IN THE INDUSTRIAL COURT OF ESWATINI

RULING

Case No. 395/17(B)
& Case 183/17 (B)

In the matter between:

VUSI ALBERT MALINDZISA Applicant

And

AVENG INFRASET SWAZI (PTY) LTD Respondent

Neutral citation: Vusi Albert Malindzisa V Aveng Infraset Swazi (Pty) Ltd (395/2017 (B) & 183/17(B)) [2020] SZIC 17 (25 February 2020)

Coram: **S. NSIBANDE JP**

(Sitting with Nominated Members of the Court Mr N. Manana and Mr M. Dlamini)

Heard: 18 September 2019

Delivered: 25 February 2020

RULING

[1] The Applicants, Vusi Albert Malindzisa and Cleopas Sanele Dlamini have applied to the President for an order that their matters be referred to arbitration under the auspices of the Conciliation, Mediation and Arbitration Commission (CMAC).

[2] They are former employees of the Respondent, a registered company carrying on its business at the Matsapha Industrial Sites in the Manzini District. They allege that they were unfairly dismissed by the Respondent on 12th June 2017 and 6th June 2018, respectively. They consider that their dismissals were substantively and procedurally unfair in that the misconduct they were accused of was never proved at their disciplinary hearings and that the sanctions passed were outside the Respondent's disciplinary code. The Applicants also complain that they were denied their rights to appeal.

[3] Applicant, Malindzisa (395/17(B) was dismissed for insubordination, insolence and breach of company policy while Applicant M. Dlamini (183/17 (B)) was dismissed for dishonesty and they claim E542 375.61 and E 444 889.64 respectively. They base their application for referral on the same grounds, that:

There are no complex factual or legal issues that arise from the matters; that the Court has dealt with issues involving insolence and dishonestys and that there are a number of judgments that could guide an arbitrator in dealing with these matters; that the CMAC arbitrators now have the legal expertise and experience to deal with such matters; and that even if the matter is heard in Court there is no appeal on findings of fact therefore there is no prejudice occasioned by having the matter heard in arbitration; and that the backlog of cases at the Industrial Court was prejudicial to the Applicants in that their cases were unduly delayed.

[4] The Respondent opposed the application on the basis that it felt the Applicants were seeking to jump the queue of matters pretext of a backlog; that the Court now had four permanent judges and even acting judges hence the backlog issue fell away; that arbitration is administered by the **Arbitration Act of 1906** and that in terms of that Act the parties must agree to go to arbitration.

[5] It was argued that **Section 85 (2)** was limited by the proviso that the Minister may revoke or nullify the President's power to refer matters to arbitration.

Finally it was argued that the President had no power to direct the Commission (CMAC) to appoint an arbitrator but that it was for the Commission to decide who would be appointed as arbitrator. It was argued that this position prejudiced the Respondent because an inexperienced arbitrator could be appointed by the

Commissioner whereas these were complex matters involving substantial amounts thus requiring formal judicial determination.

[6] **Section 8(8) of the Industrial Relations Act 2000 (as amended)** provides the following:

"Notwithstanding the provisions of Section 85 (2), the President of the Court may direct that any dispute referred to it in terms of this or any other Act be determined by arbitration under the auspices of the Commission.

[7] **Section 85(2)(b) of the industrial Relations Act 2000 (as amended)** empowers the President of the Industrial Court to decide upon receipt of an application whether an application for the determination of an unresolved dispute be heard by the Court or by an arbitrator at CMAC. The section reads:

> **Section 85(2)(b) – The President of the Industrial Court shall have the power upon receipt of an application to decide whether such application should be heard by the Court or an Arbitrator appointed by the Commission provided that the Minister may by notice published in the Government Gazette revoke or nullify this power.**

As set out in **Sydney Mkhabela v Maxi Prest Tyres (supra)**, prior to the promulgation of Industrial Relations (Amendment) Act 2005, a party to an

unresolved dispute could only be compelled submit to arbitration without its consent where:

(a) the dispute is a so called dispute of interest; and

(b) one of the parties to the dispute is engaged in an essential service **(see Section 96(3) of the Act)**.

[8] The Sections of the amended Act cited above constitute a significant extension of the concept of compulsory arbitration on our labour dispute resolution legislation. (**Sydney Mkhabela v Maxi Prest Tyres IC Case No. 25/2005)**.

[9] It is clear from the above that, not withstanding the **Arbitration Act of 1904**, the President of the Industrial Court has the power and discretion to refer a matter to arbitration by the Commission. This is regardless of the proviso set out in **Section 85(2)**. The proviso gives the Minister the right to revoke these powers. There has been no revocation or nullification of these powers by the Minister and therefore the President is entitled to continue exercising same.

[10] Turning to the particular facts of these matter, I have considered the pleadings together with the heads filed by the parties as well as their arguments before Court. While the Applicant submits that there are no novel issues raised in either case, it seems to me that a number of disputes of fact will arise from each

of the matters, a wrong determination of which stands to prejudice the Respondent who opposes the referral to arbitration.

The amount claimed is substantial and it appears to me that the Respondent should not in the circumstances be deprived of its right to the benefits of formal Court proceedings and judicial deliberation in the face of such a substantial claim.

[11] The Applicants themselves have failed to act with due expedition in prosecuting their claims. Despite that they were dismissed on 2017, their claims were filed in Court early in 2019. By the time the matters were heard for the referral applications, the matters were not trial ready and they had not asked the Registrar for trial dates.

[12] In the circumstances, the application for referral is dismissed. Each party to pay its own costs.

[13] With regard to the Applicants alternative prayer of an early date of hearing based on the alleged sale of the Respondent I can only say that the Applicants themselves have not shown any appetite to have their claims prosecuted speedily. In any event they have other avenues open if they feel the Respondent

will shut down before their matters are heard. They must explore those avenues.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicants: Mr. L. Simelane (L.M. Simelane Attorneys)

For Respondent: Mr. Z. Dlamini (Dlamini Kunene Associated)