**

The evidence before the court indeed revealed that after the Applicant has filed his application for the determination of the unresolved dispute, the 3rd Respondent thereafter filed its Reply. The Applicant did not file a Replication. The 3rd Respondent then filed a Notice to amend its Reply by inserting a point in *limine*. The Applicant did not file any answer to the point raised in *limine*. The 3rd Respondent did, however, point out in its Notice to amend that in the event that the Applicant opposes the application, he may do so in open court.

[12] The points in *limine* were however never argued in open court. Whilst the points in *limine* are pending before the court, the Applicant requested the CMAC Commissioner, 1st Respondent herein, to amend the certificate of the unresolved dispute. The 1st Respondent refused to amend the certificate stating that the issue as to what is the nature of the dispute was pending before the court.

[13] The court agrees with the ruling of 1st Respondent that the question as to the nature of the dispute is pending before the court. The question as to whether the dispute was correctly categorized in the report of dispute form was raised by the 3rd Respondent in the points in *limine*. That question has

not yet been decided by the court as no arguments have been made as yet. It was therefore irregular for the Applicant to request the 1st Respondent to amend the certificate whilst the question whether the nature of the dispute was correctly categorized in the certificate of unresolved dispute was yet to be decided by the court.

See:- **File Phildah Khumalo v. Mashovane Hezekiel
Khumalo Civil Appeal Case No. 12/2009(SC).**

[14] The question of what dispute is before the court, and what dispute was the subject of the conciliation before the 1st Respondent is still pending before the court.

[15] The present application for the review of the 1st Respondent's ruling therefore ought to be dismissed by the court for two reasons, namely;

15.1 The court is unable to find that the 1st Respondent misdirected himself in any way in his ruling.

15.2 The proceedings constitute a misstep on the part of the Applicant as the question whether the application for the

determination is properly before the court is still pending before the court as it was raised by the 3rd Respondent in the points in limine which have not yet been argued before the court.

[16] The question of what dispute was conciliated at CMAC was thoroughly dealt with by both attorneys before the court. There will be therefore no need for the court to refer that question to argument again between the parties. The court has no doubt that no party will be prejudiced by the court adopting this approach.

[17] The evidence revealed that on the report of dispute form the Applicant in paragraph 5.1 where he was required to state the nature of the dispute he wrote that it was “constructive dismissal.” The Applicant stated in paragraph 12 of the Founding Affidavit, that he mistakenly categorized the dispute as “constructive dismissal.” In its Answering Affidavit did not deny this averment but stated in its paragraph 11 that;

“It is unclear what motivated the Applicant to categorize his dispute as constructive dismissal and it therefore cannot admit or deny that it was mistaken.”

[18] Under paragraph 6.1 of the Report of Dispute Form the Applicant was required to state the issues in dispute. In paragraph 5.3 the Applicant was required to summarise the particulars of all the facts giving rise to the dispute.

[19] Looking at the report of Dispute Form as a whole, there is no doubt that the dispute between the parties was concerning the retrenchment exercise undertaken by the 3rd Respondent which led to the termination of the Applicant. In the certificate of unresolved dispute the 1st Respondent wrote that;

“3.1 The Applicant alleged that he was given pseudo promotion and later retrenched unfairly by the Respondent.

3.2 The Respondent stated that the retrenchment exercise was fair and just to everyone. The Applicant was never treated differently from other employees.”

[20] Further, in his application for the determination of the unresolved dispute before the court, the Applicant stated that his dismissal was both substantively and procedurally unfair, and not that it was “constructive.”

[21] Since it is clear on the papers before the court that the dispute that was conciliated upon was that of unfair dismissal resulting from the retrenchment exercise by the 3rd Respondent, the certificate of unresolved dispute therefore is amenable to be corrected to reflect the correct nature of the dispute that was conciliated at CMAC..

[22] As the dispute remains unsettled up to this day, the CMAC institution still has the power to deal with this matter in terms of **Section 81 (6) of the Industrial Relations (Amendment) Act, 2005** which provides that;

“(6) Notwithstanding the issue of a certificate that the dispute is not resolved, the Commissioner appointed in terms of Section 80 (1) retains jurisdiction over the dispute until it is settled.”

See also:- **Boniface Dlamini v. Swaziland United Bakeries (Pty) Ltd Case No 200/2002 (IC).**

[23] The 1st Respondent is ready and willing to effect the amendment judging from his ruling at paragraph 3 where he stated that;

“I wish to state that the only time I can amend the certificate of unresolved dispute is when the court has issued a directive.”

[24] The Industrial Court does not normally have jurisdiction to entertain a dispute that has not been first referred to CMAC and certified unresolved. The question that the Industrial Court must ask therefore is whether the dispute before it has been dealt with by CMAC by way of conciliation. The legal characterization of the dispute in the Report of Dispute Form should not bar the Industrial Court from exercising jurisdiction on the application before it if it is satisfied that the dispute before it is the same or similar dispute that was conciliated upon at CMAC level. The Industrial court must look at the factual matrix, not at the categorization of the dispute.

See:- **National Union of Metalworkers of SA & Others**
v. Driveline Technologies (Pty) Ltd & Another (2000)
ILJ 142 (LAC)

[25] Taking into account all the evidence before the court, the legal arguments by the parties and also all the circumstances of this case, the court will make the following order;

a) The Applicant’s application is dismissed.

- b) The 1st Respondent is directed to amend the certificate of unresolved dispute to read that the nature of the dispute is unfair dismissal as per the request of the Applicant in terms of ANNEXURE “F” of the Founding Affidavit within fourteen days hereof.**
- c) The Applicant’s application for determination of unresolved dispute under case No. 264/10 is referred to the Registrar’s office for trial dates allocation.**
- d) Each party to pay its own costs.**

[26] The members agree.

**N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT**

**FOR APPLICANT: MR. N.D. JELE
(ROBINSON BERTRAM)**

**FOR RESPONDENT: MR. M. SIBANDZE
(MUSA M. SIBANDZE ATTORNEYS)**