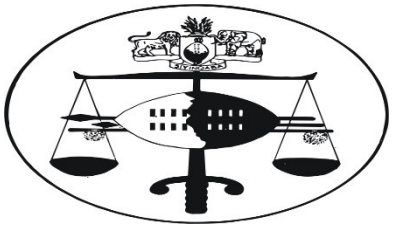

IN THE INDUSTRIAL COURT OF ESWATINI

Case No. 275/2019

In the matter between:

MALCOLM BARLOW-JONES Applicant

And

FIDELITY SERVICES GROUP SWAZILAND (PTY) LTD 1st Respondent

MEYER JOOSTE 2nd Respondent

Neutral citation: Malcolm Barlow-Jones v Fidelity Services Swaziland (Pty) Ltd and Another (275/2019 [2019] SZIC 65 (26 May 2020)

Coram: **S. NSIBANDE J.P.**

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

Date Heard: 02 March 2020

Date Delivered: 26 May 2020

RULING ON POINTS OF LAW

[1] The Applicant has applied to the Industrial Court by way of Notice of Motion supported by affidavit for an order in the following terms:

"1.1 Ordering the Respondent to provide the Applicant through his attorneys with a breakdown of what was referred to in the advices as a retrenchment package.

1.2 Ordering the 2nd Respondent to cause and instruct the release of the payment for the Applicant's shares to the Applicant without further delay or condition.

1.3 Ordering the 1st Respondent to pay to the Applicant monies in lieu of additional notice in the amount of E76 181.21.

1.4 granting the Applicant further and/or alternative relief.

1.5 Ordering the Respondents to pay the Applicant's costs on the scale of between Attorney and own client as a sign of disapproval of the Respondents' conduct, the one paying, the other to be absolved."

[2] In his founding affidavit, the Applicant sets out that he was employed by the first Respondent with effect from June 2003 and was in the continuous employment of the first respondent until 31st august 2019 where, he says, his services were terminated by the 1st Respondent on the basis of retirement. He states that he received correspondence from the 2nd Respondent dated 8th July 2019 in terms of which the second Respondent was reminding him of a meeting held in Johannesburg on May 2019 wherein he had been informed that he had reached

age of retirement and would be replaced in the company. This letter advised him that his last working day would be 31st August 2019.

[3] Applicant further stated that at the May 2019 meeting he was informed, for the first time that the Respondent's retirement age was sixty-five (65) years of age. He was surprised because in the past the company had continued to employ people over the age of 65. He himself had reached the age of 65 in January 2018 but had been allowed to continue working despite that the Respondent was aware of his age.

[4] It is this retirement saga that has resulted in this application. The Applicant demanded payment of additional notice pay in terms of **Section 33 of the Employment Act 1980** on the basis that his employer terminated his employment in August 2019. He also demanded payment for 64.35 days accumulated leave days. It is on the basis of these demands that he seeks a breakdown of his termination package.

[5] Applicant states that the demand for notice and leave pay had prompted the 2nd Respondent to adversely –interfere with the payment of his share value due to him, the letter terminating his services having informed him that the **"value of such will be given to you by McGail Raw as soon as this has been approved by the Board of Directors."** Consequently, the Applicant seeks the orders set out in paragraph 1 above.

[6] The application is opposed by the Respondent which raised points *in limine* and further pleaded over on the merits in its answering affidavit. The points *in limine* were articulated as follows –

6.1 **Non-compliance with part VIII of the Industrial Relations Act as amended**.

It was averred on behalf of the Respondent that the Honourable Court has no jurisdiction to determine this matter in the absence of a certificate of unresolved dispute regarding the additional notice claim by the Applicant. It was submitted that Applicant claims he was dismissed by the Respondent and seeks additional notice as a result. He ought therefore to follow the dictates of part VIII of the **Industrial Relations Act** by first reporting a dispute at the Conciliation Mediation and Arbitration Commission (CMAC) before approaching the Court.

6.2 The Applicant's response to this point is that the application before Court has been brought in terms of **Rule 14 of the Industrial Court Rules, 2007. Rule 14 (i) provides –** *"where a material dispute of fact is not reasonably foreseen, a party may institute an application by notice of motion supported by affidavit."*

14(6) "The applicant shall attach to the affidavit –

(a) All material and relevant document on which the Applicant relies; and

(b) In the case of an application involving a dispute which requires to be dealt with under Part VIII of the Act, a certificate of unresolved dispute issued by the Commission, unless the application is solely for the determination of a question of law."

6.3 The Applicant's submission is that in so far as the notice pay issue is concerned, there is no need for the claim to be reported at CMAC first because there is no genuine dispute of facts but there is a non-compliance with statutory obligations.

6.4 Applicant further submitted that claim for the 2nd Respondent to be ordered to cause and instruct the release of the payment for the Applicant's share is inextricably bound to the issue of the notice pay because of 2nd Respondent's demand that Applicant forfeit his statutory right to notice in return for payment of his shares. Further that, it is common cause that the 2nd Respondent had undertaken to ensure that the Applicant's shares were paid out thus there can be no real dispute of facts in this regard.

The case of **Tom Vilakati v Swazi National Treasury and Another (Pty) Ltd IC Case 574/2006** was cited in support of the Applicants contentions.

6.5 The issue of notice is a crisp legal point in our view. From the documents filed by the parties it is clear that Applicant was over the age of 65 years when he was notified of his retirement. He was told his last day would be

30th August 2019. It appears from the Applicant's annexure **MBJ4**, that the employer sought to address the issue of employees continuing to work after reaching the age of 65 years by being firm on the retirement of employees who were 65 years of age and older. The question that then arises is this – because the Applicant did not stop working upon attaining age 65 years, and only stopped upon being notified by the Respondent, is he entitled to statutory additional notice or not? This, in our view is a crisp question of law that does not require that the matter first be reported at CMAC. We quote with approval **Dunseith JP's words at paragraph 14 and 15** of the **Tom Vilakati v Swazi National Treasury and Another** supra where he says -

"The claim arises from an alleged violation of the law… in these circumstances there was no need for the claim to be reported to CMAC as a prerequisite to institution of proceedings before the Industrial Court."

We are equally of the view that the disputes of fact raised can be determined on the papers and that there was no need for the claim to be reported at CMAC as a prerequisite to the institution of these proceedings. The point of law fails.

6.6 **<u>Dispute is not one between Employer and Employee/Non-Joinder</u>.**

The Respondent submits that the claim for shares is not one that this Court has jurisdiction over because it is not an employer/employee issue; that Applicant is in the wrong Court.

Secondly, Respondent submits that the shares are held in a trust; that the trust is administered by Trustees who have not been cited yet it is the trustees who would give effect to the Court's order; that the trust is notarised and registered in South Africa and not in Eswatini thus any order the Court gave would be empty; that the trustees are a necessary party to these proceedings and the failure to cite them is fatal to the application, finally that the 2nd Respondent is not a trustee and cannot refuse or agree to the sale of the shares which are held by the Guardian Trust and not Fidelity South Africa.

6.7 The Applicant's position with regard to the shares issue is that he seeks no order against the Trust but an order directing his Regional Manager, the 2nd Respondent, to issue the instruction that the company pay out the value of his shares. The Applicant submits that the order is properly being sought against the 2nd Respondent who made the undertaking that the share value would be calculated during July 2019 and the value given to Applicant as soon as the Board of Directors approved. It was the Applicant's submission that there was no doubt that the share value was due to him and that the Regional Manager, the 2nd Respondent was refusing to facilitate the release of the share value, demanding that the Applicant should forfeit his statutory right to additional notice in return for the release of the share value.

It appears to us that the Respondents misconstrue the Applicant's claim with regard to the share value issue. The Applicant seeks no order against the Guardian Trust. He seeks an order against 2nd Respondent who he alleges has

unlawfully and deliberately interfered with the processes of the employer to withhold the share value due for purposes of forcing Applicant to forgo his claim for an Additional Notice Pay. 2nd Respondent has not pleaded specifically to the damning allegations made about his conduct but has merely made a bare denial. In the screen shot of 25 September 2019, 2nd Respondent is accused having put the shares on hold on Friday 30th August 2019. He does not deny this and must be taken to admit same.

When the Applicant pleads with him to arrange for the shares payment, the 2nd Respondent's answer is *"Not going to happen, drop all your issues and then we can talk."*

Significantly, he does not raise any issue that the trustees or the Trust has with paying the share value. Quite clearly he is acting in his position as the Applicant's Regional Executive Manager who is expected to confirm the issuance of the share value. It appears to us that he may simply be abusing his position to induce compliance with his demand that the Applicant drops his claim for statutory payment of additional notice pay. It would appear to us therefore that the matter of the share value is inextricably tied to the question whether the Applicant is due to additional notice pay or not. In the premises this points must fail.

6.8 **<u>Material disputes of fact - relating to Applicant's employer</u>**

The Respondent submits that there exists material disputes of fact with regard to who employed the Applicant such that the matter cannot be resolved by

application proceedings. The Respondent's submission is that the Applicant was never employed by the Fidelity Services Group (Swaziland) (Pty) Ltd but by Fidelity Security Services (Pty) Limited in South Africa; that Applicant was under the direct control and supervision of the South African Company which further paid his remuneration. The Court was referred to a letter from the General Manager together with a supporting affidavit from the National Human Resources and Industrial Relations Manager. Applicant's submission is that this point is an evidential issue not one of jurisdiction. He submits that the evidence he has provided is overwhelming that the 1st Respondent was his employer – the letter of appointment dated 3rd June 2003; the resolution on page 105 of the book of pleadings being a resolution of 1st Respondent signed by the Applicant; the letter of 1st August 2019 from the 1st Respondents' Branch Administrator confirming the Applicant's employment; and the letter to the Chief Immigration Officer dated 20th May 2019 seeking the renewal of the Applicant's work permit. It was the Applicant's submission that on the papers, there was no doubt that the 1st Respondent was his employer.

From the documents filed by both parties it appears that Applicant was employed by 1st Respondent. His letter of employment says as much, as do the other documents pointed out by the Applicant above. The letter marked X from the Respondent indicates that Applicants salary was "*paid into the subsidiary account of FSG Swaziland (Pty) Ltd*." This would mean that the Applicant would then receive his salary from FSG Swaziland (Pty) Ltd, the 1st Respondent.

In **Section 2 of the Employment Act 1980**, the word "employee" is defined to mean *"any person to whom wages we paid or payable under a contract of employment."* No contract of employment or letter of employment other than the one shown by the Applicant has been placed before us leaving us with the conclusion that the 1st Respondent employed the Applicant. See **Usuthu Pulp Company Ltd v The President of the Industrial Court NO Dennis Charles Mcmillan and Another Supreme Court 54/08**. The fact that Applicant reported South Africa and that instructions came from the South African Company is not strange when one considers that the Swaziland Company was a subsidiary of the South African one. It appears to us that the Applicant had established that the 1st Respondent is his employer. This point too must fail.

6.9 **Defective Service 2nd Respondent/Court's lack of Jurisdiction over 2nd Respondents**.

The Respondents submit that 2nd Respondents submit that 2nd Respondent, Mr Jooste is a peregrinus who is not domiciled within the Kingdom of Eswatini and that as such the Court has no jurisdiction to issue an order of specific performance against him;. He objects to the Court having jurisdiction over him.

The Applicant submitted that the 2nd Respondent was served at one of his places of work; that he works out of the 1st Respondent's offices everytime that he is in Eswatini; and that therefore the service on him being made at the office of the 1st Respondent is proper. Applicant submitted further that the 2nd Respondent is

Regional Executive Manager responsible for the Eswatini Office. He therefore comes to Eswatini and carries out certain duties that have legal consequences and cannot be heard to be saying the Court has no jurisdiction over him; that it would be repugnant to say that he could be in control of a business that has employees in the country and come to the country from time to time to oversee the business and the claim he can not be under the jurisdiction of the Court. Applicant further submits that the point has been overtaken by events in that 2nd Respondent has filed the necessary papers to oppose the matter.

The 2nd Respondent is a peregrinus of this Court. He however, is responsible for a business that employs more than 900 people, by the 1st Respondents own admission (See letter at page 113 of the Book of Pleadings).

It would seem to us that on the doctrine of effectiveness, this Court could give effect to its judgment based on the occasional presence of 2nd Respondent in the Kingdom of Eswatini. It would also seem that having responded and filed papers addressing the merits of this matter the 2nd Respondent has submitted to the jurisdiction of this Court. He has gone beyond merely opposing the application and objecting to the jurisdiction but has pleaded to the merits. **Herbstein and Van Winsen, in the Civil Practice of the Supreme Court of South Africa 4th edition at page 54** confirm that position and cite the case of **New York Shipping Co (Pty) Ltd v EMMI Equipment (Pty) Ltd and Others 1968 (1)SA 355 (SWA)** in support thereof.

In the circumstances we find that the Court has jurisdiction over the 2nd Respondent and that service on 2nd Respondent was proper in terms of **Rule 6(1) (c) of the Industrial Court Rules 2007**.

In the premises, the points *in limine* raised by the Respondents are dismissed.

The Members Agree.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr. Musa Sibandze (Musa M. Sibandze Attorneys)

For Respondent: Mr. H.N. Mdladla (S.V. Mdladla & Associates)