



IN THE INDUSTRIAL COURT OF ESWATINI

RULING

Case No. 336/18

In the matter between:

JOSEPH DLAMINI

Applicant

And

DIESEL SERVICES (PTY) LTD

Respondent

Neutral citation: Joseph Dlamini v Diesel Services (Pty) Ltd (336/18) [2020] SZIC 18 (25 February 2020)

Coram: **S. NSIBANDE JP**

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

Date Heard: 18 September 2019

Date Delivered: 25 February 2020

RULING

- [1] The Applicant has applied to the President that the unresolved dispute between himself and the Respondent be referred to the Conciliation Mediation and Arbitration Commission (CMAC) for arbitration. The Respondent is opposed to the application.
- [2] The unresolved dispute arises out of the dismissal of the Applicant by the Respondent on the 8th March 2018 for absenteeism which dismissal the Applicant alleges was both procedurally and substantively unfair. Applicant claims payment of his terminal benefits and compensation for unfair dismissal in the total sum of E41538.90 (forty one thousand five hundred and thirty eight Emalangeneni ninety cents).
- [3] The Applicant alleges that his dismissal was unfair because he did not commit any misconduct in the work place by being absent. He alleges he was absent with the Respondent's permission so that he could attend to his sickly relative.
- [4] He applies that the unresolved dispute be referred to CMAC for arbitration because it does not contain complex questions of law and/or facts' because it will be resolved more speedily at arbitration. The Applicant, in its application makes

a strange submission that the main matter is unopposed hence he has a right to choose the alternative dispute resolution body to hear the matter.

[5] There is no doubt that the main application is opposed. The Respondent has filed all the necessary pleadings to oppose the main application and the matter currently awaiting allocation of a trial date by the Registrar. In any event, that a matter is unopposed does not automatically mean that if an application for referral will be granted.

[6] In its opposition to this application the Respondent states that the dispute raises a novel issue, that of gardening leave, as alleged by the Applicant and argues that such leave is unknown in our law and that therefore the Court is best placed to deal with such novel issue. Respondent further says that the matter stands to raise a number of disputes of fact. The Respondent also argued that the amount claimed was substantial and that taking into account all of its submission the matter was properly before Court and should not be referred.

[7] My assessment of the pleadings and the arguments made by the parties, as well as their heads of argument lead me to the conclusion that this matter is one in which the balance of equity favours the referral. While the Applicant speaks of “gardening leave”, a wholesome reading of his application for the determination

of an unresolved dispute indicates that his claim is based in his allegation that he was absent with Respondent's permission and that the Respondent at all times knew where he had been, when he was dismissed for absenteeism. That in, my view, is not a complicated and/ or complex issue. There will be some dispute of fact given that the Respondent denies that the Applicant was even dismissed. Issues may arise as to who had given him permission to be absent, and who dismissed him if anyone. In my view the potential for complex factual disputes is not high. According to **Nathi Gamede (4th July 2012)** in his article – *“The attitude of the Industrial Court on Labour Arbitration Referrals,”* **“all CMAC Arbitrators are now experienced Attorneys with a minimum of an LLB Degree. Some of them qualify to be judges.”** This position has prevailed since 2012 when the article was written.

[8] I do not consider that the amount claimed E 41538.90 is substantial. In my view the qualification and experience of the arbitrators at CMAC means that any prejudice that the Respondent stands to suffer if the matter is referred to CMAC for arbitration will be set-of by the appointment of an experienced and qualified arbitrator.

[9] In the circumstances I order that:-

1. The unresolved dispute between the parties be and is hereby referred to
CMAC for arbitration.
2. Each party is to pay its own costs of this application.



S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For the Applicant: Mr. M. Mabuza (Mabuza Labour & Associates)

For the Respondent: Mr. D. Hleta (DemHleta Legal)