IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

JUDGMENT

Case No. 10/2019

In the matter between:

THE ATTORNEY GENERAL **Appellant**

And

THABO MGADLELA DLAMINI **Respondent**

Neutral citation: *The Attorney General v Thabo Mgadlela Dlamini (10/2019) [2019] SZICA 13 (16 October 2019)*

CORAM: M.R. Fakudze AJA, T.L. Dlamini AJA and M. Langwenya AJA

Heard : 01 October 2019

Delivered : 16 October 2019

Summary: *Labour law – The respondent reported a dispute to the Conciliation, Mediation and Arbitration Commission in the month of September 2017 – The dispute remained unresolved after conciliation and the Commission issued a certificate of unresolved dispute – The respondent then filed an application for determination of the unresolved dispute before the Industrial Court – The appellant herein (who was a respondent then) raised a point in limine and pleaded that the claim has prescribed in terms of section 76(2) of the Industrial Relations Act of 2000 – In its ruling, the court a quo dismissed the point in limine and directed the appellant to*

plead to the merits within 14 days from the date of the ruling – Not being satisfied with the ruling, the appellant lodged an appeal.

Held: *That the appellant pre-maturely filed the appeal as the order being appealed against is not final in its nature - And that the court a quo should be allowed to finalize the proceedings before it.*

Held further: *That the matter be referred back to the court a quo for finalisation – Costs of the appeal granted in favour of the respondent*

JUDGMENT

T.L. Dlamini AJA

[1] Before this court is an appeal against a ruling of the court *a quo* on a point of law that was raised by the appellant herein.

[2] From the Record of proceedings before the court *a quo*, it appears that the respondent reported a dispute to the Conciliation, Mediation and Arbitration Commission (hereinafter called "**the Commission**") around 12 September 2017. The dispute was in respect of payment of overtime worked by the respondent from the year 2007 to 2011. The dispute remained unresolved after conciliation and the Commission issued a certificate of **Unresolved Dispute** as required in terms of the Industrial Relations Act No.1 of 2000 (hereinafter called the IRA).

[3] The respondent then filed an application for determination of the unresolved dispute in the court *a quo*. The appellant raised a point *in limine* and pleaded that the dispute has prescribed in terms of s.76(2) of the IRA. The appellant submitted that eighteen (18) months have elapsed since the issue giving rise to

the dispute arose, and the claim therefore, has prescribed. Section 76(2) of the IRA provides as quoted below:

> **76. Reporting of disputes.**
> **(1) …**
> **(2) A dispute may not be reported to the Commission if more than eighteen (18) months has elapsed since the issue giving rise to the dispute arose.**

[4] The point *in limine* was dismissed by the court *a quo*. From a reading of the judgment of the court *a quo*, it seems to this court that the court *a quo* held the view that the point *in limine* only falls within the jurisdiction of the Commission for determination purposes.

[5] It is common cause that the point *in limine* was raised by the appellant at the conciliation of the matter by the Commission. There was however no ruling made by the Commissioner who was appointed to conciliate in the dispute. The certificate of unresolved dispute that he issued was attached as annexure "TMD5"and is at both pages 27 and 51 of the Record. It states, among other things, what is quoted below:

> **3. The dispute between the parties for which I was appointed as a Commissioner by the Commission on the 2nd day of August, 2017 under Section 80 and 81 of the Industrial Relations Act, 2000 (as amended) is hereby certified as an unresolved dispute due to the following reasons:**
>
> **3.1 The Applicant contends that the Respondents are failing, refusing and / or neglecting to pay him for overtime worked which sum of money was calculated by the Respondent.**
>
> **3.2 <u>The Respondents refute the Applicant's contention and state that the dispute is time barred.</u>**
>
> **3.3 Parties maintain their respective stands and dispute certified unresolved.** (underlining is emphasis by court)

[6] Below is what the court *a quo* stated concerning the point *in limine*:

> **"11.0 By law, the Commission is an independent public body that exercises powers conferred on it by the Industrial Relations Act 2000 (as amended). Those powers include the powers of determining whether or not a report is in line with Section 76(2) of the Act. The prescription clause relates to the process or procedure of reporting a dispute <u>to the Commission</u> and not any other forum. The court cannot therefore usurp the powers of the Commission and determine issues that fall within the scope of that institution.** (emphasis by Commissioner)
>
> **12.0 The court is not being asked to refer the matter back to the Commission for a determination of this issue but is being asked to determine the issue as though the dispute is reported to the Court for the first time. That determination is not, legally speaking, our call."**

[7] The court *a quo* went on to state at paragraphs 19.0 and 20.0 of its judgment what is quoted below:

> **19.0 … The failure by the Commissioner to make a determination on the objection raised by the Respondent amounted to a gross irregularity which the Respondent ought to have challenged by way of a review application or at least through written correspondence to the Commission asking for a correction of that irregularity.**
>
> **20.0 The acceptance of the certificate of unresolved dispute by the Respondent in its current form without challenging it and seeking to set it aside by way of review means that the Court is seized with jurisdiction to determine the dispute on the merits as provided for in Section 85(2) of the Act.**

[8] On the basis of the position that the court *a quo* adopted when determining the point *in limine*, and the ruling that it ultimately made, the appellant launched the present appeal before this court. Three grounds of appeal, which are couched as quoted below, were filed:

> **1. The court *a quo* erred in law and misdirected itself in dismissing the preliminary point *in limine* raised on**

prescription. The court *a quo* ought to have found that the matter has prescribed in terms of the law.

2. **The court *a quo* erred in law and misdirected itself in finding that the Conciliation Commissioner was required to determine the point on prescription raised and make a determination thereof. The court *a quo* ought to have found that a Commissioner who conciliates a dispute is not called upon to adjudicate or arbitrate such dispute.**

3. **The Court *a quo* erred in law and misdirected itself in finding that the failure by the Commissioner to make a determination on prescription raised amounted to gross irregularity susceptible to review. The Court *a quo* ought to have found that the matter was properly conciliated.**

[9] During arguments, the respondent's attorney raised an issue of jurisdiction of this court to hear the matter as, per his submission, the court *a quo* is still seized with the matter. He argued that this court has no authority to intervene in the incomplete proceedings of the lower court. He further argued that the dismissal of the point *in limine* did not make the order of the lower court to be definitive of the dispute between the parties, and for that reason the order cannot be appealed against.

[10] In support of the above contention, the respondent's attorney referred this court to the judgment of this court in the case of **Swaziland Fruit Canners (Pty) Ltd v Thulisile Mngomezulu (01/2011) [2011] SZICA 6 (23 March 2011)** where **Mamba AJA**, sitting with **Ramodibedi JP** and **Mabuza AJA** held as follows:

[5] From the above facts, and it is indeed common cause the court *a quo* did not deal with the merits of the application. It should have done so though. The only order that the court made was to dismiss the preliminary point of law raised and did not find either for or against any of the parties on the main application. For all practical purposes, the application remains unfinished or undecided by the court below. In the

> **circumstances of this case, this court cannot entertain this appeal. To do so would tantamount to interfering in the unfinished business of the court below. This, the court will not do. The proceedings have to be finalized or concluded in the court *a quo* before this court may hear the appeal.**

[11] In *contra* argument, the appellant's attorney submitted that in terms of s.19 of the IRA, an appeal lies to this court on a question of law. It was his argument that the point *in limine* which the lower court dismissed is a question of law. Section 19(1) of the IRA provides as quoted below:

> **19. Right of appeal or review.**
>
> **(1) There shall be a right of appeal against a decision of the Industrial Court, or of an arbitrator appointed by the President of the Industrial Court under section 8(8) <u>on a question of law to the Industrial Court of Appeal.</u>** (emphasis added)

[12] The appellant's attorney argued that there was an error of law which was committed by the court *a quo* and the appellant is therefore entitled to bring the appeal before this court. The court was referred to two judgments of this court, *viz*., the cases of **The Chairman, Civil Service Commission v Isaac M.F. Dlamini (14/2015) [2016] SZICA 01 (31March 2016)** and **Small Enterprise Development Company v Phyllis Ntshalintshali (8/2007) [2007] SZICA 01 (18 October 2007)**.

[13] The **Small Enterprise Development Company** case (supra) is more instructive and relevant to the issues to be determined by this court on this matter. It distinguishes the kind of interlocutory orders that are appealable from those that are not appealable. Quoted hereunder is what the court stated in paragraphs [9] and [10]:

> **[9] Interlocutory orders are generally classified under two categories, namely; (a) simple interlocutory orders and (b) other interlocutory orders that have a definitive and final effect in their application.**
>
> **[10] Pure or simple interlocutory orders are not appealable whilst those listed under (b) above are appealable, some with leave of the court. A refusal for a stay of execution falls under those orders under (b).**

[14] As a general principle, only final orders of the court are appealable. Interlocutory orders are not appealable, unless they are definitive and final in their effect.

[15] The authors **Stephen Pete *et al,*** in their procedural book titled **Civil Procedure: A Practical Guide, Oxford University Press (2016), 3rd ed, at p.314**, state what is quoted below:

> **However, in general terms, a non-appealable decision is one which is not final because the court of first instance remains entitled to alter it, , <u>or because it is not definitive of the rights of the parties or because it does not have the effect of disposing of at least a substantive portion of the relief claimed in the main proceedings</u>.**"(emphasis by the court)

[16] The order being appealed against is neither definitive of the rights of the parties nor having the effect of disposing of at least a substantive portion of the relief claimed in the main application. The lower court only dismissed the point of law and ordered the respondent to plead to the merits of the claim within 14 days. The order is at p.67 of the Record and is couched in the following terms:

> **25.0 The court accordingly makes the following orders:**
>
> **(a) The preliminary point *in limine* raised on behalf of the Respondent is dismissed.**

(b) The Respondent is directed to plead to the merits of the Applicant's claim within 14 days from the date of issue of this judgment.

(c) There is no order as to costs.

[17] Clearly, not even a remote attempt has been made by the court *a quo* to deal with the relief claimed in the application placed before it. It has also not been shown, and this court doesn't see it as such, that the order being appealed against is final in its effect. For these reasons, the appeal must fail and it is so ordered.

Costs

[18] Both parties made an application for costs to be granted in their favour. The court has taken into account the fact that the respondent is the successful party on the appeal. It has also taken into account that the design of the labour disputes resolution mechanisms and procedures is meant to accommodate even litigants who may not afford to pay for attorneys' services. Bearing in mind that costs are granted at the discretion of the court, and that the respondent was employed at the lower paying positions within the government (he is a Labourer in terms of the Appointment Letter dated July 1999, and later was promoted to Heavy Duty Driver in June/July 2010), the court finds that the same employer, who is financially a giant compared to her own citizens, has put the respondent more out of pocket by this appeal. For this reason, the court finds in the respondent's favour on the issue of costs.

[19] For the aforegoing reasons, the following order is issued.

1. The matter is removed from the roll and an order be and is hereby issued that the matter be remitted to the court *a quo* for hearing on the merits.

2. Costs of the appeal are granted in favour of the respondent.

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T.L. DLAMINI AJA

I agree

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M.R. FAKUDZE AJA

I agree

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M. LANGWENYA AJA

For appellant: **Mr. S. Hlawe (appearing with Ms. S. Gwebu)**

For respondent: **Mr. M. Ndlangamandla**