

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No. 182/2018 (A)

In the matter between:

ABEL SIBANDZE

Applicant

And

LIBERTY LIFE SWAZILAND (PTY) LTD

1st Respondent

STANLIB SWAZILAND

2nd Respondent

Neutral Citation: Abel Sibandze vs. Liberty Life Swaziland (Pty) Ltd & Another
(182/2018 (A)) [2023] SZIC 29 (18 April 2023)

Coram: **V.Z. Dlamini - Judge**
*(Sitting with Mr. D. Mncina and Mr. D.P.M Mmango
Nominated Members of the Court)*

SUPPLEMENTARY HEADS FILED: 21 December 2022

DELIVERED: 18 April 2023

RULING

INTRODUCTION

[1] The Applicant, a liSwati male adult of Mbabane in the district of Hhohho, filed an application for determination of an unresolvable dispute against the Respondents, companies duly incorporated and registered in terms of the Company laws of Eswatini, on the **14th June 2018**. The cause of action was unfair dismissal and the relief claimed was the following:

- | | | | | |
|----|--|---|----------------------|--|
| 1. | <i>Notice pay</i> | = | <i>E 56,000.00</i> | |
| 2. | <i>Additional notice</i> | = | <i>E 53,340.00</i> | |
| 3. | <i>Severance allowance</i> | = | <i>E 133,350.00</i> | |
| 4. | <i>24 months Compensation for unfair dismissal</i> | = | <i>E1,344,000.00</i> | |
| 5. | <i>Repatriation Fee</i> | = | <i>E40,000.00</i> | |
| 6. | <i>Subsistence allowance</i> | = | <i>E45,000.00</i> | |
| 7. | <i>Cellphone bill</i> | = | <i>E96,000.00</i> | |
| 8. | <i>Costs of suit</i> | | | |
| 9. | <i>Further and/or alternative relief</i> | | | |

BACI(GROUND FACTS

[2] It is common cause that the Applicant reported the dispute to the Conciliation, Mediation and Arbitration Commission (CMAC) within

eighteen (18)

months after his dismissal on the **13th April 2012**. CMAC issued the Certificate of Unresolved Dispute on the **10th July 2012**. The Applicant then filed the present application on the **14th June 2018**, virtually **six (6) years** after the certificate was issued by CMAC.

PRELIMINARY ISSUES

- (3) In addition to responding to the merits of the matter, the Respondents raised four preliminary points, to *wit*:
- Prescription of dispute - that the dispute had prescribed due to the Applicant's failure to file the application within two years after obtaining the certificate from CMAC;
 - Unreasonable delay - that the Applicant had unreasonably delayed to file the application for determination of an unresolved dispute and had not given any explanation for the inordinate delay;
 - Misjoinder - that the employment contract on which Applicant relies relates to an employment relationship between the 2nd Respondent and the Applicant; he had failed to allege or disclose any employment relationship with the 1st Respondent. Consequently, no cause of action was disclosed against the 1st Respondent;
 - Jurisdiction - that the Court has no jurisdiction to hear and determine the dispute because the contract of employment was not concluded in Eswatini and in terms of the **Part V** of the **Employment Act, 1980**, the Court shall only have jurisdiction over complaints involving termination of employment in respect of contracts of employment concluded in Eswatini;

- Jurisdiction - alternatively, that in terms of the applicable Disciplinary Code (Clause 12), where a disciplinary outcome leads to dismissal and the employee is dissatisfied with that outcome, the employee is obliged to refer the matter to compulsory private arbitration for determination.

[4] In response to the points *in limine*, the Applicant stated that:

- Prescription - the contract of employment and dispute are governed by the **Industrial Relations Act, 2000 (as amended)**; consequently, prescription based on the common law does not apply.
- Unreasonable delay - taking into account the Applicant's personal circumstances after dismissal, his delay in filing the application was not unreasonable. Moreover, at no point in time did the Applicant indicate an intention not to pursue his claims after the certificate of unresolved dispute was issued; the certificate remains valid, until lawfully set aside. Furthermore, a Court of equity is seized with the matter and should not be persuaded to apply the principles of estoppel to prevent the Applicant from exercising his rights;
- Misjoinder - the 1st Respondent has been correctly joined because the application categorically states that the Respondents merged in 2008 and the Applicant was appointed the Managing Director of both companies. Furthermore, both Respondents featured throughout the Applicant's disciplinary hearing and both issued letters of dismissal;
- Jurisdiction - that in terms of the Memorandum of Agreement, the parties submitted themselves to the jurisdiction of the local Comis. Furthermore, the Court has jurisdiction because the consequences of the contract of employment were subject to the laws of Eswatini,

particularly because its performance and termination were carried out in Eswatini. The Disciplinary Code that Respondents rely on was not annexed to its Replies.

[5] When the matter was enrolled for arguments of the points *in limine* on the 7th December 2022, the Applicant's attorney had not filed his heads of argument and sought a postponement to prepare the heads. The postponement was opposed by the Respondents' counsel. The Court rejected the application for postponement, but granted the Applicant's attorney leave to file his heads by the 6th January 2023 and Respondents' counsel leave to supplement his heads by the 20th January 2023.

[6] The Applicant's attorney filed his heads on the 21st December 2023, but the Respondents' counsel has not filed the supplementary heads of argument to date.

DEFERMENT OF DETERMINATION

[7] On the one hand, the Respondent contends that the Applicant has even failed to proffer an explanation for the delay in filing the application; while the Applicant acknowledges the delay, he conversely argues that taking into account his personal circumstances after dismissal, the delay was not unreasonable.

[8] The Applicant did not specify the personal circumstances that render his delay excusable; in the premise the Court cannot determine the points *in*

limine on

prescription and unreasonably delay in the absence of a formal application for condonation explaining the cause of delay in filing the application for determination of an unresolved dispute and Respondents' opposition thereto. The Court is also not in a position to decide the point on jurisdiction (compulsory private arbitration) in the absence of the Disciplinary Code.

- [9] Where in the Court's opinion points in issue are not clearly defined for determination, it may remit the matter with such direction as the Court may deem appropriate. To this end, **Section 12 (1) and (2) of the Industrial Relations Act** reads as follows:

"Where in the Court's opinion the points at issue in any matter before it are not clearly defined to allow the matter to be heard or determined, the Court may remit the matter to the parties, with such directions and advice as it may deem appropriate.

For the purpose of considering any matter before it, the Court may require a person to-

- (a) furnish, in writing or otherwise, such particulars as the Court may require in relation to any matter before it;*
- (b) attend before it;*
- (c) give evidence on oath or affirmation;*
- (d) produce any relevant document. "*

- [10] In previous matters, the Court exercised its discretion and granted leave to applicants to file applications for condonation even where applications for

such leave had not been initially sought by the applicants. See: **Hlengiwe Dlamini v Sicelo Mthethwa Case No.92/2010 SZIC (unreported)**; **Yusi Sikelela Dlamini v Eagles Nest (Pty) Ltd Case No. 150/2010 SZIC (unreported)** and **Bheki Tsabedze v Rob's Electrical (Pty) Ltd (299/2018) [2018] SZIC 141 (12 December 2018)**.

[11] The rest of the points are capable of being disposed separately, but to avoid a multiplicity of rulings on points *in limine* raised in the same matter, it is appropriate that the points be determined simultaneously in one ruling.

CONCLUSION

[12] In the Cami's view, based on the above reasons, it is desirable and in the interest of justice that the determination of the points *in limine* be stayed pending the filing of an application for condonation by the Applicant.

[13] In the premise, the Court orders as follows:


[a] The determination of the points *in limine* is stayed pending the filing of an application for condonation for late filing of the application for determination of an unresolved dispute by the Applicant.

[b] The Applicant is directed to file the application for condonation within ten (10) Court days of the date of issue of this order and the Respondents are ordered to file answering affidavits, if any within ten (10) days of receipt of the application for condonation. The Applicant is further directed to file a

replying affidavit within five (5) days of receipt of Respondents' answering affidavit.

- [c] The Respondents are also directed to file the Disciplinary Code or such document relied upon for the point on the Court's lack of jurisdiction, not later than the last day of Applicant's filing of the replying affidavit.
- [d] The parties are ordered to file Supplementary Heads of Argument not later than five (5) days after the last day of the Applicant's filing of the replying affidavit.
- [e] The matter is postponed to the **5th Jnr;ie 2023** for further direction of the Court.
- [f] Determination of the costs of the points *in limine* is deferred until the decision of the Court in the application for condonation.

The Members agree.



A handwritten signature in black ink, appearing to read 'V.Z. Dlamini', is written over a horizontal line. To the right of the signature is a vertical line, forming a partial rectangular box.

V.Z. DLAMINI
JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT

Mr. X. Mthethwa
(P. M. Dlamini Attorneys)

**FOR
RESPONDENTS**

Adv. CC Bester
(Instructed by Henwood & Company)