IN THE INDUSTRIAL COURT OF ESWATINI

Case No. 208/2019

In the matter between:

PHINDILE MAYISELA Applicant

And

ROYAL SWAZI SPAR HOLDINGS (PTY) LTD Respondent

Neutral citation: Phindile Mayisela v Royal Swazi Spar Holdings (Pty) Ltd [208/2019] SZIC 73 (08 June 2020)

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

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

Date Heard: 04th June 2020

Date Delivered: 08th June 2020

Summary: *Procedure – Amendment of Pleadings – Grant of application to amend is at the Court's discretion.*

Held – *In the circumstances, the application is granted.*

JUDGMENT

[1] The Applicant filed an application for determination of an unresolved dispute against the Respondent in which she alleges that she was unfairly dismissed by the Respondent.

[2] She claims that her dismissal was both substantively and procedurally unfair. She pleaded that she was wrong charged and that the penalty does not fit the offence she was charged with and further that the Respondent did not follow the code of good practice as laid down by the Respondent's staff hand book.

[3] She alleges that her dismissal was procedurally unfair in that she was not given enough time to prepare for her hearing. Secondly that she was not furnished with proper records of the hearing to prepare for an appeal.

[4] The application was opposed by the Respondent which denied, in its Reply, that the Applicant's dismissal was substantively and procedurally unfair. In its defence, the Respondent averred that the penalty meted out to Applicant was proportional to the offence she committed. With regard to procedural fairness it was the Respondent's plea that the process against Applicant followed the Respondent's code of good practice as layed out in the Respondent's staff-handbook; that such handbook is a guide and not an end in

itself; and that the Applicant was furnished with the record, statements of witnesses and all other documents of the hearing and that she was afforded further time to file her appeal.

[5] It is common cause that the Applicant has given her evidence in chief with regard to her application and that the Respondent has commenced with the cross examination of Applicant. Applicant has now applied to amend her pleadings by inserting two paragraphs to her application. The paragraphs are as follows:

8.1

"The dismissal of the applicant was substantively unfair in that she was charged with an offence that occurred in her absence, consequently she was wrongly charged on the offence of gross misconduct commencing on June 2014 while she was away, yet there was no misconduct on her part, let alone gross misconduct to warrant summary dismissal.

9.2

The Applicant's dismissal was procedurally unfair, in that, during the disciplinary hearing she was never afforded the chance to cross examine the witnesses that brought evidence against her. The chairman of the disciplinary hearing took into account statements of certain witnesses who were never

brought to testify in the disciplinary hearing yet they were considered in reaching a verdict against the Applicant.

9.3

The Applicant was never heard on appeal, when she appealed her decision she was told that the decision of the disciplinary hearing was not going to change and therefore she would not be heard."

[6] The application to amend is based on the fact that the matter was initially in the hands of another form of attorneys and the current form inherited the file. Mr Kunene for the Applicant intimated that the application was *bona fide* and meant to give a defect in the papers prepared by the previous attorneys. He submitted that there would be little prejudice, if any, to the Respondent since the Applicant's cross-examination had just started and Respondent would have the opportunity to put its defence to the Applicant. He referred the Court to the case of **Norbert LeCordier v Spintex Swaziland (Pty) Ltd Industrial Court Case No. 15/2010** and the case cited therein.

[7] The application to amend is opposed by the Respondent which submitted, it was *mala fide* and designed to argument now issues raised by the Applicant in her evidence in chief and also in some of the cross-examination. Mr Simelane for the Respondent submitted that the timing of the application for amend

being at after Applicant had given evidence was *mala fide* and would be prejudicial to the Respondent. It would cause an injustice that could not be cured by an order for costs. He submitted that a new case was being made and Respondent would have difficulty meeting same given that this matter was six years old and the Respondent had prepared its defence based on the pleadings before Court.

[8] Mr Simelane rightly pointed out that according to **Moolman v Estate Moolman and Another, 1927 CPD 27 at P29,** the "*practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless would cause an injustice to the other side which can not be compensated by costs…*"

[9] As Dlamini J states in **Norbet LeCordier** (supra) "*the morden tendency of the Courts lies in favour of an amendment whenever such amendment facilities the proper ventilation of the dispute between the parties.*

[10] On the facts of the present matter it appears to us that although the application to amend has been made at the 11th hour, it is not a *mala fide* application.

[11] Whilest the matter is from 2014 it is correct that the Applicant changed attorneys sometime last year. While Mr Kunene appeared for applicant he not responsible for the pleadings filed or record. We are not sure why the issues raised by Applicant in her evidence in chief were not raised in the pleadings. What we do not know thought, is that the Respondent stands to suffer little prejudice if the amendment is allowed. We are early into the cross-examination and Respondent can adjust itself to meet the allegations being made. We do believe that the refusal of the amendment would prevent a full enquiry into the dispute between the practice. They raise a triable issues that the Court must hear and adjudication. It is not in our view designed to harass the Respondent.

[12] Taking all the circumstances of this case into account we come to the conclusion that we ought to exercise our discretion in favour of the amendment. It will allow the Court to make a full enquiry into the issues involved herein. We accordingly make the following order:

(a) The amendment is allowed.

(b) The Applicant is to file the amended particulars of claim within 3 days of this order;

(c) The Respondent is to file its amended reply within 7 days of the delivery of the amended particulars of claim;

(d) The Applicant is to pay the costs occasioned by the amendment as tendered.

The Members agree.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr Kunene (MLK Ndlangamandla Attorneys)

For Respondent: Mr. K. Simelane (Hebnwood & Company)